Basic Estate Planning and Probate

COURSE CLASSIFICATION: BASIC LEVEL

May 18, 2018

Live Presentation:
Tampa Marriott Waterside (Tampa)
700 South Florida Avenue
Tampa, Florida 33602
Are you getting the most from your Member Benefits?

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   Over a 3 year period, each member must complete 33 hours, 5 of which are in the area of ethics, professionalism, substance abuse, or mental illness awareness, and 3 hours in technology.

3. Where may I find information on CLER?
   Rule 6-10 of the Rules Regulating The Florida Bar sets out the requirement. All the rules may be found at www.floridabar.org/rules.

4. Who administers the CLER program?
   Day-to-day administration is the responsibility of the Legal Specialization and Education Department of The Florida Bar. The program is directly supervised by the Board of Legal Specialization and Education (BLSE) and all policy decisions must ultimately be approved by the Board of Governors.

5. How often and by when do I need to report compliance?
   Members are required to report CLE hours earned every three years. Each member is assigned a three year reporting cycle. You may find your reporting date by logging in to your member portal at member.floridabar.org.

6. Will I receive notice advising me that my reporting period is upcoming?
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8. Will I receive any other information about my reporting cycle?
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9. Are there any exemptions from CLER?
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   1) Active military service
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   3) Nonresident membership (see rule for details)
   4) Full-time federal judiciary
   5) Justices of the Supreme Court of Florida and judges of district, circuit and county courts
   6) Inactive members of The Florida Bar
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   1) Lecturing at an approved CLE program
   2) Serving as a workshop leader or panel member
   3) Writing and publishing in a professional publication or journal
   4) Teaching (graduate law or law school courses)
   5) University attendance (graduate law or law school courses)

11. How do I submit various activities for credit evaluation?
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12. How are attendance hours posted on my CLER record?
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    When you post your CLE credit online, your record will be automatically updated and you will be able to see your current CLE hours and reporting period.

14. How may I find information on programs sponsored by The Florida Bar?
    You may wish to visit our website, www.floridabar.org/cle, or refer to The Florida Bar News. You may also call CLE Registrations at 850/561-5831.

15. If I accumulate more than 30 hours, may I use the excess for my next reporting cycle?
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16. Will out-of-state CLE hours count toward CLER?
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17. If I have questions, whom do I call?
    You may call the Legal Specialization and Education Department of The Florida Bar at 850/561-5842.

While online checking your CLER, don’t forget to check your Basic Skills Course Requirement status.
PREFACE

The course materials in this booklet were prepared for use by the registrants attending our Continuing Legal Education course during the lectures and later in their offices.

The Florida Bar is indebted to the members of the Steering Committee, the lecturers and authors for their donations of time and talent, but does not have an official view of their work products.

CLER CREDIT
(Maximum 7.0 hours)

General..............................................7.0 hours

CERTIFICATION CREDIT
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Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, see the CLE link at www.floridabar.org for more information about the CLER and Certification Requirements.

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The mission of the Continuing Legal Education Committee is to assist the members of The Florida Bar in their continuing legal education and to facilitate the production and delivery of quality CLE programs and publications for the benefit of Bar members in coordination with the Sections, Committees and Staff of The Florida Bar and others who participate in the CLE process.

COURSE CLASSIFICATION

The Steering Committee for this course has determined its content to be BASIC.
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BASIC ESTATE PLANNING

By

Michael Rubenstein, Naples
BASIC ESTATE PLANNING

I. Estate Planning Introduction.

A. Estate planning is the collection of preparation tasks that serve to manage an individual’s asset base in the event of their incapacitation or death, including the bequest of assets to heirs and the settlement of their estate. Estate planning is an ongoing process and should be started as soon as soon as one attains the age of majority or has any measurable asset base. As life progresses and goals shift, the estate plan should move to be in line with new goals. The lack of adequate estate planning could cause mental and emotional stress and undue financial burdens to loved ones.¹

II. Stages of Estate Planning.

A. An individual should utilize their estate planning for the following stages of life; (1) during life while healthy; (2) during life while incapacitated; (3) at death; and (4) after death.

1. During Life While Healthy: There are many reasons to plan for your life, even if you stay healthy and never become incapacitated. The main reasons to plan during life include, among other areas; (a) children, (b) retirement, (c) risk, and (d) general accumulation of wealth. Many of the vehicles used to plan for these areas include tax deferrals or savings as well, which is another reason to use estate planning. Additionally, a person can use the “annual exclusion” to gift a certain amount to any other individual, tax free, each year, without incurring a gift tax or affecting the unified “Federal Gift and Estate Tax Credit” (which is discussed in more detail below).²

(a) Children. Planning for your children and their costs of education include college pre-paid plans, 529 plans, and other tax preferred or advantageous vehicles. One will also want to plan for their children’s financial well-being in any number of ways during childhood and throughout life.

(b) Retirement. Planning for retirement, which could be a significant portion of one’s life, and which will need to be planned for carefully, in great detail, and in large amounts, includes IRAs, 401(k), Medicare, Medicaid, and Social Security planning.

(c) Risk and Creditors. Planning for risk and creditors includes exempt assets, such as Florida homestead property, other exempt property in Florida, individual retirement accounts (“IRAs”), 401(k)s, life insurance policies, annuities, and various types of trusts.

(d) Accumulation of Wealth. The goal of planning for your life during your life while wealth, is to accumulate wealth. If you plan correctly by protecting your assets, taking advantage of tax deferred or exempt vehicles, laws, and investments, then you will be able to attain financial well-being and peace of mind.

¹ Investopedia.com
² IRS.gov
2. **During Life While Incapacitated:** One must also plan for the event of mental or physical incapacity. Incapacity is defined as (a) the physical or mental inability to do something or manage one’s affairs, (b) the quality or state of being incapable, and/or (c) a natural or legal disqualification. During the period in which one is incapacitated, that individual will need one or more persons to, among other things, make financial decisions, make medical decisions, take care of them generally in all regards, and take care of any dependents or minor children for them. This can be accomplished through estate planning documents, such as (a) a power of attorney (financial decisions); (b) a health care surrogate designation (medical decisions); (c) a declaration of preneed guardian (guardian appointment); (d) an appointment of guardian for minor children or dependents (guardian for minors and dependents); and (e) a trust.

3. **At Death:** All estate plans should include a Last Will and Testament or simply a Will. This is a legal document by which a person expresses their wishes as to how their property is to be distributed at death, and names one or more persons to manage the estate until its final distribution.

   (a) **Probate.** Many times a person will plan to avoid probate, which is the judicial process whereby a Will is “proved” in a court and accepted as a valid public document that is the last testament of the deceased. This is a public process in court that can be avoided by having assets not included in one’s estate through joint ownership, beneficiary designations, or held in trust.

   (b) **Death Tax.** A person may also plan to avoid taxes as death. In 2018, after the passing of the law known as “The Tax Cuts and Jobs Act”, the basic exclusion amount for the gift and estate tax, known as the “Federal Gift and Estate Tax Exemption” is $10,000,000 before being adjusted for inflation. After the inflation adjustment the exemption is approximately $11,180,000 for an individual and $22,360,000 for a married couple in 2018. This will be touched on again later in this outline. Any combined gifting during life or bequests are death above this amount with be taxed.

   (c) **Children, Spouse and other issues.** A person also wants to make sure their loved ones are taken care of and planned to ensure emotional and financial well-being after their death. This can include an appointment of a guardian, a trustee holding assets in trust, a life insurance benefit at their death, an inherited IRA, or many other forms.

4. **After Death.** A person can continue to control their assets well after their death. Typically, IRAs, life insurance policies, brokerage accounts, and other investment vehicles change ownership or are distributed outright to the beneficiaries at one’s death. However, if the beneficiary is a trust, or if the assets are already held in a trust at one’s death, the decedent can construct the trust in such a way that the decedent continue to control the assets “from the grave” many years after the decedent’s death. This can ensure the well-being of heirs for generations, but it also comes with risk if too inflexible and may not end up as intended.

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3 Merriam-webster.com
4 IRS.gov
(a) **Legacy Planning and Charitable Giving.** Planning for the continuation of your wealth after death is known as “legacy planning.” Many times, one leaves their legacy as their family; children, grandchildren, etc. However, many individuals also leave their legacy through charitable giving and contributions. During life, a gift to a charitable organization may entitle one to a charitable deduction against their income. Gifts to a charitable organization during life or at death tax exempt. Therefore, many individuals, not only for charitable purposes, but also for tax purposes donate to charity during life and/or at death. After death, charitable trusts, foundations, or other types of charitable vehicles can last for many years leaving a lasting legacy to the original donor.

III. Exemptions

A. Exemptions in General. The federal government imposes taxes on gratuitous transfers of property made during lifetime (gifts) or at death (bequests/devises) that exceed certain exemption limits. Typically, when one makes a gift during life, that gift is subject to gift tax. When one makes a gift at death, that gift is subject to estate tax. However, there are a number of exemptions and exclusions that enable one to make gifts and transfer wealth tax-free.

1. **Annual Exclusion.** A person can gift up to $15,000 (in 2018) to any other person tax free without incurring a gift tax or affecting the unified credit. A married couple can gift $30,000. This number is indexed for inflation and increases from time to time. For instance, this number was $13,000 from 2009 through 2012, and $14,000 from 2013 through 2015.

2. **Federal Gift and Estate Tax Exemption.** A person can gift up to $11,180,000 (in 2018) total to all combined persons during life and at death, in addition to the $15,000 annual exclusion. This is $22,360,000 for a married couple. This number is indexed for inflation and will increase over time. This number recently doubled due to the law known as the “Tax Cuts and Jobs Act”, as it was $5,490,000 in 2017, $5,450,000 in 2016. This number is, under current law, to revert back to pre-“Tax Cuts and Jobs Act” status ($5,000,000 indexed for inflation beginning 2011) in 2026. Any portion of the exemption used during lifetime reduces the amount of exemption available at death for estate tax purposes. For instance, if you gift $5,000,000 in 2018 and make no other gifts during your life, then you only have $5,180,000 to gift at your death.

3. **Generation Skipping Transfer (“GST”) Tax Exemption.** The GST tax is imposed on transfers to grandchildren and more remote descendants that exceed the exemption limits so transferors cannot avoid transfer taxes on the next generation by “skipping” a generation. The GST tax is levied in addition to gift or estate taxes and is not a substitute for them. The exemption is the same as the Federal Gift and Estate Tax Exemption. For instance, if the gift above of $5,000,000 was to a grandchild, then it will also reduce your GST Tax Exemption to $5,180,000, but if it was to a child, your GST Tax Exemption amount would remain at $11,180,000 as the gift was a gift, but not a GST gift because it did not “skip” a generation.

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5 [americanbar.org](https://americanbar.org)
6 Id.
4. **Unlimited Marital Deduction.** One spouse can gift to another spouse an unlimited amount without incurring a gift or estate tax, and without using and of their Federal Gift and Estate Tax Exemption during life and at death.

5. **Unlimited Charitable Deduction.** An individual can gift an unlimited amount to charity without incurring a gift or estate tax, and without using and of their Federal Gift and Estate Tax Exemption during life and at death.

IV. **The Basic Estate Planning Documents.**

A. **Basic Estate Planning Documents.** The basic estate planning documents include; (1) a power of attorney; (2) a health care surrogate designation; (3) a living will; (4) an authorization of release of protected health information form (“HIPAA Waiver”); (5) a declaration of preneed guardian; (6) a Last Will and Testament; and (7) a Revocable Trust.

V. **The Ancillary Documents.**

A. The first five documents listed above are referred to as the basic ancillary documents. Sometimes they can be combined into as little as two or three; however, they are separated them here to illustrate the differences and importance of each. These documents typically plan for future mental or physical disability or incapacity, and give others the power to make decisions on one’s behalf be it financial, medical, and/or other.

1. **Power of Attorney**

(a) A Power of Attorney is a legal document delegating authority from one person (a “Principal”) to another (an “Agent”). In the document, the maker of the Power of Attorney is the Principal. The Principal grants another trusted person, the Agent, the right to act on the maker’s behalf as their agent. What authority is granted depends on the specific language of the Power of Attorney. A person giving a Power of Attorney may make it very broad or may limit it to certain specific acts. Typically, this document deals with financial decision (such as writing checks, selling a house, investing assets, gifting assets). Additionally, the Agent agrees to act in good faith, in line with the Principal’s best interest, and with the duties of loyalty, care, competency, and diligence. The Principal should choose their Agent wisely and with care as they are granted many powers and responsibilities.

(i) **Limited Power of Attorney.** A “Limited Power of Attorney” gives the agent authority to conduct a specific act.

(ii) **General Power of Attorney.** A “General Power of Attorney” typically gives the agent very broad powers to perform any legal act on behalf of the principal.

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7 flordabar.org
8 Florida Statutes § 709.2114.
9 flordabar.org.
10 Id.
Durable Power of Attorney. A Power of Attorney terminates if the principal becomes incapacitated, unless it is a special kind of Power of Attorney known as a “Durable Power of Attorney.” A Durable Power of Attorney remains effective even if a person becomes incapacitated. However, there are certain exceptions specified in Florida law when a Durable Power of Attorney may not be used for an incapacitated principal. A Durable Power of Attorney must contain special wording that provides the power survives the incapacity of the principal. Most Powers of Attorney granted today are durable.\(^{11}\)

More details regarding power of attorney in Florida can be found in the Florida Statutes Sections 709.2101 through 709.2402.

2. Health care Surrogate Designation (or Health care Power of Attorney or Advanced Directive)

(a) The Health Care Surrogate Designation is a document naming another person (the “Health Care Surrogate” or “Surrogate”) as one’s representative to make medical decisions for one if one is unable to make them themselves. One can include instructions about any treatment they want or do not want. One can also designate an alternate surrogate.\(^{12}\) Many times, medical decisions are time urgent and sensitive; therefore, the Surrogate should be someone an individual trusts and can be easily reached in case of an emergency. One can also name multiple Surrogates.

(b) Some Health Care Surrogate Designation including Living Wills, Declarations of Preneed Guardians, and HIPAA Waivers, and can be referred to as a Health care Power of Attorney or an Advanced Directive.

More details regarding health care surrogates in Florida can be found in the Florida Statutes Sections 765.101 through 765.113. Suggested language is found in Florida Statutes Section 765.203 and is attached to the end of this outline as Exhibit A.

3. Living Will

(a) A Living Will is a written or oral statement of the kind of medical care you want or do not want if you become unable to make your own decisions. It is called a living will because it takes effect while you are still living.\(^{13}\) The Living Will does not include an agent or other person making decisions on one’s behalf. It is the individual taking the decision out of the hands of the Surrogate or any other individual, and letting all be known that these are the individuals wishes.

(b) The Living Will deals with end of life procedures or “pull the plug” procedures. This commences when an individual (1) does not have a reasonable medical probability of recovering capacity so that the right could be exercised directly by the principal; (2) has a terminal condition, has an end-stage condition, or is in a persistent vegetative state; and (3) any

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\(^{11}\) Id.

\(^{12}\) floridahealthfinder.gov

\(^{13}\) Id.
limitations or conditions expressed orally or in a written declaration have been carefully considered and satisfied.\(^{14}\)

(c) More details regarding living wills in Florida can be found in the Florida Statutes Sections 765.301 through 765.309. Suggested language is found in Florida Statutes Section 765.303 and is attached to the end of this outline as Exhibit B.

4. **Authorization of Release of Protected Health Information (or HIPAA Waiver)**

   (a) The “Health Insurance Portability and Accountability Act of 1996” (the “Act”), commonly referred to as “HIPAA”, is the United States legislation that provides data privacy and security provisions for safeguarding medical information. A HIPAA Waiver is a legal document that allows an individual’s health information to be used or disclosed to a third party. It became necessary because health care privacy has come into increased focused in the digital age; it is much easier for doctors to transmit patient health information via the Internet than it was when records had to be mailed or faxed.\(^{15}\) The HIPAA Waiver must refer the Act and have specific language detailing the release of the information, and appoint and Authorized Person or Persons to be able to receive the protected information. Doctors will not release this protected health information unless the HIPAA Waiver is adequate and sufficient for its purposes.

5. **Declaration of Preneed Guardian**

   (a) The Health Care Surrogate Designation is during life while unable to make decisions. It attempts to avoid the need for a Guardian to be appointed by the court. However, if an individual is even declared to be incapacitated by a court, then a Guardian is appointed and the Surrogate no longer controls the decision making. While the Guardian and the Surrogate can be, and typically are, the same person, the Declaration of Preneed Guardian is an attempt by the Principal to guide the judge in the appointment of a Guardian. This is just a recommendation or suggestion for the judge to consider; however, the final decision is in the hands of the judge and the court.

   (b) More details regarding guardians or guardianships in Florida can be found in the Florida Statutes Sections 744.101 through 744.653. Suggested language is found in Florida Statutes Section 765.203 and is attached to the end of this outline as Exhibit A.

VI. **The Last Will and Testament**

A. A will is a legal document that sets forth your wishes regarding the distribution of your property and the care of any minor children. A will appoints a “Personal Representative” who is responsible for the distribution and handling of the assets during the estate settlement process.

   1. **Formalities and Requirements.** A will can be made by any person who is of sound mind and body who is either 18 years or older, or an emancipated minor.\(^{16}\) It must be signed at the end by the person making the will (the “Testator”). It also must be signed by two witnesses

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\(^{14}\) Florida Statutes § 765.304.
\(^{15}\) Investopedia.com
\(^{16}\) Florida Statutes § 732.501.
in the presence of each other and the Testator. A witness may be any person competent to be a witness, even if the witness is an interested party.

2. **Invalid Wills.** Two types of will that are not valid in Florida are; (a) Holographic Wills and (b) Nuncupative Wills.

   (a) **Holographic Wills.** A holographic will is handwritten; testator signed, document and is an alternative to a will produced by a lawyer. These are not witnessed and do not have the necessary requirements to be effective in Florida. Written wills in front of two witnesses that meet all the requirements to be an effective will in Florida are valid, however.

   (b) **Nuncupative Wills.** A nuncupative will is a verbal will. These are not recognized in Florida even if they are in front of two witnesses. Wills must be in writing to be valid in Florida at the minimum.

3. **Codicil.** A codicil is an addition or amendment to a will. It refers to the previous will and is executed with the same formalities to be effective.

4. **Revocation.** A will may be revoked by writing or by an act. The writing can be a subsequent inconsistent will or codicil, or a document stating expressly the previous will or codicil has been revoked. The act, such as burning, tearing, canceling, or defacing, must be accompanied with the intent and purpose of revocation, and not accidental. If one revokes a codicil, one does not revoke the will and the will continues as if the codicil was never made.

5. **Self-Proving.** A will can be self-proved at the time of its execution or subsequently by the acknowledgement of it by the Testator an the affidavits of the witnesses, made before and officer authorized to administer oaths and evidenced by the officer’s certificate to or following the will. If a will is not self-proved, then when probated one or two witnesses, or the personal representative in some cases, must attest to its validity. If a will is self-proved, then this is not necessary at the time of submitting the will to the court. Sample Self-Proving Affidavit language is found in Florida Statutes Sections 732.503 and attached as Exhibit C.

6. **Dispositions of Property.** One can distribute their tangible personal property directly in the will or by a separate writing attached to the will. Separate writing rules can be found in Florida Statutes Section 732.515. One can distribute their other assets outright in total, or in part, by specific bequest or outright distribution. One can also distribute their property in trust, either created by the will, or to a trust already inexistence created previously.

   (a) **Devises to Trustees (Pour-Over Wills).** Assets in one’s estate can transfer to ones trust at death by devising the assets to the trustee of a trust. Since the assets “pour” into the trust

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17. Id. at 732.502. 
18. Id. at 732.504 
19. Id. at 732.505. 
20. Id. at 732.506. 
21. Id. at 732.509. 
22. Id. at 735.503. 
23. Id. at 732.513
this is known as a “pour-over will.” Pour Over Wills are very popular and common today. Many times people already have Revocable Trusts created in order to avoid probate, and would like all of their assets to be handled the same way as the Revocable Trust, so they devise all of their assets remaining after the disposition of tangible personal property and estate settlement to the Revocable Trust.

B. More details regarding wills in Florida can be found in the Florida Statutes Sections 732.501 through 732.518.

VII. The Revocable Trust

A. A Revocable Trust is a trust whereby provisions can be altered or canceled dependent on the person creating the trust (the “Grantor”). There are many types and forms, however, the most common provide for the Grantor during their lifetime and in times of incapacity. Typically, during the life of the trust, the beneficiary is the Grantor and the trustee is also the Grantor. There can be other trustees and co-trustees, but this is the most common scenario. Therefore, the Grantor can receive the income and the principal of the trust. Only after death does property transfer to the beneficiaries. This trust can be revoked or amended or restated at any time by the Grantor while not incapacitated. This type of agreement provides flexibility and funds to the living Grantor. The Grantor is able to adjust the provisions of the trust and earn income, all the while knowing that the estate will be transferred upon death. The Grantor can also control the assets “from his grave” for many years if the Grantor so chooses, and the terms can be constructed in many different ways with various different provisions.

B. For purposes of this discussion, assets already titled in the name of the Revocable Trust prior to one’s death are not subject to probate. Therefore, if most of one’s assets are already in the Revocable Trust at death, they can avoid probate and have a Summary Estate Administration or an even simpler estate administration. Assets in the Revocable Trust are, however, part of the gross estate of the Decedent and subject to estate tax.

C. This discussion will only provide a simplistic introduction to revocable trusts. For more detail see the Florida Trust Code, Chapter 736 of the Florida Statutes. Revocable Trusts are covered by Part VI, Sections 736.0601 through 736.0604.
EXHIBIT A

765.203  Suggested form of designation.—A written designation of a health care surrogate executed pursuant to this chapter may, but need not be, in the following form:

DESIGNATION OF HEALTH CARE SURROGATE

I, __________, designate as my health care surrogate under s. 765.202, Florida Statutes:

Name: __________
Address: __________
Phone: __________

If my health care surrogate is not willing, able, or reasonably available to perform his or her duties, I designate as my alternate health care surrogate:

Name: __________
Address: __________
Phone: __________

INSTRUCTIONS FOR HEALTH CARE

I authorize my health care surrogate to:

__(Initial here)__ Receive any of my health information, whether oral or recorded in any form or medium, that:

1. Is created or received by a health care provider, health care facility, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and
2. Relates to my past, present, or future physical or mental health or condition; the provision of health care to me; or the past, present, or future payment for the provision of health care to me.

I further authorize my health care surrogate to:

__(Initial here)__ Make all health care decisions for me, which means he or she has the authority to:

1. Provide informed consent, refusal of consent, or withdrawal of consent to any and all of my health care, including life-prolonging procedures.
2. Apply on my behalf for private, public, government, or veterans’ benefits to defray the cost of health care.
3. Access my health information reasonably necessary for the health care surrogate to make decisions involving my health care and to apply for benefits for me.
4. Decide to make an anatomical gift pursuant to part V of chapter 765, Florida Statutes.

__(Initial here)__ Specific instructions and restrictions:
While I have decision-making capacity, my wishes are controlling and my physicians and health care providers must clearly communicate to me the treatment plan or any change to the treatment plan prior to its implementation.

To the extent I am capable of understanding, my health care surrogate shall keep me reasonably informed of all decisions that he or she has made on my behalf and matters concerning me.

THIS HEALTH CARE SURROGATE DESIGNATION IS NOT AFFECTED BY MY SUBSEQUENT INCAPACITY EXCEPT AS PROVIDED IN CHAPTER 765, FLORIDA STATUTES.

PURSUANT TO SECTION 765.104, FLORIDA STATUTES, I UNDERSTAND THAT I MAY, AT ANY TIME WHILE I RETAIN MY CAPACITY, REVOKE OR AMEND THIS DESIGNATION BY:

1. SIGNING A WRITTEN AND DATED INSTRUMENT WHICH EXPRESSES MY INTENT TO AMEND OR REVOKE THIS DESIGNATION;

2. PHYSICALLY DESTROYING THIS DESIGNATION THROUGH MY OWN ACTION OR BY THAT OF ANOTHER PERSON IN MY PRESENCE AND UNDER MY DIRECTION;

3. VERBALLY EXPRESSING MY INTENTION TO AMEND OR REVOKE THIS DESIGNATION; OR

4. SIGNING A NEW DESIGNATION THAT IS MATERIALLY DIFFERENT FROM THIS DESIGNATION.

MY HEALTH CARE SURROGATE’S AUTHORITY BECOMES EFFECTIVE WHEN MY PRIMARY PHYSICIAN DETERMINES THAT I AM UNABLE TO MAKE MY OWN HEALTH CARE DECISIONS UNLESS I INITIAL EITHER OR BOTH OF THE FOLLOWING BOXES:

IF I INITIAL THIS BOX [ ], MY HEALTH CARE SURROGATE’S AUTHORITY TO RECEIVE MY HEALTH INFORMATION TAKES EFFECT IMMEDIATELY.

IF I INITIAL THIS BOX [ ], MY HEALTH CARE SURROGATE’S AUTHORITY TO MAKE HEALTH CARE DECISIONS FOR ME TAKES EFFECT IMMEDIATELY. PURSUANT TO SECTION 765.204(3), FLORIDA STATUTES, ANY INSTRUCTIONS OR HEALTH CARE DECISIONS I MAKE, EITHER VERBALLY OR IN WRITING, WHILE I POSSESS CAPACITY SHALL SUPERSEDE ANY INSTRUCTIONS OR HEALTH CARE DECISIONS MADE BY MY SURROGATE THAT ARE IN MATERIAL CONFLICT WITH THOSE MADE BY ME.
SIGNATURES: Sign and date the form here:

[date] [sign your name]
[address] [print your name]
[city] [state]

SIGNATURES OF WITNESSES:

First witness
[print name]
[address]
[city] [state]
[signature of witness]
[date]

Second witness
[print name]
[address]
[city] [state]
[signature of witness]
[date]
EXHIBIT B

765.303  Suggested form of a living will.—

(1)  A living will may, BUT NEED NOT, be in the following form:

Living Will

Declaration made this day of , (year), I, , willfully and voluntarily make known my desire that my dying not be artificially prolonged under the circumstances set forth below, and I do hereby declare that, if at any time I am incapacitated and

  _ (initial)  I have a terminal condition
  or _ (initial)  I have an end-stage condition
  or _ (initial)  I am in a persistent vegetative state

and if my primary physician and another consulting physician have determined that there is no reasonable medical probability of my recovery from such condition, I direct that life-prolonging procedures be withheld or withdrawn when the application of such procedures would serve only to prolong artificially the process of dying, and that I be permitted to die naturally with only the administration of medication or the performance of any medical procedure deemed necessary to provide me with comfort care or to alleviate pain.

    It is my intention that this declaration be honored by my family and physician as the final expression of my legal right to refuse medical or surgical treatment and to accept the consequences for such refusal.

    In the event that I have been determined to be unable to provide express and informed consent regarding the withholding, withdrawal, or continuation of life-prolonging procedures, I wish to designate, as my surrogate to carry out the provisions of this declaration:

Name:
Address:

Phone:

    I understand the full import of this declaration, and I am emotionally and mentally competent to make this declaration.

Additional Instructions (optional):

    (Signed)
    Witness

    Witness

(2)  The principal’s failure to designate a surrogate shall not invalidate the living will.
EXHIBIT C

732.503  Self-proof of will.—

(1) A will or codicil executed in conformity with s. 732.502 may be made self-proved at the time of its execution or at any subsequent date by the acknowledgment of it by the testator and the affidavits of the witnesses, made before an officer authorized to administer oaths and evidenced by the officer’s certificate attached to or following the will, in substantially the following form:

STATE OF FLORIDA
COUNTY OF

I, , declare to the officer taking my acknowledgment of this instrument, and to the subscribing witnesses, that I signed this instrument as my will.

Testator

We, and , have been sworn by the officer signing below, and declare to that officer on our oaths that the testator declared the instrument to be the testator’s will and signed it in our presence and that we each signed the instrument as a witness in the presence of the testator and of each other.

Witness

Witness

Acknowledged and subscribed before me by the testator, (type or print testator’s name), who is personally known to me or who has produced (state type of identification—see s. 117.05(5)(b)2.) as identification, and sworn to and subscribed before me by the witnesses, (type or print name of first witness) who is personally known to me or who has produced (state type of identification—see s. 117.05(5)(b)2.) as identification and (type or print name of second witness) who is personally known to me or who has produced (state type of identification—see s. 117.05(5)(b)2.) as identification, and subscribed by me in the presence of the testator and the subscribing witnesses, all on (date).

(Print, type, or stamp commissioned name and affix official seal)

(Signature of Officer)

(2) A will or codicil made self-proved under former law, or executed in another state and made self-proved under the laws of that state, shall be considered as self-proved under this section.
BASIC PROBATE

By

Michael Rubenstein, Naples
I. FLORIDA PROBATE INTRODUCTION

A. Probate is the legal process through which a deceased person’s estate is properly distributed to heirs and designated beneficiaries and any debt owed to creditors is paid off. In general, probate property is distributed according to the decedent’s Last Will and Testament, if there is one, or according to state law if no will exists.

B. The probate process begins with the death and the will. First, you must prove the person has died with sufficient evidence, then you must produce a will. If there is no will (no valid will or no will can be found), then the Florida Intestacy Laws will control the disposition of property. If there is a valid will, then the named Personal Representative will be appointed to administer the estate of the decedent. The will is “proved” to the court to be valid by state law. The decedent’s property is identified, marshalled, inventoried, appraised, accounted for, and handled. Any debts and taxes are paid, along with other administrative expenses of the estate administration. Then the remaining assets are distributed according to the decedent’s wishes, as pursuant to the terms of the will, or if no will, state law.

C. This outline is a summary of basic Florida probate laws, and does not discuss all the issues related to probate or many of the issues in great detail. Chapters 731 through 735 of the Florida Statutes are known as the Florida Probate Code. More detail and information regarding probate can be found in these Chapters.

II. INTESTACY

A. Evidence as to Death or Status. As proof the someone is indeed deceased, one must submit a death certificate to the court. This is considered prima facie proof of the fact, place, date, and time of the death and the identity of the decedent.1 If no death certificate is available, a copy of any record or report of a governmental agency, domestic or foreign, that a person is alive, missing, detained, or, from the facts related, presumed dead is prima facie evidence of the status and of the dates, circumstances, and places disclosed by the record or report.2

B. Intestacy: No Valid Will. When a person dies without leaving a will or the will is invalid for any number of reasons, he or she is described as “dying intestate.” A partial intestacy can also arise where a deceased does not effectively dispose of part of his or her estate. If any part of an individual’s estate passes through intestacy, it is controlled by the Florida Statutes. For the purposes of this outline, we will only discuss intestate succession in regards to intestacy.

C. Surviving Spouse’s Share. The surviving spouse will receive the entire intestate estate if the decedent had no descendants or all of the decedent’s descendants were also the descendants of the spouse.3 If there are one or more surviving descendants of the decedent who

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1 Florida Statutes § 731.103(1)
2 Id. at 731.103(2)
3 Id. at 732.102(1) and 732.102(2)
are not lineal descendants of the surviving spouse, the surviving spouse only gets one-half of the intestate estate and the descendant or descendants get the other half in per stirpital shares.  

D. **Share of Heirs other than Spouse.** The part of the intestate estate not passing to the surviving spouse, or the entire intestate estate if there is no surviving spouse, descends as follows:

1. To the descendants of the decedent.  
2. If the decedent dies without any descendants, then the decedent’s mother and father equally, or all to the survivor.  
3. If the decedent dies without any descendants and without a mother or father, then to the decedent’s brothers and sisters and the descendants of deceased brothers and sister.  
4. If none of the foregoing, the estate shall be divided, one-half to the decedent’s paternal, and the other half to the decedent’s maternal, kindred in the following order:

   (a) Grandfather and grandmother equally, or survivor.  
   (b) Uncles and aunts and descendants of deceased uncles and aunts.  
   (c) Other kindred who survive in order stated above.

5. **Escheat.** When a person dies leaving an estate without being survived by any person entitled to a part of it, that part shall escheat to the state.

E. **Other Intestate Matters**

1. **Per Stirpes.** Descent shall be per stirpes, whether to descendants or to collateral heirs.  
   Per stirpes means each branch receives an equal share, vertically. For instance, a grandfather dies with no surviving spouse and is survived by three children and each child has two children (the grandfather’s grandchildren). One of the three children, however, died prior to the grandfather’s death. If the grandfather leaves his asset per stirpes, the first child gets one-third, the second child gets one-third, and the third child’s grandchild each split his one-third share, and each receive one-sixth. This is in contrast to per capita, where each level receives an equal shares, horizontally. For instance, in this case his living children would each receive one-half, and the grandchildren who are the horizontal level beneath the children, would receive nothing.

2. **Half-blood.** When property descends to the collateral kindred of the intestate and part of the collateral kindred are of the whole blood to the intestate and the other part of the half

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4 Id. at 732.102(3)  
5 Id. at 732.103(1)  
6 Id. at 732.103(2)  
7 Id. at 732.103(3)  
8 Id. at 732.103(4)(a)  
9 Id. at 732.103(4)(b)  
10 Id. at 732.103(4)(c)  
11 Id. at 732.107(1)
blood, those of the half-blood shall inherit only half as much as those of the whole blood; but if all are of the half blood, they shall have whole parts.  

3. **Adopted Persons.** If one is an adopted child, then one is a descendant of the adopting parents. One is treated as natural kindred of all members of the adopting parent’s family. One is no longer a descendant of his or her biological parents. 

4. **Persons Born Out of Wedlock** A person born out of wedlock is a descendant of his or her mother and is one of the natural kindred of all members of the mother's family. The person is also a descendant of his or her father and is one of the natural kindred of all members of the father’s family, if: (a) married to the mother at any point in time, even if void; or (b) paternity is established or acknowledged in writing by the father. 

5. **Termination of Parental Rights.** A natural or adoptive parent is barred from inheriting from or through a child if the natural or adoptive parent’s parental rights were terminated pursuant to chapter 39 prior to the death of the child, and the natural or adoptive parent shall be treated as if the parent predeceased the child. 

III. **TESTATE ESTATES**

A. **Making a Valid Will.** A Will can be made by any person who is of sound mind and who is either 18 or more years of age or an emancipated minor may make a will. The Will must be in writing, signed at end by Testator, and in the presence of two (2) attesting witnesses. 

B. **Witnesses.** A witness may be any person competent to be a witness. Additionally, a will or codicil, or any part of either, is not invalid because the will or codicil is signed by an interested witness. A codicil is an amendment or addition to the will. The attesting witnesses must sign the will in the presence of the testator and in the presence of each other. 

C. **Valid Wills and Codicils.** Any will executed by a nonresident of Florida is valid as a Will in this state if valid under the laws of the state or country where the will was executed, other than (a) a Holographic Will (hand written with no witnesses); and a (b) nuncupative will (verbal will). A will in the Testator’s handwriting that has been executed in accordance with subsection (1) shall not be considered a Holographic Will. No particular form of words is necessary to the validity of a will if it is executed with the formalities required by law. A codicil shall be executed with the same formalities as a will. 

D. **Revocation of Will.** A Will can be revoked at any time by the Testator, either by writing or by act. If by writing, by a subsequent inconsistent will or codicil, even though the subsequent inconsistent will or codicil does not expressly revoke all previous wills or codicils, but the

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13 Id. at 732.105
14 Id. at 732.108(1)
15 Id. at 732.108(2)
16 Id. at 732.1081
17 Id. at 732.501
18 Id. at 732.502
revocation extends only so far as the inconsistency.\textsuperscript{19} By a subsequent will, codicil, or other writing executed with the same formalities required for the execution of wills declaring the revocation.\textsuperscript{20} If by act, a will or codicil is revoked by the Testator, or some other person in the Testator’s presence and at the Testator’s direction, by burning, tearing, canceling, defacing, obliterating, or destroying it \textit{with the intent, and for the purpose}, of revocation.\textsuperscript{21}

E. Revival by Revocation. Revoking a will, that revokes a former will, does not revive the former will. The revocation of a codicil to a will does not revoke the will. Revoking the codicil reinstates the provisions of the will or codicil that were changed or revoked by the revoked codicil, as if the revoked codicil had never been executed.\textsuperscript{22}

F. Other Common Practices in Drafting Will

1. Self-Proving Affidavit. A will or codicil executed in conformity with s. 732.502 may be made self-proved at the time of its execution or at any subsequent date by the acknowledgment of it by the testator and the affidavits of the witnesses, made before an officer authorized to administer oaths and evidenced by the officer’s certificate attached to or following the will. Form statutory language (see Exhibit A attached).\textsuperscript{23}

2. Devises to Trustee (Pour-Over Will). A valid devise may be made to the trustee of a trust that is evidenced by a written instrument in existence at the time of making the will, or by a written instrument subscribed concurrently with making of the will, if the written instrument is identified in the will. The devise shall dispose of property under the terms of the instrument that created the trust as previously or subsequently amended. An entire revocation of the trust by an instrument in writing before the testator’s death shall invalidate the devise or bequest. Unless the will provides otherwise, the property devised shall not be held under a testamentary trust of the testator but shall become a part of the principal of the trust to which it is devised.

3. Separate Writing Identifying Devises of Tangible Property. A written statement or list referred to in the decedent’s will shall dispose of items of tangible personal property, otherwise specifically disposed of by the will. To be admissible under this section as evidence of the intended disposition, the writing must be signed by the testator and must describe the items and the devisees with reasonable certainty. The writing may be prepared before or after the execution of the will. It may be altered by the testator after its preparation. It may be a writing that has no significance apart from its effect upon the dispositions made by the will. If more than one otherwise effective writing exists, then, to the extent of any conflict among the writings, the provisions of the most recent writing revoke the inconsistent provisions of each prior writing.

4. Contesting a Will. If a person believe the will to be invalid, they can contest the will. The will can be invalid for a number of reasons. A common reason is the lack of capacity. For instance, the Testator was incapacitated or did not have the mental capacity to make a will when

\begin{itemize}
\item \textsuperscript{19} Id. at 732.505(1)
\item \textsuperscript{20} Id. at 732.505(2)
\item \textsuperscript{21} Id. at 732.506 (emphasis added)
\item \textsuperscript{22} Id. at 732.508
\item \textsuperscript{23} Id. at 732.503(1)
\end{itemize}
he did. The formalities can be contested. For instance, if the will was not signed at the end or correctly, if there were not enough witnesses or if the witnesses were not in the presence of each other of the Testator at the time of signature. Lastly, the contesting party can claim that the will is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the will is void if so procured, but the remainder of the will not so procured shall be valid if it is not invalid for other reasons. In Florida, a provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable.

G. Spousal Rights and Family Issues

The surviving spouse and family of the decedent have many rights. These can be seen below.

1. Elective Share. This is most common in instances where a spouse dies and tries to cut the spouse out of the will by leaving the surviving spouse nothing. In this case, the surviving spouse of a person who dies domiciled in Florida has the right to a share of the elective estate of the decedent as provided in this part, to be designated the elective share. The election does not reduce what the spouse receives if the election were not made and the spouse is not treated as having predeceased the decedent. The elective share is an amount equal to 30 percent of the elective estate.

2. Pretermitted Spouse. Many times, a person executes a Will, and then gets married or divorced, and has more children or a child dies. When this happens the pretermitted rules come into play. When a person marries after making a will and the spouse survives the testator, the surviving spouse shall receive a share in the estate of the testator equal in value to that which the surviving spouse would have received if the testator had died intestate, unless the spouse: (a) made or waived by prenuptial or postnuptial agreement; (b) was already provided for in the will; or (c) was specifically and intentionally not provided for in the will.

3. Pretermitted Children. When a testator omits to provide by will for any of his or her children born or adopted after making the will and the child has not received a part of the testator’s property equivalent to a child’s part by way of advancement, the child shall receive a share of the estate equal in value to that which the child would have received if the testator had died intestate, unless: (a) it appears from the will that the omission was intentional; or (b) The testator had one or more children when the will was executed and devised substantially all the estate to the other parent of the pretermitted child and that other parent survived the testator and is entitled to take under the will.

4. Homestead, Exempt Property, and Family Allowance

(a) Devise of Homestead. As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or a minor child or minor

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24 Id. at 732.201
25 Id. at 732.2065
26 Id. at 732.301(2)
27 Id. at 732.302
children, except that the homestead may be devised to the owner’s spouse if there is no minor child or children.  

(i) **Descent of Homestead.** If not devised as authorized by law and the constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent’s death, *per stirpes*. In lieu of a life estate, the surviving spouse may elect to take an undivided one-half interest in the homestead as a tenant in common, with the remaining undivided one-half interest vesting in the decedent’s descendants in being at the time of the decedent’s death, *per stirpes*. Election may be exercised by the surviving spouse within 6 months after the decedent’s death and once made, the election is irrevocable.  

Sample statutory language included (see Exhibit B).

(b) **Exempt Property.** If a decedent was domiciled in this state at the time of death, the surviving spouse, or, if there is no surviving spouse, the children of the decedent shall have the right to share of the estate of the decedent as provided in this section, to be designated “exempt property.” Exempt property shall be exempt from all claims against the estate except perfected security interest thereon. Exempt property includes:

(i) Household furniture, furnishings, and appliances in the decedent’s usual place of abode up to a net value of $20,000 as of the date of death.
(ii) Two motor vehicle held in the decedent’s name and regularly used by the decedent or members of the decedent’s immediate family as their personal motor vehicles.
(iii) All qualified tuition programs
(iv) All benefits for teachers and school administrator.

(c) **Family Allowance.** In addition to protected homestead and statutory entitlements, if the decedent was domiciled in Florida at the time of death, the surviving spouse and the decedent’s lineal heirs the decedent was supporting or was obligated to support are entitled to a reasonable allowance in money out of the estate for their maintenance during administration. The court may order this allowance to be paid as a lump sum or in periodic installments. The allowance shall not exceed a total of $18,000. It shall be paid to the surviving spouse, if living, for the use of the spouse and dependent lineal heirs. If the surviving spouse is not living, it shall be paid to the lineal heirs or to the persons having their care and custody.

5. **Construction and Intention.** The intention of the testator as expressed in the will controls the legal effect of the testator’s dispositions. A will is construed to pass all property which the testator owns at death, including property acquired after the execution of the will.

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28 Id. at 732.4015(1)
29 Id. at 732.401
30 Id. at 732.402
IV. ADMINISTRATION OF ESTATES

A. Commencing Administration

1. **Venue.** The county in the state when the decedent was domiciled. If no domicile in the state, then in any county where the decedent’s property is located. If no domicile and no property, then in any county where any debtor of the decedent resides.\(^{31}\)

2. **Proof of Wills.** Self-proved wills executed in accordance with this code may be admitted to probate without further proof. If not self-proved, upon the oath of any attesting witness taken before a circuit judge, commissioner appointed by the court, or clerk. If no witness can be found, upon the oath of the personal representative nominated by the will, or upon the oath of any person having no interest in the estate under the will stating that the person believe the writing to be the trust last will of the decedent.\(^{32}\)

3. **Establishment and Probate of a Lost or Destroyed Will.** Any interested person may establish the full and precise terms of a lost or destroyed will and offer the will for probate. The specific content of the will must be proved by the testimony of two disinterested witnesses, or, if a correct copy is provided, it shall be proved by one disinterested witness.\(^{33}\)

4. **Discovery of a Later Will.** On the discovery of a later will or codicil, any interested person may petition to revoke the probate of the earlier will or to probate the later will or codicil. No will or codicil may be offered after the testate or intestate estate has been completely administered and the personal representative discharged.\(^{34}\)

B. Notice of Administration. The personal representative shall promptly serve a copy of the notice of administration on the following persons who are known to the personal representative: (1) The decedent’s surviving spouse; (2) Beneficiaries; (3) The trustee of any trust and each qualified beneficiary of the trust; and (4) Persons who may be entitled to exempt property.

1. The notice shall state the following: (1) Name of decedent; (2) File number of the estate; (3) Designation and address of the court; (4) Whether the estate is testate or intestate; (5) If testate, the date of the will and any codicils; (6) The name and address of the personal representative and attorney for the personal representative; (7) That the fiduciary lawyer-client privilege applies with respect to the personal representative and any attorney employed by the personal representative; (8) Challenges to the validity of the will, venue, or jurisdiction of the court must be filed within 3 months after the date of service of the copy of the notice of administration; (9) Persons entitled to exempt property will be deemed to have waived their right to claim the property as exempt property unless a petition for determination is filed before the later of the date that is 4 months after the date of service or 40 days after the date of termination of any proceeding involving the construction, admission to probate, or validity of the will; and

\[^{31}\text{Id. at 733.101}\]
\[^{32}\text{Id. at 733.201}\]
\[^{33}\text{Id. at 733.207}\]
\[^{34}\text{Id. at 733.208}\]
(10) That an election to take an elective share must be filed on or before the earlier date that is 6 months after the date of service of a copy of the notice of administration on the surviving spouse, or that date that is 2 years after the date of the decedent’s death.

C. Notice to Creditors. Included in Creditors’ Claims section below.

V. THE PERSONAL REPRESENTATIVE

A. Personal Representative

1. Preference of Appointment; In Testate Estates. The personal representative, or his or her successor, nominated by the will or pursuant to a power conferred in the will. The person selected by a majority in interest of the persons entitled to the estate. A devisee under the will. If more than one devisee applies, the court may select the one best qualified.35

2. Preference of Appointment; In Intestate Estates (a) The surviving spouse. (b) The person selected by a majority in interest of the heirs. (c) The heir nearest in degree. If more than one applies, the court may select the one best qualified.36

In either a testate or an intestate estate, if no one is named to able to serve via the above, the court shall appoint a capable person.

B. Qualified and Not Qualified Personal Representatives. Subject to the limitations in this part, any person who is sui juris and is a resident of Florida at the time of the death of the person whose estate is to be administered is qualified to act as personal representative in Florida.37 Persons not qualified to are persons who (1) have been convicted of a felony; (2) are mentally or physically unable to perform the duties; (3) are under the age of 18 years. If the person named as personal representative in the will is not qualified, letters shall be granted as provided in s. 733.301.38

C. Nonresidents. A person who is not domiciled in the state cannot qualify as personal representative unless the person is: (1) A spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent, or someone related by lineal consanguinity to any such person; (2) Related by lineal consanguinity to the decedent; (3) A legally adopted child or adoptive parent of the decedent; or (4) The spouse of a person otherwise qualified under this section.39

D. Trust companies and other corporations and associations. All trust companies incorporated under the laws of Florida, all state banking corporations and state savings associations authorized and qualified to exercise fiduciary powers in Florida, and all national banking associations and federal savings and loan associations authorized and qualified to

35 Id. at 733.301(1)(a)
36 Id. at 733.301(1)(b)
37 Id. at 733.302
38 Id. at 733.303
39 Id. at 733.304
exercise fiduciary powers in Florida shall be entitled to act as personal representatives and curators of estates.\(^{40}\)

E. **Resignation.** A personal representative may resign. After notice to all interested persons, the court may accept the resignation and then revoke the letters of the resigning personal representative if the interests of the estate are not jeopardized by the resignation. The acceptance of the resignation shall not exonerate the personal representative or the surety from liability.\(^{41}\) When the personal representative’s resignation is accepted, the court shall appoint a personal representative or shall appoint a curator to serve until a successor personal representative is appointed.\(^{42}\)

F. **Removal.** A personal representative shall be removed and the letters revoked if he or she was not qualified to act at the time of appointment. A personal representative may be removed and the letters revoked for any of the following causes:

1. Incapacity
2. Failure to comply with any order of the court
3. Wasting or maladministration of the estate
4. Conviction of a felony
5. Insolvency, in case of corporate personal representative
6. Holding or acquiring conflicting or adverse interests against the estate that will or may interfere with the administration of the estate as a whole. This cause of removal shall not apply to the surviving spouse because of the exercise of the right to the elective share, family allowance, or exemptions, as provided elsewhere in this code.
7. Revocation of the probate of the decedent’s will that authorized or designated the appointment of the personal representative.
8. Removal of domicile from Florida, if domicile was a requirement of initial appointment.
9. The personal representative was qualified to act at the time of appointment but is not now entitled to appointment.\(^{43}\)

1. Proceedings for removal of a personal representative may be commenced by the court or upon the petition of an interested person. The court shall revoke the letters of a removed personal representative. The removal of a personal representative shall not exonerate the removed personal representative or the removed personal representative’s surety from any liability.\(^{44}\) When a personal representative is removed, the court shall appoint a personal representative or shall appoint a curator to serve until a successor personal representative is appointed.\(^{45}\)

\(^{40}\) Id. at 733.305  
\(^{41}\) Id. at 733.502  
\(^{42}\) Id. at 733.503  
\(^{43}\) Id. at 733.504  
\(^{44}\) Id. at 733.506  
\(^{45}\) Id. at 733.5061
G. Duties and Powers

1. Settle and Distribute. A personal representative is a fiduciary who shall observe the standards of care applicable to trustees. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of the decedent’s will and this code as expeditiously and efficiently as is consistent with the best interests of the estate. A personal representative shall use the authority conferred by this code, the authority in the will, if any, and the authority of any order of the court, for the best interests of interested persons, including creditors. (FS 733.602(1))

2. Inventory. Unless an inventory has been previously filed, a personal representative shall file a verified inventory of property of the estate, listing it with reasonable detail and including for each listed item its estimated fair market value at the date of the decedent’s death. If the personal representative learns of any property not included in the original inventory, or learns that the estimated value or description indicated in the original inventory for any item is erroneous or misleading, the personal representative shall file a verified amended or supplementary inventory showing any new items and their estimated value at the date of the decedent’s death, or the revised estimated value or description. Upon written request to the personal representative, a beneficiary shall be furnished a written explanation of how the inventory value for an asset was determined, or, if an appraisal was obtained, a copy of the appraisal, as follows: (a) To a residuary beneficiary or heir in an intestate estate, regarding all inventoried assets; and (b) To any other beneficiary, regarding all assets distributed or proposed to be distributed to that beneficiary. The personal representative must notify each beneficiary of that beneficiary’s rights under this subsection. Neither a request nor the failure to request information under this subsection affects any rights of a beneficiary in subsequent proceedings concerning any accounting of the personal representative or the propriety of any action of the personal representative.

3. Opening Safe-Deposit Box. This is self-explanatory, but I find it is an issue with many estates so I wanted to mention it.

4. Possession of Estate Assets. Except as otherwise provided by a decedent’s will, every personal representative has a right to, and shall take possession or control of, the decedent’s property, except the protected homestead, but any real property or tangible personal property may be left with, or surrendered to, the person presumptively entitled to it unless possession of the property by the personal representative will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by a beneficiary is conclusive evidence that the possession of the property by the personal representative is necessary for the purposes of administration, in any action against the beneficiary for possession of it. The personal representative shall take all steps reasonably necessary for the management, protection, and preservation of the estate until distribution and may maintain an action to recover possession of property or to determine the title to it.

46 Id. at 733.604(1)(a)  
47 Id. at 733.604(2)  
48 Id. at 733.607(1)
5. **Breach of Fiduciary Duty.** A personal representative’s fiduciary duty is the same as the fiduciary duty of a trustee of an express trust, and a personal representative is liable to interested persons for damage or loss resulting from the breach of this duty. In all actions for breach of fiduciary duty or challenging the exercise of or failure to exercise a personal representative’s powers, the court shall award taxable costs as in chancery actions, including attorney’s fees.49

6. **Transactions.** (a) Retain assets owned by the decedent; (b) Perform, or, when proper, refuse to perform, the decedent’s contracts; (c) Receive assets; (d) Invest funds; (e) Acquire or dispose of an asset, excluding real property in this or another state, for cash or on credit and at public or private sale, and manage, develop, improve, exchange, partition, or change the character of an estate asset; (f) Make ordinary or extraordinary repairs or alterations; (g) Enter into a lease; (h) Abandon property; (i) Vote, or refrain from voting, stocks or other securities; (j) Insure the assets of the estate against damage or loss; (k) Borrow money; (l) Extend, renew, or in any manner modify any obligation owing to the estate; (m) Pay taxes, assessments, and other expenses incident to the administration of the estate; (n) Allocate items of income or expense to either estate income or principal; (o) Employ persons, including, but not limited to, attorneys, accountants, auditors, appraisers, investment advisers, and others; (p) Prosecute or defend claims or proceedings; (q) Sell, mortgage, or lease any personal property of the estate; (r) Continue any unincorporated business or venture; (s) Satisfy and settle claims and distribute the estate as provided in this code; (t) Make partial distribution to the beneficiaries of any part of the estate not necessary to satisfy claims, expenses of administration, taxes, family allowance, exempt property, and an elective share, in accordance with the decedent’s will or as authorized by operation of law; (u) Execute any instruments necessary in the exercise of the personal representative’s powers.

7. **Compensation.** A personal representative shall be entitled to a commission payable from the estate assets without court order as compensation for ordinary services. The commission shall be based on the compensable value of the estate, which is the inventory value of the probate estate assets and the income earned by the estate during administration.50 A commission computed on the compensable value of the estate is presumed to be reasonable compensation for a personal representative in formal administration as follows:

(a) At the rate of 3 percent for the first $1 million.
(b) At the rate of 2.5 percent for all above $1 million and not exceeding $5 million.
(c) At the rate of 2 percent for all above $5 million and not exceeding $10 million.
(d) At the rate of 1.5 percent for all above $10 million.

In addition to the previously described commission, a personal representative shall be allowed further compensation as is reasonable for any extraordinary services including, but not limited to:

(a) The sale of real or personal property.
(b) The conduct of litigation on behalf of or against the estate.
(c) Involvement in proceedings for the adjustment or payment of any taxes.

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49 Id. at 733.609(1)
50 Id. at 733.617(1)
(d) The carrying on of the decedent’s business.
(e) Dealing with protected homestead.
(f) Any other special services which may be necessary for the personal representative to perform.\(^{51}\)

8. **Compensation of Multiple Personal Representatives.** If the probate estate’s compensable value is $100,000 or more, and there are two representatives, each personal representative is entitled to the full commission allowed to a sole personal representative. If there are more than two personal representatives and the probate estate’s compensable value is $100,000 or more, the compensation to which two would be entitled must be apportioned among the personal representatives. The basis for apportionment shall be one full commission allowed to the personal representative who has possession of and primary responsibility for administration of the assets and one full commission among the remaining personal representatives according to the services rendered by each of them respectively. If the probate estate’s compensable value is less than $100,000 and there is more than one personal representative, then one full commission must be apportioned among the personal representatives according to the services rendered by each of them respectively.\(^{52}\)

9. **Compensation of Personal Representative/Attorney.** If the personal representative is a member of The Florida Bar and has rendered legal services in connection with the administration of the estate, then in addition to a fee as personal representative, there also shall be allowed a fee for the legal services rendered.\(^{53}\)

10. **Compensation for Extraordinary Services.** Upon petition of any interested person, the court may increase or decrease the compensation for ordinary services of the personal representative or award compensation for extraordinary services if the facts and circumstances of the particular administration warrant.\(^{54}\)

(a) The promptness, efficiency, and skill
(b) The responsibilities assumed by and the potential liabilities
(c) The nature and value of the assets
(d) The benefits or detriments resulting to the estate or interested persons from the personal representative’s services
(e) The complexity or simplicity of the administration and the novelty of the issues presented
(f) The personal representative’s participation in tax planning for the estate and the estate’s beneficiaries and in tax return preparation, review, or approval
(g) Any other relevant factors.

VI. **CREDITORS CLAIMS**

A. **Notice to Creditors.** Unless creditors’ claims are otherwise barred by s. 733.710, the personal representative shall promptly publish a notice to creditors. The notice shall contain the

\(^{51}\) Id. at 733.617(3)
\(^{52}\) Id. at 733.617(5)
\(^{53}\) Id. at 733.617(6)
\(^{54}\) Id. at 733.617(7)
name of the decedent, the file number of the estate, the designation and address of the court in which the proceedings are pending, the name and address of the personal representative, the name and address of the personal representative’s attorney, and the date of first publication. The notice shall state that creditors must file claims against the estate with the court during the time periods set forth in s.733.702, or be forever barred.55

1. **Publication.** Publication shall be once a week for 2 consecutive weeks, in a newspaper published in the county where the estate is administered or, if there is no newspaper published in the county, in a newspaper of general circulation in that county.56

2. **Diligent Search.** The personal representative shall promptly make a diligent search to determine the names and addresses of creditors of the decedent who are reasonably ascertainable, even if the claims are unmatured, contingent, or unliquidated, and shall promptly serve a copy of the notice on those creditors. Impracticable and extended searches are not required. Service is not required on any creditor who has filed a claim as provided in this part, whose claim has been paid in full, or whose claim is listed in a personal representative’s timely filed proof of claim.57 If the personal representative in good faith fails to give notice required by this section, the personal representative is not liable to any person for the failure. Liability, if any, for the failure is on the estate.58 Claims are barred as provided in ss. 733.702 and 733.710.59

3. **Barred Claims; Known Creditors.** If a creditor is a known creditor, (known by the Personal Representative or should have been known after a diligence search), then the Personal Representative must serve such creditor with a Notice to Creditors. If served, the known creditor has 30 days after the date of service to file a claim. If not serve, then the known creditor will have 2 years to file a claim.

4. **Barred Claims; Unknown Creditors.** If a creditor is unknown, then the creditor will have 3 months after the time of the first publication of the notice to creditors to file a claim. Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent’s estate, the personal representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.60

5. **Payment of and Objections to Claims.** The personal representative shall pay all claims within 1 year from the date of first publication of notice to creditors, provided that the time shall be extended with respect to claims in litigation, other than some exemptions. The court may extend the time for payment of any claim upon a showing of good cause.61 The Personal Representative can object to the claim as well, if the Personal Representative feels it is not a legitimate claim.

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55 Id. at 733.2121(1)  
56 Id. at 733.2121(2)  
57 Id. at 733.2121(3)  
58 Id. at 733.2121(3)(c)  
59 Id. at 733.2121(4)  
60 Id. at 733.710(1)  
61 Id. at 733.705(1)
6. **Order of Payment.** The personal representative shall pay the expenses of the administration and obligations of the decedent’s estate in the following order. After paying any preceding class, if the estate is insufficient to pay all of the next succeeding class, the creditors of the latter class shall be paid ratably in proportion to their respective claims.

(a) **Class 1.**—Costs, expenses of administration, and compensation of personal representatives and their attorneys fees and attorney’s fees awarded under s.
(b) **Class 2.**—Reasonable funeral, interment, and grave marker expenses, whether paid by a guardian, the personal representative, or any other person, not to exceed the aggregate of $6,000.
(c) **Class 3.**—Debts and taxes with preference under federal law, claims pursuant to ss. 409.9101 and 414.28, and claims in favor of the state for unpaid court costs, fees, or fines.
(d) **Class 4.**—Reasonable and necessary medical and hospital expenses of the last 60 days of the last illness of the decedent, including compensation of persons attending the decedent.
(e) **Class 5.**—Family allowance.
(f) **Class 6.**—Arrearage from court-ordered child support.
(g) **Class 7.**—Debts acquired after death by the continuation of the decedent’s business, in accordance with s. 733.612(22), but only to the extent of the assets of that business.
(h) **Class 8.**—All other claims, including those founded on judgments or decrees rendered against the decedent during the decedent’s lifetime, and any excess over the sums allowed in paragraphs (b) and (d).\(^{62}\)

**VII. CLOSING ESTATE**

A. **Final Discharge.** After administration has been completed, the personal representative shall be discharged. The discharge of the personal representative shall release the personal representative and shall bar any action against the personal representative, as such or individually, and the surety.\(^{63}\)

**V. FOREIGN PERSONAL REPRESENTATIVES AND ANCILLARY ADMINISTRATION**

A. **Foreign Personal Representative.** Personal representatives who produce authenticated copies of probated wills or letters of administration duly obtained in any state or territory of the United States may maintain actions in the courts of this state.\(^{64}\)

B. **Ancillary Administration.** If a nonresident of this state dies leaving assets in this state, credits due from residents in this state, or liens on property in this state, a personal representative specifically designated in the decedent’s will to administer the Florida property shall be entitled to have ancillary letters issued, if qualified to act in Florida. Otherwise, the foreign personal representative of the decedent’s estate shall be entitled to have letters issued, if qualified to act in Florida. If the foreign personal representative is not qualified to act in Florida and the will names an alternate or successor who is qualified to act in Florida, the alternate or successor shall be entitled to have letters issued. Otherwise, those entitled to a majority interest of the Florida

\(^{62}\) Id. at 733.707

\(^{63}\) Id. at 733.902

\(^{64}\) Id. at 734.101
property may have letters issued to a personal representative selected by them who is qualified to act in Florida. Ancillary administration shall be commenced as provided by the Florida Probate Rules. Ancillary personal representatives shall have the same rights, powers, and authority as other personal representatives in Florida to manage and settle estates; to sell, lease, or mortgage local property; and to raise funds for the payment of debts, claims, and devises in the domiciliary jurisdiction. No property shall be sold, leased, or mortgaged to pay a debt or claim that is barred by any statute of limitation or of nonclaim of this state.

C. Foreign Wills. An authenticated copy of the will of a nonresident that devises real property in this state, or any right, title, or interest in the property, may be admitted to record in any county of this state where the property is located at any time after 2 years from the death of the decedent or at any time after the domiciliary personal representative has been discharged if there has been no proceeding to administer the estate of the decedent in this state, provided: (1) the will was executed as required by chapter 732; and (2) the will has been admitted to probate in the proper court of any other state, territory, or country.

VI. SMALL ESTATES

A. Summary Administration. A summary administration may be had in the administration of either a resident or nonresident decedent’s estate, when it appears that the value of the entire estate subject to administration in this state, less the value of property exempt from the claims of creditors; (1) does not exceed $75,000 or (2) that the decedent has been dead for more than 2 years.

1. Petition for Summary Administration. A petition for summary administration may be filed by any beneficiary or person nominated as personal representative in the decedent’s will offered for probate. The petition must be signed and verified by the surviving spouse, if any, and any beneficiaries except that the joinder in a petition for summary administration is not required of a beneficiary who will receive a full distributive share under the proposed distribution. However, formal notice of the petition must be served on a beneficiary not joining in the petition.

2. Summary Administration Distribution. The order of summary administration and distribution so entered shall have the following effect: (1) those to whom specified parts of the decedent’s estate, including exempt property, are assigned by the order shall be entitled to receive and collect the parts and to have the parts transferred to them. They may maintain actions to enforce the right. (2) Debtors of the decedent, those holding property of the decedent, and those with whom securities or other property of the decedent are registered are authorized and empowered to comply with the order by paying, delivering, or transferring to those specified in
the order the parts of the decedent’s estate assigned to them by the order, and the persons so paying, delivering, or transferring shall not be accountable to anyone else for the property.\textsuperscript{71}

B. Disposition of Tangible Personal Property Without Administration. No administration shall be required or formal proceedings instituted upon the estate of a decedent leaving only personal property exempt under the provisions of s. 732.402, personal property exempt from the claims of creditors under the Constitution of Florida, and nonexempt personal property the value of which does not exceed the sum of the amount of preferred funeral expenses and reasonable and necessary medical and hospital expenses of the last 60 days of the last illness.\textsuperscript{72}

VII. FIDUCIARY ACCESS TO DIGITAL ASSETS

A. Fiduciary Access to Digital Assets. This law deals with the access to digital assets after one’s death. Many people die with e-mail accounts, social media accounts, cellular phones, online access to bill paying websites, online access to financial websites, and more. This act allows an Agent or Authorized User to access these websites in the decedent’s place, if appointed by the decedent at or prior to death. This act does not deal with ownership. For instance, one can gift their cellular phone (tangible personal property) and their digital songs/movies/books library (intangible personal property and digital asset) to their friend. Their friend can take possession and use and enjoy these items. However, this act is for access to the object. For instance, if a Personal Representative is appointed as Digital Agent, and the Personal Representative needs to (1) access the decedent’s online financial accounts to retrieve asset information, or (2) get into the decedent’s cellular phone to obtain contact information of family members, or (3) get onto their social media account to delete the account or to post a message regarding any number of matters, they will need to meet the requirements on this act in order to perform such tasks. If they do not meet these requirements the online service provider does not need to give the Personal Represented access, and could prevent efficient administration of the decedent’s estate.

B. Default and Definitions. The default is to only allow access to “Catalog of electronic communications” and not to “Content of an electronic communication”. Catalog Information, for instance, in regard to an e-mail account is simple date, time, e-mail address, and other such information. Content Information would be the actual contents and details of the e-mail. In the absence of express lawful consent providing access to Content Information, the online service provider is only required to provide Catalog Information. In the absence of any direction, the online service provider may not have to provide any information at all.

1. “Digital asset” means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.\textsuperscript{73}

\textsuperscript{71} Id. at 735.206
\textsuperscript{72} Id. at 735.301(1)
\textsuperscript{73} Id. at 740.002(9)
2.  “Catalog of electronic communications” means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.\(^{74}\)

3.  “Content of an electronic communication” means information concerning the substance or meaning of the communication which: (a) has been sent or received by a user; (b) is in electronic storage by a custodian providing an electronic communication service to the public or is carried or maintained by a custodian providing a remote computing service to the public; and (c) is not readily accessible to the public.\(^{75}\)

C.  User Direction.  (1) If the website or “Online Tool” provides a mechanism to appoint an Agent or Authorized User, and this appointment was exercised by the original user, then this shall supersede any other document.  (2) If the Online Tool does not provide a mechanism to appoint an Authorized user, or none was appointed through the Online Tool, then the estate planning documents control, such as will, trust, power of attorney, or other record.  (3) If both the Online Tool and estate planning documents are silent, then the terms-of-service agreement control.\(^{76}\) Typically, in this case, only catalogue information may be disclosed.

D.  Procedure for Disclosing Digital Assets.  When disclosing the digital assets of a user under this chapter, the custodian may, at its sole discretion. Grant a fiduciary or designated recipient full access, partial access, provide a copy.\(^{77}\)

E.  Disclosure of Catalog Information.  Unless a user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalog of electronic communications sent or received by the user and digital assets of the user, except the content of electronic communications, if the personal representative gives to the custodian:

1.  A written request for disclosure which is in physical or electronic form
2.  A certified copy of the death certificate of the user
3.  A certified copy of the letters of administration, the order authorizing a curator or administrator ad litem, the order of summary administration issued pursuant to chapter 735, or other court order
4.  If requested by the custodian: (a) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user’s account; (b) evidence linking the account to the user; (c) an affidavit stating that disclosure of the user’s digital assets is reasonably necessary for the administration of the estate; or (d) an order of the court finding that (i) the user had a specific account with the custodian, identifiable by information specified in paragraph (a); or (ii) disclosure of the user’s digital assets is reasonably necessary for the administration of the estate.\(^{78}\)

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\(^{74}\) Id. at 740.002(4)
\(^{75}\) Id. at 740.002(5)
\(^{76}\) Id. at 740.003
\(^{77}\) Id. at 740.005
\(^{78}\) Id. at 740.007
F. Disclosure of Content Information. Same requirements as catalog information and some additional requirements. Unless the user provided direction using an online tool, a copy of the user’s will, trust, power of attorney, or other record evidencing the user’s consent to disclosure of the content of electronic communications.79 A finding by the court that: (a) disclosure of the content of electronic communications of the user would not violate 18 U.S.C. ss. 2701 et seq., 47 U.S.C. s. 222, or other applicable law;80 and (b) unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communication.81

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79 Id. at 740.006(4)
80 Id. at 740.006(5)(c)(2)
81 Id. at 740.006(5)(c)(3)
Exhibit A

Self-Proving Affidavit Template in Statute

STATE OF FLORIDA

COUNTY OF ______________

I, ________________, declare to the officer taking my acknowledgment of this instrument, and to the subscribing witnesses, that I signed this instrument as my will.

Testator

We, ________________ and ________________, have been sworn by the officer signing below, and declare to that officer on our oaths that the testator declared the instrument to be the testator’s will and signed it in our presence and that we each signed the instrument as a witness in the presence of the testator and of each other.

Witness

Witness

Acknowledged and subscribed before me by the testator, (type or print testator’s name), who is personally known to me or who has produced (state type of identification—see s. 117.05(5)(b)2.) as identification, and sworn to and subscribed before me by the witnesses, (type or print name of first witness) who is personally known to me or who has produced (state type of identification—see s. 117.05(5)(b)2.) as identification and (type or print name of second witness) who is personally known to me or who has produced (state type of identification—see s. 117.05(5)(b)2.) as identification, and subscribed by me in the presence of the testator and the subscribing witnesses, all on (date).

(Signature of Officer)

(Print, type, or stamp commissioned name and affix official seal)
Exhibit B

ELECTION OF SURVIVING SPOUSE
to take a one-half interest of
decedent’s interest in
homestead property

STATE OF ____________  )
COUNTY OF ____________  )

1. The decedent, ____________ , died on ____________ . On the date of the decedent’s death, the decedent was married to ____________, who survived the decedent.

2. At the time of the decedent’s death, the decedent owned an interest in real property that the affiant believes to be homestead property described in s. 4, Article X of the State Constitution, which real property being in ____________ County, Florida, and described as: (description of homestead property).

3. Affiant elects to take one-half of decedent’s interest in the homestead as a tenant in common in lieu of a life estate.

4. If affiant is not the surviving spouse, affiant is the surviving spouse’s attorney in fact or guardian of the property, and an order has been rendered by a court having jurisdiction of the real property authorizing the undersigned to make this election.

(Affiant)

Sworn to (or affirmed) and subscribed before me this ____________ day of ____________, ____________, by ____________

(Signature of Notary Public-State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

(Type of Identification Produced)
TRUST CODE BASICS

By

Matt Ahearn, Orlando
FLORIDA TRUST CODE BASICS

I. INTRODUCTION

A. The Florida Trust Code (“FTC”) was enacted in 2006 and became effective July 1, 2007. It is broken down into 13 parts and contains 132 statutes. This outline will not provide a detailed discussion of the entire FTC. Rather, this outline will provide a general overview of certain selected provisions of the FTC.

B. The FTC was drafted after extensive consideration of the Uniform Trust Code (2000) (“UTC”).

II. GENERAL PROVISIONS AND DEFINITIONS

A. The general provisions and definitions are found in Part I of the FTC.

B. FTC applies to charitable and non-charitable express trusts and trusts required to be administered as express trusts. 736.0102. It does not apply to resulting or constructive trusts, business trusts and land trusts under 689.071 (except to the extent provided in 689.071(7), 721.08(2)(c)(4) or 721.53(1)(e)), custodial arrangements under Florida Uniform Transfer to Minors Act, Totten Trusts, Pay or Death or Transfer on Death accounts.

1. The FTC applies to all above-referenced trusts regardless of when formed.

C. Definitions. 736.0103.

1. “Beneficiary” means a person who has a present or future beneficial interest in a trust, vested or contingent, or who holds a power of appointment over trust property in a capacity other than that of trustee. An interest as a permissible appointee of a power of appointment is not a beneficial interest; however, upon an irrevocable exercise of a power of appointment, the interest of a person in whose favor the appointment is made shall be considered a present or future beneficial interest in a trust in the same manner as if the interest had been included in the trust instrument. 736.0103(4).

2. “Interests of the Beneficiary” means the beneficial interests intended by the Settlor as provided in the terms of the trust. This definition was updated in 2018 to refer to the intent of the Settlor. 736.0103(11).

3. “ Qualified Beneficiary” means a living beneficiary who, on the date of the beneficiary’s qualification is determined:

   a. Is a distributee or permissible distributee of trust income or principal;
   b. Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph a. terminated on that date without causing the trust to terminate; or
   c. Would be a distributee or permissible distributee of trust income or principal if the trust terminated in accordance with its terms on that date. 736.0103(16).

4. “Settlor” means a person, including a testator, who creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person’s contribution except to the extent another person has the power to revoke or withdraw that portion. 736.0103(18).

1 All references to “736” are to Chapter 736 of the Florida Statutes in effect as of the end of 2017, unless otherwise stated.
5. “Terms of Trust” means the manifestation of the settlor’s intent regarding a trust’s provision as expressed in the trust instrument or may be established by other evidence that would be admissible in a judicial proceeding. 736.0103(21).

6. “Trustee” means the original trustee and includes any additional trustee, any successor trustee, and any cotrustee. 736.0103(23).

D. Default and Mandatory Rules. 736.0105
1. Generally, the terms of a trust prevail over any provision of the FTC except for certain provisions enumerated under 736.0105.
2. The mandatory provisions of the FTC will be addressed elsewhere in this outline where relevant.

E. Governing Law. 736.0107.
1. The meaning and effect of the terms of a trust are determined by:
   a. The law of the jurisdiction designated in the terms of the trust, provided there is a sufficient nexus to the designated jurisdiction at the time of the creation of the trust or during the trust administration, including, but not limited to, the location of real property held by the trust or the residence or location of an office of the settlor, trustee, or any beneficiary; or
   b. In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction where the settlor resides at the time the trust is first created.

F. Principal Place of Administration. 736.0108.
1. The terms of a trust designating the principal place of administration of the trust are valid only if there is a sufficient connection with the designated jurisdiction. Without precluding other means for establishing a sufficient connection, the terms of a trust designating the principal place of administration are valid and controlling if:
   a. A trustee’s principal place of business is located in, or a trustee is a resident of, the designated jurisdiction; or
   b. All or part of the administration occurs in the designated jurisdiction.
2. Unless otherwise validly designated in the trust instrument, the principal place of administration of a trust is the trustee’s usual place of business where the records pertaining to the trust are kept or, if the trustee has no place of business, the trustee’s residence.

G. Methods of Giving Notice. 736.0109.
1. Notice to a person under the FTC or the sending of a document to a person under the FTC must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include:
   a. first-class mail,
   b. personal delivery,
   c. delivery to the person’s last known place of residence or place of business,
   d. properly directed facsimile or other electronic message, or
   e. posting a document to a secure electronic account or website where the document can be accessed.
III. CREATION, REVOCATION AND AMENDMENT OF TRUSTS

A. Methods of Creating Trust. 736.0401. A trust may be created by:
   1. Inter vivos or testamentary transfer of property to another person as trustee;
   2. Declaration by the owner of property that the owner holds identifiable property as trustee; or
   3. Exercise of a power of appointment in favor of a trustee (includes the trustee’s power to decant).

B. Requirements for Creation. 736.0402. A trust is created only if:
   1. The settlor has capacity to create the trust.
   2. The settlor indicates an intent to create the trust.
   3. The trust has a definite beneficiary or is:
      a. A charitable trust;
      b. A trust for the care of an animal, as provided in 736.0408; or
      c. A 21 year trust for a noncharitable purpose, as provided in 736.0409.
      d. A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.
   4. The trustee has duties to perform.
   5. The same person is not the sole trustee and sole beneficiary.

C. The trust must have a lawful purpose, not contrary to public policy, which is possible to achieve. 736.0404.

D. All or any part of a trust procured by fraud, duress, mistake, or undue influence, is void. 736.0406.

E. The testamentary aspects of a revocable trust, executed by a Florida resident are invalid unless the trust instrument is executed by the settlor with the formalities required for the execution of a will. 736.0403. 732.0502 provides every will must be in writing and executed as follows:
   1. Testator must sign the will at the end or the testator’s name must be subscribed at the end of the will by some other person in the testator’s presence and by the testator’s direction;
   2. The testator’s signing or acknowledgement of the will must be in the presence of at least two attesting witnesses;
   3. The attesting witnesses must sign the will in the presence of the testator and in the presence of each other.

F. A trust not created by will is validly created if the creation of the trust complies with the law of the jurisdiction in which the trust instrument was executed or the law of the jurisdiction in which, at the time of creation, the settlor was domiciled.

G. If the trust holds any interest in real property, it must be in writing. 689.05. 736.0407 allows oral trusts if they can be proved by clear and convincing evidence, except when a written instrument is required by 736.0403.

H. Revocation or Amendment of Trust. 736.0602.
   1. Unless the terms of the trust expressly provide that it is irrevocable, the Settlor may revoke or amend the trust. 736.0602(1).
   2. The revocation or amendment must comply with the formalities for the creation of a trust. 736.0602(3).
3. The Settlor may revoke or amend a revocable trust:
   a. By substantial compliance with a method provided in the terms of the trust; or
   b. If the terms of the trust do not provide a method, by:
      1. A later will or codicil that expressly refers to the trust or specifically
         devises property that would otherwise have passed according to the terms of the
         trust; or
      2. Any other method manifesting clear and convincing evidence of the
         Settlor’s intent. 736.0602(3).

4. Upon revocation of a revocable trust, the trustee shall deliver the trust property as
   the Settlor directs. 736.0602(4).

5. A Settlor’s power to revoke, amend or direct the distribution of trust property may
   be exercised by an agent under a power of attorney only as authorized by 709.2202.
   736.0602(5).

6. A guardian of the property of the Settlor may exercise a Settlor’s powers to
   revoke, amend or direct the distribution of trust property only as provided in 744.441 (requires
   court approval). 736.0602(6).

IV. REPRESENTATION OF BENEFICIARY

A. “Actions taken by a person who represents the interests of another person under [Part III
   of the FTC] are binding on the person whose interests are represented to the same extent as if the
   actions had been taken by the person whose interests are represented.” 736.0301(2).

B. Representation by holder of power of appointment. 736.0302.
   1. The holder of a power of appointment may represent and bind persons whose
      interests, as permissible appointees, takers in default, or otherwise, are subject to the power.
      However, such representation cannot occur (1) with respect to any matter determined by a court
      to involve fraud or bad faith by the trustee, or (2) if the holder of the power of appointment is
      also the trustee.
   2. Takers in default may represent and bind persons whose interests, as permissible
      appointees, are subject to the power.
   3. Note that this statute does not (1) distinguish between a special and general power
      of appointment or (2) prohibit a power holder from representing another person when there is a
      conflict of interest between the power holder and the represented party. These are changes from
      the UTC. Further, eliminating the prohibition on representation when a conflict exists is
      different than 736.0303 and 736.0304, which prohibit representation by fiduciaries, parents, and
      persons having substantially identical interests when a conflict of interest exists. Perhaps one
      rationale for permitting representation by a powerholder in light of a conflict is that power
      holders often have the ability to appoint assets away from the party or parties the power holder
      is representing. Finally, even though a power holder may not be prohibited from representing a
      party with whom he or she has a conflict of interest does not mean the power holder is absolved
      of liability for doing so.
C. Representation by fiduciaries and parents. 736.0303.
   1. To the extent there is no conflict of interest between the representative and the represented party with respect to a particular question or dispute:
      a. A guardian of the property may bind the estate of the guardian that such guardian controls;
      b. An agent with authority to act on the issue may bind the principal;
      c. A trustee may bind the trust beneficiaries;
      d. A personal representative may bind persons interested in the estate; and
      e. A parent may bind the parent’s unborn child, or the parent’s minor child if a guardian of the property for the minor child has not been appointed.

D. Representation by person having substantially identical interest. 736.0304.
   1. Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented and bound by another person having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

E. Appointment of representative. 736.0305.
   1. A court may appoint a representative if it determines that an interest is not represented or that the representation is inadequate.
   2. The representative can be appointed for any matter arising under the FTC, such as receiving notice or entering into a nonjudicial settlement agreement, regardless of whether a judicial proceeding is pending.
   3. A common situation where this may occur is when a minor child who is a beneficiary does not have any adult siblings who are also beneficiaries and the trust action at issue benefits the child’s parent, thereby creating a conflict of interest prohibiting the parent from representing the interests of the child.

F. Designated representative. 736.0306.
   1. The trust instrument may designate a representative to represent and bind a beneficiary, or authorize another person (other than the trustee) to designate a representative for a beneficiary.
   2. Trustees cannot represent beneficiaries as a designated representative.
   3. A beneficiary may represent another beneficiary only if the representing beneficiary was named by the settlor or is the represented beneficiary’s spouse or a grandparent or descendant of a grandparent of the represented beneficiary or represented beneficiary’s spouse.
   4. There is a lack of case law in Florida defining the potential liability of a designated representative. Accordingly, although 736.0306(4) provides that no person designated is liable to the represented beneficiary or anyone claiming through such beneficiary, for actions or omissions to act made in good faith, many practitioners still have concerns as to the extent of liability a designated representative may have, especially if the designated representative decides not to notify the represented beneficiary prior to binding him or her. Further, there is concern that failing to provide any notice to the represented beneficiary may violate the beneficiary’s constitutional due process rights. For these reasons, conservative trustees, including corporate trustees, may be hesitant to rely on actions of a designated representative with respect to a trust modification.
G. Others treated as qualified beneficiaries. 736.0110.
   1. The Attorney General may assert the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in Florida.

V. MODIFICATION OF TRUSTS

A. The authority to modify a trust in Florida is generally found under Part IV of the FTC. There is also common law in Florida which supplements the FTC and provides additional avenues for modification.

B. While some of the modification options available under the UTC were incorporated into the FTC, the FTC also contains additional options for modifications as well, including some that were included in Chapter 737 prior to the enactment of the FTC. With respect to certain provisions in the FTC that were taken from the UTC, one should consider reviewing the Official Comments to the UTC for guidance where Florida case law is lacking.

C. The modification statutes in the FTC that cannot be overridden by the terms of a trust, are:
   1. 736.0410 – Modification or termination of trust; proceedings for disapproval of judicial acts;
   2. 736.04113 – Judicial modification of irrevocable trust when modification is not inconsistent with settlor’s purpose;
   3. 736.0413 – Cy pres;
   4. 736.0415 – Reformation to correct mistakes; and
   5. 736.0416 – Modification to achieve settlor’s tax objectives.

D. The modification statutes that can be altered by the terms of a trust are:
   1. 736.04115 – Judicial modification of an irrevocable trust when modification is in best interests of beneficiaries;
   2. 736.04117 – Trustee’s power to invade principal in trust;
   3. 736.0412 – Nonjudicial modification of irrevocable trust;
   4. 736.0414 – Modification or termination of uneconomic trust; and
   5. 736.0417 – Combination and division of trusts.

E. Reformation
   1. Reformation can be thought of as an equitable remedy to change the terms of a trust to comply with the original intent of the settlor.
   2. Reformations are typically effective retroactively to the time at which the error occurred, although the IRS may not accept the retroactive effect for tax purposes.
   3. Grounds for reformation include a mistake of law or fact, whether in expression or inducement, including a scrivener’s error.

F. Modification
   1. Generally, a prospective change to the trust terms for one or more reasons sanctioned under law even though the original provisions of the trust are not inconsistent with the settlor’s intent and there was no mistake.
2. Do the terms of the trust authorize or restrict modification, either nonjudicially or judicially?
   a. Certain avenues of modification may be prohibited by the terms of a trust, while others cannot be. Further, the trust may provide a mechanism to modify the trust beyond what is expressly available under the FTC.
   b. One must always look to the settlor’s intent and the trust terms. As stated in several cases, the polestar of trust interpretation is the settlor’s intent, and in determining the settlor’s intent, the court should not resort to isolated words and phrases, but instead should construe the instrument as a whole taking into account the general dispositional scheme. *Robert v. Sarros*, 920 So. 2d 193 (Fla. 2d DCA 2006); *Pounds v. Pounds*, 703 So. 2d 487 (Fla. 5th DCA 1997).
   c. Some modifications under the FTC may only be accomplished if they would not be inconsistent with the settlors’ intent (see e.g., 736.04113, 736.0416). Other modifications avenues are not limited by the settlors’ intent. See e.g., 736.0412 and 736.04115.
3. What are the sources of liability for the trustee?
   a. Just because the trustee may have authority to modify a trust does not mean the trustee should exercise that authority.
4. Trustees have a duty to act in the best interests of the beneficiaries, taking into account the terms and purposes of the trust and the intent of the settlor, not just the interests of the beneficiary who may be seeking to have the trust modified for his or her own personal gain.
5. Qualified beneficiaries generally have the same ability to file a judicial modification action that a trustee possesses under the FTC. Therefore, consider whether the trustee should even be the party bringing the modification action.
6. Some modifications only require the involvement of qualified beneficiaries as opposed to non-qualified beneficiaries and interested persons. Beneficiaries who are not “qualified beneficiaries” include those beneficiaries with future interests, whether vested or contingent, holders of a power of appointment, and those in favor of whom a power of appointment has been irrevocably exercised. 736.0103(4). Including only qualified beneficiaries will not foreclose potential claims from interested persons and beneficiaries who are not “qualified beneficiaries”. Further, it is not always clear who should be included as a qualified beneficiary. Thus, a trustee should be cognizant of joining any interested persons and beneficiaries who may not be qualified beneficiaries but could potentially have claims against the trustee arising from the modification.
G. Judicial Modification and Reformation
   1. Modification Not Inconsistent with Settlor’s Purpose. 736.04113.
      a. A court may modify the terms of an irrevocable trust if:
         1. The purposes of the trust have been fulfilled or have become illegal, impossible, wasteful or impracticable to fulfill;
         2. Because of circumstances not anticipated by the settlor, compliance with the trust’s terms would defeat or substantially impair the accomplishment of a material purpose of the trust; or
         3. A material purpose of the trust no longer exists.
b. A court may:
   1. Amend or change the terms of the trust, specifically including those governing distribution of income or principal or terms governing administration;
   2. Terminate the trust in whole or in part;
   3. Direct or permit the trustee to do things that are not authorized or that are expressly prohibited by the terms of the trust; and/or
   4. Prohibit the trustee from doing things that the trust permits or directs them to do.

c. Trustee or qualified beneficiary may apply to the court.
   1. A trust cannot be drafted to prohibit judicial modification under this section. See 736.0105(2)(j).
   2. Modification in Best Interests of Beneficiaries. 736.04115.
      a. A court may modify an irrevocable trust if compliance with the existing terms of the trust is not in the best interests of the beneficiaries.
      b. Trustee or qualified beneficiary may apply to the court.
      c. This section is not available for:
         1. Irrevocable trusts created prior to January 1, 2001.
         2. Irrevocable trusts created after December 31, 2000 that either have the “old” RAP period (lives in being plus 21 years or 90 years), or expressly prohibit judicial modification.
         3. Note: Revocable trusts are considered to be created as an irrevocable trust when the right of revocation terminates.
      4. Additional points
         (a) For modifications pursuant to 736.04115, it is not necessary to show that the purposes have been fulfilled, or become illegal, impossible, wasteful or impractical to fulfill, or that there has been a change of circumstances, or that a material purpose no longer exists.
         (b) “Best interests” is a very broad term, leaving the door open for parties to modify almost any trust under this provision, provided that the trust itself meets the creation date and RAP requirements.
         (c) Modifications pursuant to 736.04115 can be prevented by including a prohibition against judicial modification in the trust terms.

3. Cy Pres. 736.0413.
   a. A court may modify or terminate a trust if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful.
   b. The settlor, trustee or any qualified beneficiary can apply to the court.
   c. If cy pres is applied, the court may direct trust property to be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

4. Modification or Termination of Uneconomic Trusts. 736.0414(2).
   a. A court may modify or terminate a trust or remove a trustee and appoint a new trustee if the court determines that the value of the trust property is insufficient to justify the cost of administration.
   b. Trustee or qualified beneficiary may apply to the court.
c. If a trust is terminated under this section, the trustee shall distribute the trust property “in a manner consistent with the purposes of the trust.” Typically, this means distributing out the assets amongst the qualified beneficiaries in accordance with the actuarial value of their interests or in some other manner agreed to amongst the trustee and qualified beneficiaries.

d. Does not apply to an easement for conservation or preservation. The rationale stated under the Comments to the UTC is that such easements are different than cash and securities, and the creators of such easements likely would prefer the easement to continue even if it has a low value.

e. Additional points
   1. Judicial termination may be used regardless of the value of the trust as long as a court determines the value is insufficient to justify the administration.
   2. The settlor can draft to prohibit or modify the requirements of this section.

736.0414 is not a mandatory provision of the FTC. See 736.0105.

5. Reformation to Correct Mistakes. 736.0415.
   a. A court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor’s intent if it can be proven by clear and convincing evidence that BOTH of the following have been affected by a mistake of fact or law, whether in expression or inducement:
      1. Settlor’s intent; and
      2. Terms of the trust.
   b. Settlor or interested person may apply to the court.
   c. Evidence of the settlor’s intent can be considered even when the evidence contradicts an apparent plan meaning of the trust instrument.
   d. Mistake of expression occurs when the terms of the trust misstate the settlor’s intention, fail to include a term that was intended to be included, or include a term that was not intended to be included. See Comment to UTC § 415.
   e. Mistake of inducement occurs when the terms accurately reflect what the settlor intended to be included or excluded but the settlor’s intent was based on a mistake of fact or law. See Comment to UTC § 415.
   f. The heightened standard of proof of clear and convincing evidence is used to guard against the possibility of unreliable or contrived evidence. See Comment to UTC § 415.
   g. Reformation of trusts in Florida is allowable both under the common law and under the FTC. See Robinson v. Robinson, 720 So. 2d 540 (Fla. 4th DCA 1998).

6. Modification to Achieve Settlor’s Tax Objectives. 736.0416.
   a. A court may modify the terms of a trust in a manner that is not contrary to the settlor’s probable intent in order to achieve the settlor’s tax objectives.
   b. Any interested person may apply to the court.
   c. Modification may have retroactive effect.
   d. Be aware that, although the state court may approve a modification on the basis that it will achieve the settlor’s tax objectives, the IRS is not bound by a lower state court decision. Estate of Bosch. Therefore, the IRS could impose a different tax result than intended; however, the modification would still be binding for state law purposes.
7. Attorney’s fees and costs
   a. In proceedings arising under 736.0410 – 736.0417, the court “shall award taxable costs as in chancery actions, including attorney fees and guardian ad litem fees.”
   b. When awarding taxable costs, including attorney fees, the court in its discretion may direct payment from a party’s interest, if any, in the trust or enter a judgment that may be satisfied from other property of the party, or both.
   c. The phrase “as in chancery actions” generally means that costs follow the judgment unless there are circumstances that render application of this rule unjust. *In re Estate of Simon v. Levin & Fishman, P.A.*, 549 So. 2d 210 (Fla. 3d DCA 1989).

H. Nonjudicial Modification
1. Nonjudicial Modification. 736.0412.
   a. Trust may be modified at any time after the settlor’s death upon the unanimous agreement of the trustee and all qualified beneficiaries.
   b. No justification is necessary for modification or termination as long as the trustee and all qualified beneficiaries agree.
   c. This section is not available for:
      1. Irrevocable trusts created prior to January 1, 2001.
      2. Irrevocable trusts created after December 31, 2000 that have the “old” RAP period (lives in being plus 21 years or 90 years) unless the terms of the trust expressly authorize nonjudicial modification.
      3. Irrevocable trusts for which a charitable deduction is allowed until the termination of all charitable interests. This restriction is intended to preserve the deductibility of charitable trusts for federal tax purposes.
      4. Note: Revocable trust are considered to be created as an irrevocable trust when the right of revocation terminates.
   d. A nonjudicial modification under this section may:
      1. Amend or change the terms of the trust, specifically including those governing distribution of income or principal or terms governing administration;
      2. Terminate the trust in whole or in part;
      3. Direct or permit the trustee to do things that are not authorized or that are expressly prohibited by the terms of the trust; and/or
      4. Prohibit the trustee from doing things that the trust permits or directs them to do.
   5. Note: These are the same modifications that a court may make under 736.04113(2).
   e. Additional notes:
      1. Representation under 736.0301-736.0306 is expressly permitted to bind beneficiaries who are not part of the nonjudicial modification agreement. Although such representation is permitted, the representative could still have liability to the represented party for doing so.
      2. Modification is only permitted after the settlor’s death. This limitation was included because there was some concern that a settlor could be deemed to possess a Code §§ 2036 or 2038 power (causing the inclusion of trust assets in the settlor’s gross estate for estate tax purposes) if the settlor could participate in the modification, either directly or indirectly.
3. For short-term trusts (i.e., those with a RAP of lives in being plus 21 years or 90 years), the trust terms must expressly authorize nonjudicial modification for 736.0412 to be available.

4. For long-term trusts (i.e., those with a RAP period longer than lives in being plus 21 years or 90 years), the availability of 736.0412 is mandatory and cannot be overridden by the terms of the trust. See 736.0105(2)(k). The policy argument is that long-term trusts need greater flexibility than short-term trusts. However, the anomaly that has been created is that short-term trusts can end up being locked up longer than long-term trusts because 736.0412 cannot be used for short-term trusts, but long-term trusts can be modified the day after the settlor’s death. There has been some discussion in RPPTL of proposing legislation either (1) permitting settlors to draft against 736.0412 for long-term trusts or (2) prohibiting nonjudicial modification under 736.0412 for the first 90 years of a long-term trust in order to provide consistent treatment for short-term and long-term trusts.

5. The existence of a spendthrift provision, or even a provision prohibiting amendment or revocation of the trust, will not prevent modification under this section.

2. Termination of Uneconomic Trusts. 736.0414(1).

a. After notice to qualified beneficiaries, a trustee may terminate a trust if the value of the trust property is less than $50,000 and the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

   1. If a trust is terminated under this section, the trustee must distribute the trust property in a manner consistent with the purposes of the trust.

   2. This is the nonjudicial counterpart of the judicial modification/termination for uneconomic trusts discussed above.

   3. Termination under this section can be prohibited by including a provision in the trust. Further, the settlor may specify a higher or lower threshold for termination.

   4. If a qualified beneficiary objects upon receipt of the notice, then the qualified beneficiary may commence a judicial proceeding to block the trustee’s termination.

3. Nonjudicial Settlement Agreements. 736.0111.

a. “Interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.”

b. The term “interested persons” is defined for purposes of this section to mean persons whose interest would be affected by a settlement agreement.

c. An interested person may request a court to approve or disapprove a nonjudicial settlement agreement, but judicial approval is not required.

d. Issues that may be resolved by a nonjudicial settlement agreement include, but are not limited to:

   1. Interpretation or construction of trust terms;

   2. Approval of a trustee’s report or accounting;

   3. Direction to a trustee to refrain from performing a specific act or the grant to a trustee of a necessary or desirable power;

   4. Resignation or appointment of a trustee and the determination of trustee compensation;

   5. Transfer of principal place of administration; and
6. Liability of a trustee for an action relating to the trust.
e. The only limitation imposed on a nonjudicial settlement agreement is that it is valid only to the extent the terms and conditions could be properly approved by a court. Thus, a nonjudicial settlement agreement can be used to modify or terminate a trust as long as a court could approve such modification or termination pursuant to one of the aforementioned judicial modification options under the FTC.
f. Nonjudicial settlement agreements are intended to encourage the nonjudicial resolution of trust matters. As a result, having 736.0111 effectively expands all judicial modification avenues discussed in Section III above into nonjudicial modification options as well.

a. See Section IV.F below.

5. Trust Protectors / Trust Directors
   a. The FTC permits the use of trust protectors and advisers. However, the full scope of what can be accomplished by a trust protector or adviser, and the fiduciary obligations of the trust protector or adviser, currently are not well defined.

I. Decanting
   1. The word “decanting” is used to describe the process by which the trustee appoints or distributes a portion or all of the assets of one trust to one or more other trusts. In effect, a trustee holding a decanting power can change the terms of a trust by creating a new trust and decanting all of the assets of the existing trust to the new trust.
   2. At least 25 states currently have decanting statutes. These statutes vary substantially, ranging from one or two sentences to several pages.
      a. It is not uncommon for trustees to first figure out what they want to accomplish with a decanting, then change the situs of the trust to a state with a decanting law that permits the goals of the trustee to be accomplished.

a. Background
   1. Originally enacted in 2007 as part of the FTC.
   2. Chapter 2018-35, House Bill 413, was signed into law by Governor Scott on March 19, 2018. The legislation is the first amendment to the decanting statute passed in 2007.
   b. Regardless of the method of decanting, only an authorized trustee can decant.
      1. Who is an authorized trustee?
         (a) A trustee other than the settlor or a beneficiary;
         (b) Who has the power to invade principal.
      2. The prior statute did not limit the trustee who could decant, which could create tax problems for a settlor or beneficiary who served as, or had the unrestricted right to remove and replace, the trustee for the decanting.
   c. Decant Using Absolute Power
      1. Unless the trust instrument expressly provides otherwise, an authorized trustee who has the absolute power under the terms of a trust to invade principal (the
‘first trust’) to make distributions to or for the benefit of one or more beneficiaries may instead exercise the power by appointing all or part of the principal subject to the power in favor of a trustee of one or more other trusts, whether created under the same trust instrument as the first trust or a different trust instrument, including a trust instrument created for the purposes of exercising the power granted by this section (each a ‘second trust’) for the current benefit of one or more beneficiaries; provided:

(a) The beneficiaries of the second trust include only beneficiaries of the first trust; and

(b) The second trust may not reduce any vested interest.

2. What qualifies an absolute power?

(a) Any power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance and support.

(b) Purposes such as “best interests, welfare, comfort, or happiness” constitute an absolute power (at least under Florida law).

3. What constitutes a vested interest?

(a) A current unconditional right to receive a mandatory distribution of income, a specified dollar amount, or a percentage of value of a trust; or

(b) A current unconditional right to withdraw income, a specified dollar amount or a percentage of value of a trust.

(c) Rights that are subject to the occurrence of a specified event, the passage of a specified time, or the exercise of discretion are not vested.

(d) The prior statute referred to a “fixed income, annuity, or unitrust interest” but did not define that term. The new statute’s definition of a vested interest clarifies the interest of a beneficiary that may not be reduced pursuant to a decanting.

4. In an exercise of absolute power, a second trust may:

(a) Retain a power of appointment granted in the first trust;

(b) Omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;

(c) Create or modify a power of appointment if the powerholder is a current beneficiary of the first trust;

(d) Create or modify a power of appointment if the powerholder is not a current beneficiary, but the exercise of the power may take effect only after the power holder becomes, or would have become if then living, a current beneficiary of the first trust; and

(e) Extend the term of the second trust beyond the term of the first trust.

(f) The class of permissible appointees may differ from the class identified in the first trust.

(g) A current beneficiary includes the holder of a presently exercisable general power of appointment.

5. The new statute addresses topics that were not addressed in the prior statute, such as when a power of appointment may be granted or modified and whether the term of the first trust may be extended.
d. Decant Using Power Other Than Absolute Power

1. Unless the trust instrument expressly provides otherwise, an authorized trustee who has a power, other than an absolute power, under the first trust to invade principal to make current distributions to or for the benefit of one or more beneficiaries may instead exercise the power by appointing all or part of the principal of the first trust subject to the power in favor of a trustee of one or more second trusts, provided:
   (a) The second trust grants each beneficiary of the first trust beneficial interests in the second trust which are substantially similar to the beneficial interests of the beneficiary in the first trust.
   (b) If the first trust grants a power of appointment to a beneficiary, the second trust must also grant the power, and the class of permissible appointees must be the same.
   (c) If the first trust does not grant a power of appointment, the second trust may not do so.
   (d) Notwithstanding (a) – (c) above, the term of the second trust may extend beyond the term of the first trust, and, for any period after the first trust would have otherwise terminated (in whole or in part) pursuant to its provisions, the second trust may with respect to property subject to the extended term:
      (i) Provide the trustee with the absolute power to invade principal of the second trust; and
      (ii) Create a power of appointment, if the power holder is a current beneficiary of the first trust, or expand the class of permissible appointees.

2. What are substantially similar beneficial interests?
   (a) There is no material change in a beneficiary’s beneficial interests;
   (b) There is no material change in the power to make distributions; and
   (c) The power to make distributions under a second trust for the benefit of an individual beneficiary is substantially similar to the power under the first trust to make a distribution directly to the beneficiary.
   (d) A distribution is deemed to be for the benefit of a beneficiary if:
      (i) The distribution is applied for the benefit of a beneficiary;
      (ii) The beneficiary is legally disabled or the trustee reasonably believes the beneficiary is incapacitated, and the distribution is permitted under the trust code; or
      (iii) The distribution is permitted under the first trust and the second trust for the benefit of the beneficiary.

3. The prior statute did not permit a trust decanting when the trustee did not have the absolute power to invade the principal of the trust. Thus, this is an expansion of the statutory decanting authority.

e. Decant to Supplemental Needs Trust

1. Notwithstanding the other forms of decanting described above, unless the trust instrument expressly provides otherwise, an authorized trustee who has the power under the first trust to invade principal to make current distributions to or for the benefit
of a beneficiary with a disability may instead exercise the power by appointing all or part of the principal of the first trust in favor of a trustee of a supplemental needs trust if:

- The supplemental needs trust benefits the disabled beneficiary;
- The beneficiaries of the supplemental needs trust include only beneficiaries of the first trust; and
- The authorized trustee determines that the exercise of the power will further the purposes of the first trust.

2. A “beneficiary with a disability” means a beneficiary who the authorized trustee believes may qualify for government benefits, regardless of whether the beneficiary currently receives government benefits or has been adjudicated incapacitated.

3. “Government benefits” means financial aid or services from any state, federal, or other public agency.

4. A “supplemental needs trust” means a trust that the authorized trustee believes would not be considered a resource for purposes of determining whether the beneficiary who has a disability is eligible for government benefits.

5. The prior statute did not permit a trust decanting to a supplemental needs trust when the trustee did not have the absolute power to invade the principal of the trust. Thus, this is an expansion of the statutory decanting authority.


1. An authorized trustee may not decant a trust in a manner that would prevent a contribution from qualifying for, or that would reduce a federal tax benefit, including a federal tax exclusion or deduction, which was originally claimed or could have been claimed for that contribution, including:
   - An exclusion under Sections 2503(b) (annual) or 2503(c) (minors) of the Internal Revenue Code;
   - A marital deduction under Sections 2056, 2056A, or 2523 of the Internal Revenue Code;
   - Direct skip treatment under Section 2642(c) of the Internal Revenue Code; or
   - Any other tax benefit for income, gift, estate, generation-skipping transfer tax purposes under the Internal Revenue Code.

2. If S corporation stock is held in the first trust, an authorized trustee may not distribute all or part of that stock to a second trust that is not a permitted shareholder under section 1361(c)(2) of the Internal Revenue Code. If the first trust is a qualified subchapter S trust (QSST) under section 1361(d) of the Internal Revenue Code, the second trust must also be a QSST.

3. Except for transfers otherwise prohibited, an authorized trustee may distribute the principal of a first trust to a second trust regardless of whether the settlor is treated as the owner of either trust under sections 671-679 of the Internal Revenue Code; however, if the settlor is not treated as the owner of the first trust, he or she may not be
treated as the owner of the second trust unless he or she at all times has the power to cause the second trust to cease being treated as if it were owned by the settlor.

4. If trust property is subject to the minimum distribution rules of Section 401(a)(9) of the Internal Revenue Code, an authorized trustee may not distribute the property to a second trust if the distribution would shorten the otherwise applicable maximum restriction period.

g. Procedural Rules

1. The decanting must be by a written instrument, signed and acknowledged by the authorized trustee, and filed with the records of the first trust.

2. The authorized trustee must provide written notification of the manner in which he or she intends to exercise the decanting to:
   (a) All qualified beneficiaries of the first trust.
   (b) The settlor of the first trust (if decanting from a non-grantor trust to a grantor trust).
   (c) All trustees of the first trust.
   (d) Any person who can remove and replace the authorized trustee of the first trust.

3. The new statute expands the class of persons entitled to notice of a trust decanting. The prior statute only required notice to be provided to the qualified beneficiaries of the first trust.

4. Notice must be provided at least 60 days prior to effective date of the decanting.

5. The notice requirement is met when the authorized trustee provides copies of the proposed instrument exercising the power, the trust instrument of the first trust, and the proposed trust instrument of the second trust.

6. The persons entitled to notice can waive the 60 day period by signed written instrument delivered to the authorized trustee.

7. Waiver of the 60 day period does not equate to consent from the beneficiary, which would raise potential gift tax concerns.

8. The expiration of the notice period does not affect the rights of the beneficiaries to bring an action against the authorized trustee relating to the decanting. Rather, the opportunity to bring an action is governed by the limitations period to challenge trustee actions under Section 736.1008 (e.g., 6 months after receiving an accounting and limitations notice).

9. The requirement of notice is based on constitutional principles of due process that an individual cannot be deprived of an interest in property without being notified and having the opportunity to object.

h. Restrictions

1. A decanting may not:
   (a) Increase the authorized trustee’s compensation specified in the first trust; or 
   (b) Relieve the authorized trustee from liability for breach of trust or provide for indemnification of the authorized trustee for any liability or claim to a greater extent than provided in the first trust.
The decanting may divide and reallocate fiduciary powers among fiduciaries and relieve a fiduciary from liability for an act or failure to act of another fiduciary as otherwise allowed under law.

The prior statute did not address trustee compensation or liability.

2. A decanting is subject to Section 689.225 covering the time when the permissible period of the rule against perpetuities begins and the law that determines the permissible period of the rule against perpetuities of the first trust.

i. Additional Key Points

1. A decanting is considered the exercise of a limited power of appointment.
2. The first trust may be decanted to a second trust created or administered under the law of any jurisdiction.
3. A decanting is not prohibited by a spendthrift clause or by a trust provision that prohibits amendment or revocation of the trust.
4. The decanting statute does not create or imply a duty to decant, and no inference of impropriety may be made because an authorized trustee fails to decant.
5. Section 736.04117 supplements common law (i.e., Phipps) decanting. It does not replace it.

(a) Thus, when fiduciaries want to decant, but do not want to provide notice to beneficiaries, they may opt for a Phipps decanting rather than decanting pursuant to Section 736.04117.
6. The settlor can draft to prohibit decanting.
7. Florida’s decanting statute applies to trusts regardless of the date of creation.
8. The exercise of the decanting power is subject to fiduciary duty principles, such as the duty of loyalty and impartiality. Thus, just because a trustee has the power to decant does not mean the trustee should exercise that power, or that the trustee will be absolved of liability for doing so in compliance with the statute. One must consider what changes are to be made as a result of the decanting.
9. The term “beneficiary” is defined in Section 736.0103(4). The definition includes future and contingent beneficiaries. Thus, these more remote beneficiaries must be considered for purposes of determining whether the second trust includes only beneficiaries of the first. Section 736.0103(4) states that permissible appointees are not considered “beneficiaries”, but if the powerholder has irrevocably exercised the power in favor of a person, then then the person in whose favor the power was exercised is considered a beneficiary.
5. The principal concern with decanting is that the IRS has not issued guidance on the tax consequences associated with decanting.

a. In IRS Notice 2011-101, Treasury and the IRS requested comments from the public on the income, gift, estate and GST tax consequences arising from decanting.
b. The IRS has announced that it will not issue additional private letter rulings on the tax consequences of decanting until formal guidance is issued, as contemplated in Notice 2011-101.
VI. BENEFICIARY’S INTERESTS AND CREDITORS

A. The provisions concerning creditor’s claims and spendthrift and discretionary trusts are found in Part V of the FTC.

B. Third-party Trusts (Without a Spendthrift Provision)

1. Except with respect to discretionary trusts, to the extent a beneficiary’s interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary’s interests by attachment of present or future distributions to or for the benefit of the beneficiary or by other means. 736.0501.

2. Without a spendthrift provision, the beneficiary must generally rely on the discretionary nature of his or her interest to avoid losing such interest to a creditor. Under 736.0504(2)(a), a creditor cannot compel a discretionary distribution regardless of whether or not the trust contains a spendthrift provision.

3. Creditor cannot reach the interest of a beneficiary that is the result of the trustee’s authority to make discretionary distributions to or for the benefit of the beneficiary regardless of whether the discretion is expressed in the form of a standard of distribution, such as health, education, maintenance or support. 736.0504(2)(b).

4. Creditor cannot compel a distribution or reach the interest of a beneficiary who is also the trustee as long as the trustee’s discretion is limited by an ascertainable standard (e.g., health, education, maintenance and support). 736.0504(3).

5. Trusts should permit trustees to make distributions “to or for the benefit of” the beneficiary in order to allow trustee to pay expenses of beneficiary (rent, mortgage, etc.) directly.

C. Third-Party Trusts (With a Spendthrift Provision)

1. A spendthrift provision is valid only if the provision restrains both voluntary and involuntary transfer of a beneficiary’s interest. A term of a trust providing that the interest of a beneficiary is held subject to a spendthrift trust, or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary’s interest. 736.0502(1) and (2).

2. Creditor cannot reach the interest of a beneficiary subject to a spendthrift provision before the beneficiary receives the interest or distribution. 736.0502(3); See, e.g., In re Knowles, 123 B.R. 428 (Bankr. M.D. Fla. 1991); Zlatkiss v. All America Team Concepts, LLC 38 Fla. L. Weekly 1194 (Fla. 5th DCA 2013) (finding that spendthrift trust protection dates back to common-law and does not violate constitutional right of access to courts).

3. Beneficiary cannot transfer an interest in a trust subject to a spendthrift provision. 736.0502(3).

4. If the sole beneficiary who holds a vested interest is also the sole trustee, there is likely a merger of the legal and equitable title in the trust and the protection of a spendthrift provision will likely be lost. In re Scott, 21 Fla. L. Weekly Fed. B13 (Bankr. S.D. Fla. 2007).

5. EXCEPTION CREDITORS: Under 736.0503, a spendthrift provision is unenforceable against:
   a. A beneficiary’s child, spouse or ex-spouse who has a judgment or court order for support or maintenance. See Bacardi v. White, 463 So. 2d 218 (Fla. 1985);
   b. A judgment creditor who has provided services for the protection of a beneficiary’s interest in the trust (i.e., attorney’s fees); and
c. A claim of the State or United States to the extent the law otherwise provides (such as a tax lien).

6. The interest of a beneficiary who may only receive discretionary distributions should still be protected against any creditor, including exception creditors. See 736.0504(2).

a. CAUTION: Some practitioners have raised concerns that, despite the express language of 736.0504(2), exception creditors may be able to garnish distributions from discretionary trusts, which means that distributions could not be made to or for the benefit of a beneficiary who has an exception creditor without paying the exception creditor first. This arises out of Bacardi and the legislative history concerning the subsequent enactment of 736.0504. This does not mean the exception creditor could reach inside the trust to get undistributed assets or otherwise force distributions. It means that if the trustee and beneficiary do not want the creditor to get any trust assets, distributions would need to be suspended until the debt is otherwise satisfied or settled.

D. Self-settled Trust (Revocable and Irrevocable)

1. Property in a revocable trust is subject to claims of the settlor’s creditors during life to the same extent as if owned directly by the settlor. 736.0505(1)

2. Property owned by a decedent’s revocable trust is liable for the expenses of administration and obligations of the decedent’s estate to the extent the estate is insufficient to otherwise pay such claims. 736.05053 and 733.707(3).

3. Florida currently does not recognize self-settled asset protection trusts; a creditor of the settlor of a trust can reach the maximum amount that can be distributed to or for the settlor’s benefit. 736.0505(1)(b); Menotte v. Brown, 303 F. 3d 1261 (11th Cir. 2002); In re Lichstrahl, 750 F. 2d 1488 (11th Cir. 1985); In re Witlin, 640 F. 2d 661 (5th Cir. 1981).

E. Withdrawal Rights / General Power of Appointment (GPOA)

1. Debtor’s unrestricted control over trust property, such as the right to request the trustee to distribute some or all of the assets of the trust to the debtor, is reachable by creditors of the beneficiary even if the trust contains a spendthrift provision. In re May, 83 B.R. 812 (Bankr. M.D. Fla. 1988).

2. The lapse of a Crummey power to the extent it exceeds the greater of (1) the amount in I.R.C. § 2041(b)(2) or 2514(e) (currently, $5,000 or 5% of the trust corpus), or (2) the gift tax annual exclusion in I.R.C. § 2503(b) (currently $13,000), results in the Crummey holder being treated as the settlor of the trust as to the lapsed portion, and thus, may be reachable by creditors. If the donor was married at the time of the gift to the trust, then the protected amount is twice the gift tax annual exclusion. 736.0505(2).

F. Limited Power of Appointment

1. Creditor of powerholder cannot reach assets subject to the limited power.
VII. OFFICE OF TRUSTEE AND DUTIES, LIABILITIES AND PROTECTIONS OF TRUSTEES

A. Accepting or Declining Trusteeship. 736.0701.
   1. A person designated as trustee accepts the trusteeship:
      a. By substantially complying with a method of acceptance provided in the terms of
         the trust; or
      b. If the terms of the trust do not provide a method or the method provided in the
         terms is not expressly made exclusive, by accepting delivery of the trust property,
         exercising powers or performing duties as trustee, or otherwise indicating acceptance of
         the trusteeship.
   2. A person designated as trustee who has not accepted the trusteeship may decline
      the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable
      time after knowing of the designation is deemed to have declined the trusteeship.
   3. A person designated as trustee may, without accepting the trusteeship:
      a. Act to preserve the trust property if, within a reasonable time after acting, the
         person sends to a qualified beneficiary a written statement declining the trusteeship.
      b. Inspect or investigate trust property to determine potential liability under
         environmental or other law or for any other purpose.

B. Co-Trustees. 736.0703.
   1. Co-trustees who are unable to reach a unanimous decision may act by majority
      decision.
   2. If a vacancy occurs in a co-trusteeship, the remaining co-trustees or a majority of
      the remaining co-trustees may act for the trust.
   3. A co-trustee must participate in the performance of a trustee’s function unless the
      co-trustee is unavailable to perform the function because of absence, illness, disqualification
      under other provision of law, or other temporary incapacity or the co-trustee has properly
      delegated the performance of the function to another co-trustee.
   4. A trustee may delegate to a co-trustee, but with some limitations. A trustee is
      prohibited from delegating to his co-trustee any function that the settlor reasonably expected the
      co-trustees to perform jointly, except that a co-trustee may delegate investment functions to the
      co-trustee under 518.112. A co-trustee may revoke a delegation previously made.

C. Vacancy in Trusteeship; Appointment of Successor. 736.0704.
   1. A vacancy in a trusteeship occurs if:
      a. A person designated as trustee cannot be identified or does not exist;
      b. A trustee resigns;
      c. A trustee is disqualified or removed;
      d. A trustee dies; or
      e. A trustee is adjudicated to be incapacitated.
   2. If one or more co-trustees remain in office, a vacancy in a trusteeship need not be
      filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee. A vacancy
      in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following
      order of priority:
      a. By a person named or designated pursuant to the terms of the trust to act as
         successor trustee.
b. By a person appointed by unanimous agreement of the qualified beneficiaries.
c. By a person appointed by the court.

D. Resignation of Trustee. 736.0705.
1. A trustee may resign upon 30 days notice to the qualified beneficiaries, the settlor (if living) and all co-trustees; or court approval.
2. A trustee is still liable for acts taken during the trusteeship unless he is otherwise discharged from liability. 736.0705(3).
3. A trust may authorize the trustee or another named individual to appoint a successor. The trustee should make certain a successor is appointed and willing to serve before resigning.

E. Removal of Trustee. 736.0706.
1. The trust may give certain persons the ability to remove a trustee. The removal may be either for cause or for any reason.
2. The settlor, co-trustee or beneficiary may petition the court to remove the trustee. A court may remove the trustee for the following reasons:
a. if the trustee has committed a breach of trust;
b. there is a lack of cooperation among the co-trustees which impairs the trust administration;
c. due to the unfitness, unwillingness, or persistent failure of the trustee, the court determines that the removal would be in the beneficiaries’ best interests; or
d. if there has been a substantial change in circumstances or all of the qualified beneficiaries request the trustees removal and the court finds that removal is in the best interest of the beneficiaries and does not impair a material purpose of the trust. 736.0706.

F. Delivery of Property by Trustee who has Resigned or been Removed. 736.0707.
1. A trustee who has resigned or has been removed has a duty to deliver the trust property to a successor trustee. Until the property has been delivered, the trustee still has an obligation to protect the trust property.

G. Trustee Compensation. 736.0708.
1. If the compensation of the trustee is not specified in the trust document, the trustee is entitled to reasonable compensation. 736.0708(1).
a. What is reasonable compensation?
   1. In West Coast Hospital Ass’n v. Florida National Bank of Jacksonville, 100 So.2d 807 (Fla. 1958), the Florida Supreme Court listed several factors to consider in determining reasonable compensation of the trustee:
      (a) The amount of capital and income of the trust;
      (b) The compensation of agents for performing similar work in the community;
      (c) The success or failure of the administration;
      (d) The trustee’s skill;
      (e) The amount of risk assumed by the trustee;
      (f) The time involved in the administration;
      (g) The character of the work of the trustee.
   2. Terms of the Trust
   a. If the terms of the trust specify the trustee’s compensation, the trustee is entitled to such compensation, but it may be adjusted by the court. 736.0708(2).
3. Agreement with the Beneficiaries
   a. The trustee should consider entering into an agreement with the beneficiaries as to his compensation. Doing so would prevent a beneficiary from later claiming the trustee’s compensation was unreasonable.
4. Judicial Determination
   a. If the trustee is concerned about the payment of his fees and the beneficiaries will not agree to a reasonable fee, the trustee may seek a judicial determination of the validity of his or her fees. 736.0201(4)(c).
5. Statute of Limitation
   a. If the trustee has already been paid from the trust, or the trustee does not wish to (or cannot) obtain the consents of the beneficiaries or judicial approval, the trustee can disclose the payment in a trust disclosure document so as to begin the statute of limitations.

H. Reimbursement of Expenses. 736.0709.
   1. A trustee is entitled to be reimbursed, with interest, for reasonable expenses properly incurred in the administration of the trust.
   2. An advance for protection of the trust gives rise to a lien against the property to secure reimbursement with reasonable interest.

I. Duty to Administer Trust. 736.0801.
   1. The Trustee shall administer the trust in good faith, in accordance with its forms and purposes and the interests of the beneficiaries, and in accordance with the FTC.

J. Duty of Loyalty. 736.0802.
   1. Conflicts of Interest
      a. The trustee has a duty to administer the trust solely in the interest of the beneficiaries. Any sale, encumbrance, or other transaction entered into by the trustee which involves the trust property and benefits the trustee or in which there is another conflict of interest is a breach of fiduciary duty and is voidable per se. If a beneficiary wants to void the transaction, the only defense the trustee will have are those enumerated in 736.0802(2), that is:
         1. the transaction was authorized by the terms of the trust;
         2. the transaction was approved by the court;
         3. the statute of limitations has run;
         4. the beneficiary consented to the transaction;
         5. the transaction was entered into before the trustee contemplated becoming the trustee; or
         6. the transaction was consented to by the settlor.
      b. If the transaction does not fall within one of the above exceptions, then the transaction will be voided.
   2. Presumed Conflict
      a. Pursuant to 736.0802(3), a conflict of interest is presumed when a transaction is entered into by the trustee with:
         1. the trustee’s spouse;
         2. trustee’s relatives;
         3. an agent, employee, officer or director of the trustee; or
         4. an entity in which the trustee has a significant interest in.
b. Unlike transactions which directly involve the trustee, a transaction in which there is a presumed conflict of interest is not void per se. The trustee may rebut the presumption by showing evidence that no conflict existed.

3. Affiliated Investments - Corporate Trustee Exceptions to Presumed Conflict Rule
   a. Notwithstanding the above, a conflict of interest is not presumed to exist with respect to a corporate trustee where:
      1. The corporate trustee invests in mutual funds in which the trustee or its affiliate provides services in a capacity other than as trustee. The trustee, or associate or affiliate of the trustee may receive reasonable compensation for its services from such mutual fund provided such compensation is fully disclosed in writing to all qualified beneficiaries. 736.0816(3); and
      2. The corporate trustee invests in “investment instruments” (e.g. securities, private investment funds, REITs, etc.) that are controlled or owned by the trustee or its affiliate, or from which the trustee or its affiliate receives compensation. Certain notices and disclosures must be provided to the beneficiaries AND a majority of qualified beneficiaries must provide written consent within 90 days after delivery of the written request by the trustee. See 736.0802(5).

4. Preventing a Claim Before the Transaction Occurs
   a. Obtain Court Approval. 736.0802(2)(b).
   b. Obtain Beneficiary Consents. 736.0802(2)(d).
   c. Transaction Authorized by the Trust Document. 736.0802(2)(a).

5. Limiting Liability After the Transaction Occurs
   a. The trustee can shorten the statute of limitations by disclosing the transaction in a trust accounting or other disclosure document.
   b. Even if the trustee does not obtain the beneficiaries’ consents before the transaction, if the beneficiaries consent to, or ratify the transaction, the trustee will be free from liability. So the trustee can obtain the beneficiaries’ consents after the transaction has occurred. 736.0802(2)(d).

K. Delegation by Trustee. 736.0807.
   1. A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances, including investment functions. The trustee shall exercise reasonable care, skill, and caution in:
      a. Selecting an agent.
      b. Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust.
      c. Reviewing the agent’s actions periodically, in order to monitor the agent’s performance and compliance with the terms of the delegation.

   2. In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

   3. A trustee who complies with subsection (1) and, when investment functions are delegated, is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

L. Powers to Direct. 736.0808.
   1. Subject to 736.0403(2) (formalities required for trusts) and 736.0602(3)(a) (settlor may revoke or amend by substantially complying with the method provided in the terms of the
trust), the trustee may follow a direction of the settlor that is contrary to the terms of the trust while a trust is revocable.

2. If the terms of a trust confer upon a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless it would be manifestly contrary to the terms of the trust or the trustee knows it would constitute a serious breach of a fiduciary duty.

3. The terms of a trust may confer on a trustee or other person a power to direct the modification or termination of the trust.

4. A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from a breach of fiduciary duty.

M. Failure to Keep Accurate Records. 736.0810.
1. The trustee has a duty to keep clear, distinct, and accurate records. If the trustee fails to keep accurate records and accounts, all presumptions are against the trustee.

Traub v. Traub, 135 So.2d 243 (Fla. 2nd DCA 1961).

N. Duty to Inform and Account. 736.0813.
1. Informing the Qualified Beneficiaries of Existence and Acceptance of Trust
a. Within 60 days of accepting as trustee, the trustee must give notice to qualified beneficiaries of the acceptance of the trust and the trustee’s name and address.

736.0813(1)(a).

b. Within 60 days after the trustee acquires knowledge of an irrevocable trust, the trustee must give notice to the qualified beneficiaries of the trust’s existence, the identity of the settlor, the right to request a copy of the trust, and the right to receive accountings.

736.0813(1)(b).

1. Who is a qualified beneficiary?
(a) Pursuant to 736.0103(14), a “qualified beneficiary” is a beneficiary who:
(b) is a distributee or permissible distributee of trust income or principal;
(c) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in A, above, terminated on that date without causing the trust to terminate; or
(d) would be a distributee or permissible distributee of trust income principal if the trust terminated in accordance with its terms on that date.

c. Things to consider when initially notifying beneficiaries:
1. Waiver of future trust accountings. 736.0813(2).
2. Limiting action for contesting the validity of a revocable trust.

736.0604(2).

3. Getting release from duty to institute proceeding against prior trustee.

736.08125(1)(c).

4. Determining representation of qualified beneficiaries.

O. Trust Accountings. 736.08135.
1. A trustee has a duty to provide accountings to the qualified beneficiaries annually, on change of trustee, and on termination of the trust pursuant to 736.0813(1)(d). The accountings must include:
a. statement identifying the trust, the trustee, and the time period covered by the accounting;
b. all cash and property transactions and all significant transactions;
c. receipts and disbursements during the accounting period;
d. gains and losses realized during the accounting period;
e. to the extent possible, the identity and value (both acquisition or carrying value and estimate of current value) of the assets at the close of the accounting period;
f. all non-contingent liabilities;
g. allocation of receipts and disbursements between income and principal; and
h. for final accountings, a plan of distribution.

2. Waiver of Accountings
a. Qualified Beneficiaries can waive the right to receive accountings. 736.0813(2).
b. If the beneficiaries waive the right to accountings, then the trustee should consider providing “informal accountings” to the beneficiaries along with a limitation notice so as to reduce the statute of limitations. An “informal accounting” can be anything that provides the beneficiary with enough information so that the beneficiary could know of a claim or reasonably should have inquired into the existence of a claim, such as bank account statements, investment account statements, or a letter from the trustee to the beneficiary describing transactions of the trust. 736.1008(4)(a).

3. Court Approval of Accountings
a. The trustee may ask the court to review and settle an interim or final accounting. 736.0201.

P. Termination of Trust. 736.0817.
1. The trustee has a duty to proceed expeditiously to distribute the trust property to the beneficiaries once a trust has terminated.
2. Unless waived by the beneficiaries, the trustee has a duty to provide a final trust accounting upon the termination of the trust or the trustee’s resignation.

Q. Florida’s Prudent Investor Rule (“Florida’s Prudent Investor Act or PIA,” 518.11) requires a “fiduciary” to invest prudently considering the purposes, terms, distribution requirements, and other circumstances of the trust.
1. Scope and Application of Florida’s PIA.
   a. Fiduciary. The term “fiduciary” is broadly defined and references not only customary fiduciaries, such as an executor and trustee, but also any other person, whether individual or corporate, who agree in writing to invest other people’s money (for convenience, a “trustee”).
   b. Includes agent under power of attorney.
2. Prudence. Modern Portfolio Theory is the basis for Florida’s PIA and it allowed Florida’s PIA to shift the focus under the Prudent Man Rule from capital preservation and risk avoidance to return, assessing risk tolerance and managing risk through diversification and correlation of assets. Consequently, Florida’s PIA provides that:
   a. reasonable care and caution must be applied in the context of the entire investment portfolio, and
   b. reasonable care and caution must be applied as a part of an overall investment strategy that incorporates risk and return objectives reasonably suitable to the trust.
   a. A trustee may invest in all types of assets and no specific investment, taken alone, is prudent or imprudent.
   b. The trustee is measured by his or her reasonable business judgment.
   c. The test of whether the trustee has breached his or her duty to invest prudently is one of conduct rather than performance.
   d. Performance is judged by the portfolio as a whole and not as to any particular asset.
   e. If the trustee has, or has represented that the trustee has, special skills, the trustee is under a duty to use those skills.

4. Circumstances. Florida’s PIA requires consideration of purposes, terms (including distribution requirements, termination, taxes, beneficiaries other resources) in setting total portfolio strategy based on risk tolerance.
   a. The trust may expand, restrict, eliminate or otherwise alter Florida’s PIA.
   b. The trustee must consider the interests of both current beneficiaries and remainder beneficiaries.
   c. The fiduciary may consider related trusts.
   d. The fiduciary may consider other resources available to a beneficiary.
   e. Florida’s PIA requires an examination of the propriety of an investment decision based on facts and circumstances prevailing at the time of the decision. The fiduciary may consider:
      1. general economic conditions,
      2. possible effect of inflation,
      3. expected tax consequences of investment decisions,
      4. role of each investment within the portfolio,
      5. expected total return, and
      6. duty to incur only reasonable and appropriate costs.
   f. The attorney’s role is to interpret the purposes, terms and distribution requirements of the trust, as well as advise the trustee regarding the application of Florida’s PIA.

5. Complying with Florida’s PIA.
   a. Duties.
      1. The trustee has a duty to diversify investments unless he or she reasonably believes that under the circumstances it is in the beneficiaries’ interests, and furthers the purposes of the trust, not to diversify.
      2. The fiduciary must review investment portfolio within a reasonable time after acceptance of trust.
      3. The fiduciary must promptly implement investment decisions.
      4. The fiduciary may retain trust assets if there is a special relationship or value to the purposes of the trust or to the beneficiaries.
      5. The fiduciary must pursue an investment strategy that considers the reasonable production of income and safety of capital. The strategy must be consistent with the fiduciary’s duty of impartiality and purposes of the trust.
      a. The Investment Policy Statement cannot be generic.
b. The investment policy statement should consider the following items:
   1. Special assets, such as small business interests, real estate holdings and unusual investments;
   2. Settlor’s purpose;
   3. Distribution requirements;
   4. Beneficiary’s other resources, if applicable;
   5. Risk v. reward;
   6. Effect on meeting purposes, terms, distribution requirements of trust; and
   7. Quantitative analysis.
7. Investment Changes.
a. The trustee should consider the objectives for adding the investment, and its effect on the overall portfolio.
8. Periodic Review.
a. The trustee should monitor the portfolio’s performance at reasonable intervals.
b. The trustee should measure investment selections by objective standards, such as a benchmark indexes.
c. The trustee should check the overall performance against the portfolio’s risk tolerance (i.e., volatility).
a. Florida’s PIA applies to all fiduciaries regardless of skill. Therefore, there may be a duty to delegate investment responsibility if the trustee does not have the requisite skills.
b. A trustee may delegate investment functions that a comparable investor might delegate to an agent if the trustee exercises reasonable care, judgment, and caution:
   1. in selecting the investment agent,
   2. in establishing the scope and specific terms of any delegation, and
   3. in reviewing periodically the agent’s actions in order to monitor overall performance and compliance with the scope and specific terms of the delegation.
c. In the case of a trust or estate, the delegating trustee must, give written notice to all beneficiaries within 30 days, unless such notice is waived.
10. Exoneration.
a. A fiduciary is not liable for reasonably relying on the express provisions of a trust.
b. Under Florida law, it is unknown whether a trustee may still have liability under Florida’s PIA in the event a trust provision waives Florida’s PIA or allows the retention of assets originally contributed by the settlor.
c. Even if the trust directs the retention of certain assets, a court may permit the trustee to deviate from the trust’s terms.
R. ILIT Trustee Liability.
1. General Rule. The Florida legislature enacted 736.0902, effective July 1, 2010, to limit the duties and liabilities of the Trustee of an insurance trust.
2. Insurable Interest. 736.0902 relieves the Trustee of the duty to determine if the contract was procured or effected by a person with an insurable interest in the policy if:
a. the ILIT owns insurance on a qualified person;
b. the ILIT does not specifically opt out of 736.0902(1)(a);
c. the insurance was not purchased from an affiliate of the Trustee and the Trustee did not receive commission on the sale of the insurance (unless duties have been delegated to another person);  
3. the Trustee did not have knowledge that the beneficiaries did not have an insurable interest when the policy was issued; and  
4. the Trustee did not have knowledge that the contract was obtained, directly or indirectly, by a person who did not have an insurance interest at the inception of such contract and that there was an agreement to sell the policy to a third person.  
5. Prudent Investor Rule. In addition, 736.0902 makes the prudent investor rule inapplicable to the contract and the Trustee will have no liability for any loss on the insurance policy if:  
a. the ILIT does not specifically opt out of 736.0902;  
b. the ILIT specifically states that 736.0902 will apply OR the Trustee provides notice to the qualified beneficiaries that 736.0902 will apply to the ILIT; and  
c. the insurance was not purchased from an affiliate of the Trustee and the Trustee did not receive commission on the sale of the insurance (unless duties have been delegated to another person).  
6. Notice. If the Trustee provides notice to the qualified beneficiaries that 736.0902 will apply to the ILIT, the beneficiaries can object in writing to the application of the statute, and the statute will not apply until the objection is withdrawn.  
7. Qualified Person. 736.0902 only applies if the insurance is held by the ILIT on a “qualified person.” A “qualified person” is defined as an insured or proposed insured, or the spouse of that person, who has provided the trustee with the funds used to acquire or pay the premiums on the policy. Thus, this section will not apply to ILITs where the funds are provided by a third party, such as an employer or family business.  
8. Compensation. If 736.0902 applies to an ILIT, the Trustee is precluded from charging a fee for performing the services for which the duty has been removed.

VIII. JUDICIAL PROCEEDINGS AND LIABILITY OF TRUSTEE

A. Role of Court in Trust Proceedings. 736.0201.  
1. Judicial proceedings concerning trusts shall be commenced by filing a complaint and shall be governed by the Florida Rules of Civil Procedure.  
2. The court may intervene in the administration of a trust to the extent the court’s jurisdiction is invoked by an interested person or as provided by law.  
3. A trust is not subject to continuing judicial supervision unless ordered by the court.  
4. A judicial proceeding involving a trust may relate to the validity, administration, or distribution of a trust.

B. Jurisdiction Over Trustee and Beneficiary. 736.0202.  
1. Any beneficiary of a trust having its principal place of administration in Florida is subject to the jurisdiction of the courts of Florida to the extent of the beneficiary’s interest in the trust.
2. Any trustee, trust beneficiary, or other person, whether or not a citizen or resident of Florida, who personally or through an agent, does any of the following acts related to a trust, submits to the jurisdiction of the courts of Florida involving that trust:
   a. Accepts trusteeship of a trust having its principal place of administration in Florida at the time of acceptance.
   b. Moves the principal place of administration of a trust to Florida.
   c. Serves as trustee of a trust created by a settlor who was a resident of Florida at the time of creation of the trust or serves as trustee of a trust having its principal place of administration in Florida.
   d. Accepts or exercises a delegation of powers or duties from the trustee of a trust having its principal place of administration in Florida.
   e. Commits a breach of trust in Florida, or commits a breach of trust with respect to a trust having its principal place of administration in Florida at the time of the breach.
   f. Accepts compensation from a trust having its principal place of administration in Florida.
   g. Performs any act or service for a trust having its principal place of administration in Florida.
   h. Accepts a distribution from a trust having its principal place of administration in Florida with respect to any matter involving the distribution.

C. Subject Matter Jurisdiction. 736.0203.
   1. The circuit court has original jurisdiction in Florida of all proceedings arising under the FTC.

   1. The court may review the propriety of the employment by a trustee of any person, including any attorney, auditor, investment adviser, or other specialized agent or assistant, and the reasonableness of any compensation paid to that person or to the trustee.
   2. The trustee, any person employed by the trustee, or any interested person may have the propriety of employment and the reasonableness of the compensation of the trustee or any person employed by the trustee determined in the probate proceeding.
   3. The burden of proof of the propriety of the employment and the reasonableness of the compensation shall be on the trustee and the person employed by the trustee. Any person who is determined to have received excessive compensation from a trust for services rendered may be ordered to make appropriate refunds.
   4. Court proceedings to determine reasonable compensation of a trustee or any person employed by a trustee, if required, are a part of the trust administration process. Costs of the proceedings shall be determined by the court and paid from the assets of the trust unless the court finds the compensation paid or requested to be substantially unreasonable. The court shall direct from which part of the trust assets the compensation shall be paid.

E. Trust Contests. 736.0207.
   1. In an action to contest the validity or revocation of all or part of a trust, the contestant has the burden of establishing the grounds for invalidity.
   2. An action to contest the validity of all or part of a revocable trust, or the revocation of part of a revocable trust, may not be commenced until the trust becomes irrevocable by its terms or by the settlor’s death. If all of a revocable trust has been revoked, an action to contest the revocation may not be commenced until after the settlor’s death.
F. Burden to Prove Breach
   1. The initial burden of proof is on the beneficiaries to prove that a breach occurred which proximately caused an injury. If that is established, the burden shifts to the trustee to demonstrate that the loss or injury would have occurred absent the breach. *Fort Myers Memorial Gardens, Inc. v. Barnett Banks Trust Company, N.A.*, 474 so.2d 1215 (Fla. 2nd DCA 1985).

G. Remedies for Breach of Trust. 736.1001.
   1. A transaction involving the trustee’s conflict of interest is voidable by any beneficiary who was affected by it. 736.0802(2).
   2. 736.1001(2) provides a non-exclusive list of remedies a court may order for any breach of trust. The court can:
      a. compel performance by the trustee;
      b. enjoin the trustee from committing the breach;
      c. order the trustee to return the trust property or pay monetary damages;
         1. the monetary damages against the trustee are the greater of the amount required to restore the value of the trust property or the amount of profit realized by the trustee. 736.1002(1).
      d. compel the trustee to provide an accounting;
      e. remove the trustee and appoint a successor trustee; or reduce or deny the compensation of the trustee.

H. Damages for Breach of Trust. 736.1002.
   1. A trustee who commits a breach of trust is liable for the greater of:
      a. The amount required to restore the value of the trust property and trust distributions to what they would have been if the breach had not occurred; or
      b. The profit the trustee made by reason of the breach.
   2. If more than one person, including a trustee or trustees, is liable to the beneficiaries for a breach of trust, each liable person is entitled to pro rata contribution from the other person or persons. A person is not entitled to contribution if the person committed the breach of trust in bad faith. A person who received a benefit from the breach of trust is not entitled to contribution from another person to the extent of the benefit received.
   3. In determining the pro rata shares of liable persons in the entire liability for a breach of trust:
      a. Their relative degrees of fault shall be the basis for allocation of liability.
      b. If equity requires, the collective liability of some as a group shall constitute a single share.
      c. Principles of equity applicable to contribution generally shall apply.

I. Attorney’s Fees and Costs. 736.1004.
   1. In all actions for breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee’s powers; and in proceedings for the modification or termination of trust, the court shall award taxable costs as in chancery actions, including attorney fees and guardian ad litem fees.
   2. When awarding taxable costs, including attorney fees and guardian ad litem fees, the court, in its discretion, may direct payment from a party’s interest, if any, in the trust or enter a judgment that may be satisfied from other property of the party, or both.
J. Attorney’s Fees for Services to Trust. 736.1005.
   1. Any attorney who has rendered services to a trust may be awarded reasonable compensation from the trust. The attorney may apply to the court for an order awarding attorney fees and, after notice and service on the trustee and all beneficiaries entitled to an accounting under 736.0813, the court shall enter an order on the fee application.
   2. If attorney fees are to be paid from the trust, the court, in its discretion, may direct from what part of the trust the fees shall be paid.
      a. All or any part of the attorney fees to be paid from the trust may be assessed against one or more persons’ part of the trust in such proportions as the court finds to be just and proper.
      b. In the exercise of its discretion, the court may consider the following factors:
         1. The relative impact of an assessment on the estimated value of each person’s part of the trust.
         2. The amount of attorney fees to be assessed against a person’s part of the trust.
         3. The extent to which a person whose part of the trust is to be assessed, individually or through counsel, actively participated in the proceeding.
         4. The potential benefit or detriment to a person’s part of the trust expected from the outcome of the proceeding.
         5. The relative strength or weakness of the merits of the claims, defenses, or objections, if any, asserted by a person whose part of the trust is to be assessed.
         6. Whether a person whose part of the trust is to be assessed was a prevailing party with respect to one or more claims, defenses, or objections.
         7. Whether a person whose part of the trust is to be assessed unjustly caused an increase in the amount of attorney fees incurred by the trustee or another person in connection with the proceeding.
         8. Any other relevant fact, circumstance, or equity.
K. Costs in Trust Proceedings. 736.1006.
   1. In all trust proceedings, costs may be awarded as in chancery actions.
   2. If costs are to be paid from the trust, the court, in its discretion, may direct from what part of the trust the costs shall be paid. All or any part of the costs to be paid from the trust may be assessed against one or more persons’ part of the trust in such proportions as the court finds to be just and proper. In the exercise of its discretion, the court may consider the factors set forth in 736.1005(2).
L. Trustee’s Attorney Fees. 736.1007.
   1. Statutory Authority
      a. The trustee has the power to hire professionals to advise the trustee and to pay a reasonable compensation for such services. 736.0816(20). This statute governs all professionals including, investment advisors, accountants, etc. The amount of “reasonable compensation” will depend on the facts and circumstances.
      b. 736.1007 specifically governs the compensation of attorneys for the trustee.
         1. For ordinary services in the initial administration of the trust, 75% of the rate specified in 733.6171 is presumed reasonable, i.e.:
            (a) $1,125 for a trust valued at $40,000 or less;
            (b) an additional $562.50 for trusts valued between $40,000 and $70,000;
(c) an additional $562.5 for trusts valued between $70,000 and $100,000;
(d) an additional 2.25% on the excess of a trust’s value over $100,000 and less than $1,000,000;
(e) an additional 1.875% on the excess of a trust’s value over $1,000,000 and less than $3,000,000;
(f) an additional 1.5% on the excess of a trust’s value over $3,000,000 and less than $5,000,000;
(g) an additional 1.125% on the excess of a trust’s value over $5,000,000 and less than $10,000,000; and
(h) an additional .75% on the excess of a trust’s value over $10,000,000.
2. An attorney is entitled to reasonable compensation for extraordinary services provided. 736.1007(5).
3. The court may increase or decrease the compensation paid to an attorney. 736.1007(6).

2. Court Authorization
a. If in doubt about the reasonableness of the compensation, the trustee can get a court order authorizing the payment of professional fees from the trust. 736.0201.

3. Beneficiary Consent
a. The trustee may also obtain consents from the beneficiaries for the payment of any expenses of the trust, including professional fees. 736.1012

4. Statute of Limitations
a. If the trustee has already paid the fees, the trustee should disclose the payment in a trust accounting or other trust disclosure document to begin the statute of limitations.

M. Statute of Limitations. 736.1008.
1. The failure to provide an accounting may not give rise to a liability, although a qualified beneficiary can compel the trustee to provide an accounting pursuant to 736.1001(2)(d). The benefit for providing trust accountings frequently is the statute of limitations for bringing an action against a trustee is reduced for actions adequately disclosed in the accounting.
   a. Without providing an accounting, a beneficiary may have up to forty years after a trust terminates or the trustee resigns to bring an action against a trustee. 736.1008(6).
   b. The statute of limitations is reduced to four years for matters adequately disclosed in an accounting or other trust disclosure document. 736.1008(1)(a).
   c. The statute of limitations is further reduced to six months if a limitation notice is given to the beneficiary along with the accounting or trust disclosure document. 736.1008(2).
      1. 736.1008(4)(c) provides sample language for a limitation notice: “An action for breach of trust based on matters disclosed in a trust accounting or other written report of the trustee may be subject to a 6-month statute of limitations from the receipt of the trust accounting or other written report. If you have questions, please consult your attorney.”
      2. Harris Trust Co. of Florida v. Davis, 668 So.2d 689 (Fla. 4th DCA 1996). The trustee made trust distributions on behalf of the Beneficiary. These distributions were shown on the accounting provided by the trustee along with a limitation notice. The Beneficiary brought a complaint that the distributions made on her behalf were not really
distributions to her. The court held that because the Beneficiary did not bring the action within six months of receiving the accounting, the Beneficiary’s claim was barred.

2. If trustee actively conceals facts supporting a cause of action, the applicable statute of limitations is extended an additional thirty years. 736.1008(6)(b).

3. Standard of Review
   a. When a trustee’s judgment or discretion is involved, courts will not interfere with the trustee’s actions except to prevent abuse. Restatement (Third) of Trusts, §50.

N. Reliance on the Terms of the Trust. 736.1009.
   1. A trustee who acts in reasonable reliance on the terms of the trust is not liable to a beneficiary for a breach of trust to the extent the breach was based on the reliance. 736.1009.

O. Exculpatory Clauses. 736.1011.
   1. A clause in a trust relieving a trustee of liability for breach of trust is valid in Florida, but it does not relieve the trustee from acts of bad faith or reckless indifference. If, however, the trustee caused the exculpatory clause to be drafted, the exculpatory clause is invalid unless:
      a. the trustee proves that the clause is fair under the circumstances, and
      b. the term’s existence and contents were adequately communicated directly to the settlor or the independent attorney of the settlor. 736.1011

P. Consents and Releases from Beneficiaries. 736.1012.
   1. The trustee should obtain releases from all of the beneficiaries before making the final distribution from the trust. Otherwise, a beneficiary may bring a claim against the trustee and the trustee would have no source of funds with which to defend the claim.
   2. A beneficiary may even consent to a breach of trust, release the trustee from liability for the breach, or ratify the transaction constituting the breach, unless either:
      a. The consent, release or ratification was induced by improper conduct by the trustee or
      b. the beneficiary did not know of his or her rights or of the material facts relating to the breach. 736.1012
EXAMPLE #1 – REVOCABLE TRUSTS

Client, a resident of Florida, comes to your office for estate planning. Client has a substantial estate with properties in multiple jurisdictions. Client decides to create a revocable trust because he’s interested in avoiding probate, keeping the terms of his estate plan confidential and providing a mechanism for the management of his assets in the event of his incapacity. You agree to prepare a draft of the revocable trust in accordance with your discussions with the client.

Does the FTC apply?
Yes. The FTC applies to express trusts. 736.0102(1). Also, the FTC requirements for creating a trust prevail over the terms of the trust. Because client is a Florida resident, the meaning and effect of the terms of the trust will be determined by Florida law, unless a different jurisdiction is designated and there is sufficient nexus to that jurisdiction (except for matters of strong public policy). 736.0107. If the client will serve as sole trustee of his revocable trust, the principal place of administration will be Florida. 736.0108. If the client decides to relocate to another jurisdiction, the principal place of administration will move to that jurisdiction. 736.0108.

How do you create a revocable trust under the FTC?
The client, as settlor, will transfer property to the trustee, and the trustee will accept the property. 736.0401. This is reflected in the trust instrument and typically a schedule will be attached to the revocable trust listing the property in the trust estate. The schedule may only reflect a dollar amount (say, $10.00) and will generally not be updated throughout the term of the trust.

The client must have the capacity to create a revocable trust, which is the same capacity required for the creation of a will. He must be of sound mind and over 18 years of age. 736.0402, 736.0601 and 732.501.

The revocable trust instrument will reflect the client’s intent to create the trust, the current and remainder beneficiaries and that the trustee has duties to perform. 736.0402.

Generally, the client will execute the revocable trust agreement with the same formalities required for the execution of a will. 736.0403(2)(b) and 732.502. Note that this rule only applies to the “testamentary aspects” of the revocable trust, which means those provisions of the trust instrument that dispose of the trust property on or after the death of the settlor other than to the settlor’s estate. This rule is mandatory and cannot be modified by the terms of the trust. 736.0105(2)(j).

Generally, the trustee will accept his position as trustee by signing an acceptance that is maintained with the trust instrument. This is not necessarily required (unless the trust instrument so provides) as the trustee can accept his position by accepting delivery of trust property, performing trustee duties or otherwise indicating acceptance of the trusteeship. 736.0701.

How does the settlor revoke or amend the revocable trust?
The terms of the trust should provide that it can be revoked or amended by the settlor, but it should be noted that a trust is revocable by default under the FTC. 736.0602(1). The settlor can
amend or revoke the trust by substantially complying with the method provided in the terms of
the trust. 736.0602(3). An amendment to the revocable trust should be executed with the same
formalities required for the revocable trust. 736.0602(3).

What are the duties of the trustee after the creation of the revocable trust?
The trustee must administer the trust is good faith, in accordance with its terms and purposes and
the interests of the beneficiaries, and in accordance with the FTC. 736.0801. While the trust is
revocable, the duties of the trustee are owed exclusively to the settlor. 736.0603. This includes
the trustee’s duties to inform and account. 736.0813(4). Also, the trustee may follow the
direction of the settlor that is contrary to the terms of the trust while a trust is revocable.
736.0808(1).

Does the settlor, as the beneficiary, enjoy protection from creditors?
No. Property in a revocable trust is subject to the claims of the settlor’s creditors during life to
the same extent as if owned directly by the settlor. 736.0505.

What happens if the settlor who is serving as sole trustee becomes incapacitated?
Assuming a successor trustee is appointed in the trust instrument, the successor trustee will
accept his position as trustee by substantially complying with the method provided in the terms
of the trust. 736.0701. The duties of the trustee are still owed exclusively to the settlor.
736.0603.

If the settlor his granted his agent under a power of attorney the power to revoke or amend the
trust and the terms of the trust allow for revocation and amendment by the agent, then the agent
can revoke or amend the trust on the settlor’s behalf. 736.0602(5).

A guardian of the property of the settlor can revoke or amend the trust with approval of the
guardianship court. 736.0602(6).

What should happen shortly after the death of the settlor?
Assuming a successor trustee is appointed in the trust instrument, the successor trustee will
accept his position as trustee by substantially complying with the method provided in the terms
of the trust. 736.0701.

Upon the death of a settlor of a revocable trust, the trustee must file a notice of trust with the
court of the county of the settlor’s domicile and the court having jurisdiction of the settlor’s
estate. 736.05055.

Within 60 days after the date the trustee acquires knowledge that a formerly revocable trust has
become irrevocable, whether by the death of the settlor or otherwise, the trustee shall give notice
to the qualified beneficiaries of the trust’s existence, the identity of the settlor, the right to
request a copy of the trust instrument, the right to accountings, and that the fiduciary lawyer-
client privilege in 90.5021 applies with respect to the trustee and any attorney employed by the
trustee. 736.0813(1)(b). This is a mandatory provision that cannot be overridden by the terms of
the trust. 736.0105(8)(r).
Upon reasonable request, the trustee shall provide a qualified beneficiary with a complete copy of the trust instrument. 736.0813(1)(c). This is a mandatory provision that cannot be overridden by the terms of the trust. 736.0105(2)(s). The trust instrument is the instrument executed by the settlor that contains the terms of the trust, including any amendments to the trust. 736.0103(22). This definition includes the original trust instrument and all amendments thereafter, even if subsequent amendments completely restated the terms of the trust.

The trustee may want to provide the qualified beneficiaries with a complete copy of the trust when the trustee sends the notice letter because an action to contest the validity of a revocable trust is barred if not commenced within six months after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust existence, of the trustee’s name and address, and of the time allowed for commencing a proceeding. 736.0604.

The trustee must provide a trust accounting, as set forth in 736.08135, to each qualified beneficiary at least annually and on termination of the trust or on change of the trustee. 736.0813(1)(d). This is a mandatory provision that cannot be overridden by the terms of the trust. 736.0105(2)(s). However, a qualified beneficiary may waive the trustee’s duty to account. 736.0813(2).

A qualified beneficiary is a living beneficiary who is a distributee or permissible distributee of trust income or principal, would be a distributee or permissible distributee of trust income or principal if the interests of the current distributees terminated without causing the trust to terminate, or would be a distributee or permissible distributee of trust income or principal if the trust terminated. 736.0103(16).

The representation provisions of part three of the Florida trust code apply with respect to all rights of a qualified beneficiary concerning the trustee’s duty to inform and account. 736.0813(3). See Section III above.

Notice to a qualified beneficiary must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice. Permissible methods of notice include first-class mail, personal delivery, delivery to the person’s last known place of residence or place of business, or a properly directed facsimile or other electronic message. 736.0109(1).

What happens when a trustee resigns or is removed?
A trustee may resign upon at least 30 days’ notice to the qualified beneficiaries, the settlor, if living, and all co-trustees, or with approval of the court. 736.0705. The trust may give certain persons the right to remove a trustee for cause or for any reason, and a court can remove a trustee for the reasons specified under 736.0706(2). The trustee has the duties and powers necessary to protect trust property until it can be delivered to the successor trustee, which must be done within a reasonable period of time. 736.0707. Within 60 days after acceptance of the trust, the trustee shall give notice to the qualified beneficiaries of the acceptance of the trust, the full name and address of the trustee, and that the fiduciary lawyer-client privilege in 90.5021 applies with respect to the trustee and any attorney employed by the trustee. 736.0813(1)(a). This is a mandatory provision that cannot be overridden by the terms of the trust. 736.0105(8)(r).
How much should the trustee be compensated?
If the compensation of the trustee is not specified in the trust document, the trustee is entitled to reasonable compensation. 736.0708(1). In West Coast Hospital, the Florida Supreme Court listed several factors to consider, including (a) the amount of capital and income of the trust, (b) the compensation of agents for performing similar work in the community, (c) the success or failure of the administration; (d) the trustee’s skill; (e) the amount of risk assumed by the trustee; (f) the time involved in the administration; and (g) the character of the work of the trustee.

To determine the trustee’s fees for administration of a revocable trust following the death of the settlor, we use as a preliminary measure 75% of the presumptively reasonable personal representative’s fees for ordinary services under the schedule provided in 733.617. This methodology is based on how the presumptively reasonable fees for the attorney employed by the trustee are determined.

The conflicts of interest rules under 736.0802 do not preclude an agreement between the trustee and the beneficiary relating to compensation of the trustee for payment of reasonable compensation to the trustee, provided it is fair to the beneficiaries. 736.0802(7)(a) and (b). If the trustee is a corporate trustee, a conflict of interest is not presumed to exist where (a) the corporate trustee invests in mutual funds in which the trustee or its affiliate provides services and receives reasonable compensation, and (b) the corporate trustee invests in investment instruments that are controlled or owned by the trustee or its affiliate and from which receives compensation. 736.0802(5).

How much should the attorney for the trustee be compensated?
If the trustee of a revocable trust retained an attorney to render legal services in connection with the initial administration, the attorney is entitled to reasonable compensation without court order, subject to the conflict of interest rules. 736.1007. The trustee an attorney may agree to compensation determined in a different manner or amount. The agreement is not binding on a person who bears the impact of the compensation unless that person is a party to, or consents to, the agreement. 736.1007. If a separate written agreement regarding compensation exists between the attorney and the settlor, the attorney shall furnish a copy to the trustee prior to commencement of employment and, if employed, she’ll probably file and serve a copy on all interested persons. 736.1007(7). Note that this does not obligate the trustee to employ that attorney.

Unless otherwise agreed, compensation based on the value of the trust assets immediately following the settlor’s death and the income earned by the trust during initial administration at the rate of 75% of the probate fee schedule for attorneys (733.6171(3)) is presumed to be reasonable total compensation for ordinary services of all attorneys employed to advise a trustee concerning the trustee’s duties in initial trust administration. 736.1007(2). A representative list of ordinary services are set forth in 736.1007(4).

In addition to attorney’s fees for ordinary services, the attorney is allowed further reasonable compensation for any extraordinary service. A representative list of extraordinary services are set forth in 736.1007(5).
Upon petition of any interested person, the court may increase or decrease the compensation for ordinary services of the attorney or award compensation for extraordinary services. 736.1007(6).

The conflicts of interest rules under 736.0802 do not preclude the employment of attorneys, even if they are the trustee, an affiliate of the trustee, or otherwise associated with the trustee, to advise or assist the trustee in the exercise of any of the trustee’s powers and to pay reasonable compensation and costs incurred in connection with such employment. 736.0802(8).

**Should the trustee delegate any duties or powers?**

A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances, including investment functions pursuant to 518.112. The trustee shall exercise reasonable care, skill, and caution in (a) selecting an agent, (b) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust, (c) reviewing the agent’s actions periodically, in order to monitor the agent’s performance and compliance with the terms of the delegation. 736.0807.

A trustee who properly delegate’s duties and powers and, when investment functions are delegated is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated. 736.0807(3). Generally, an individual trustee who does not have any special expertise with investments should consider delegating investment functions to professional advisor in order to shift liability for that matter to the professional advisor.
EXAMPLE #2 – IRREVOCABLE TRUSTS

Client, a resident of Florida, comes to your office for estate planning. Client has a substantial estate and wants to purchase life insurance to help pay estate taxes on his death. Client decides to create an irrevocable trust because he wants to keep the death benefit under the life insurance policy out of his estate for tax purposes. You agree to prepare a draft of the irrevocable trust in accordance with your discussions with the client.

Does the FTC apply?
Yes. The FTC applies to express trusts. 736.0102(1). Also, the FTC requirements for creating a trust prevail over the terms of the trust. Because client is a Florida resident, the meaning and effect of the terms of the trust will be determined by Florida law, unless a different jurisdiction is designated and there is sufficient nexus to that jurisdiction (except for matters of strong public policy). 736.0107. If the trustee resides or has its principal place of business in Florida, the principal place of administration will be Florida. 736.0108.

How do you create an irrevocable trust under the FTC?
The client, as settlor, will transfer property to the trustee, and the trustee will accept the property. 736.0401. This is reflected in the trust instrument and typically a schedule will be attached to the trust listing the property in the trust estate. The schedule may only reflect a dollar amount (say, $10.00).

The client must have the capacity to create a trust. The trust instrument must reflect the client’s intent to create the trust, the current and remainder beneficiaries and that the trustee has duties to perform. 736.0402.

It is good practice for the client to execute the trust agreement with the same formalities required for the execution of a will; however, those formalities are not required. 736.0402. Because the life insurance trust does not hold land, it may even be formed as an oral trust. 736.0403(2)(a).

Generally, the trustee will accept his position as trustee by signing an acceptance that is maintained with the trust instrument. This is not necessarily required (unless the trust instrument so provides) as the trustee can accept his position by accepting delivery of trust property, performing trustee duties or otherwise indicating acceptance of the trusteeship. 736.0701.

What are the duties of the trustee after the creation of the trust?
The trustee must administer the trust is good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with the FTC. 736.0801.

Within 60 days after the trustee acquires knowledge of the creation of an irrevocable trust, the trustee shall give notice to the qualified beneficiaries of the trust’s existence, the identity of the settlor, the right to request a copy of the trust instrument, the right to accountings, and that the fiduciary lawyer-client privilege in 90.5021 applies with respect to the trustee and any attorney
employed by the trustee. 736.0813(1)(b). This is a mandatory provision that cannot be overridden by the terms of the trust. 736.0105(8)(r).

Upon reasonable request, the trustee shall provide a qualified beneficiary with a complete copy of the trust instrument. 736.0813(1)(c). This is a mandatory provision that cannot be overridden by the terms of the trust. 736.0105(2)(s).

The trustee must provide a trust accounting, as set forth in 736.08135, to each qualified beneficiary at least annually and on termination of the trust or on change of the trustee. 736.0813(1)(d). This is a mandatory provision that cannot be overridden by the terms of the trust. 736.0105(2)(s). However, a qualified beneficiary may waive the trustee’s duty to account. 736.0813(2).

The definition of qualified beneficiary, the application of the representation provisions and the requirements for notice are the same as discussed under Example #1 above.

**What happens when a trustee resigns or is removed?**
The same rules apply as discussed above with respect to revocable trusts.

**How much should the trustee be compensated?**
Generally, the same rules apply as discussed above with respect to revocable trusts. In practice, when advising an individual trustee about his or her compensation, we consider the compensation of local corporate trustees. There is no statutory fee schedule that can be referred to for guidance.

**How much should the attorney for the trustee be compensated?**
The trustee can employ the attorney’s and pay reasonable compensation and costs incurred in connection with such employment, subject to the conflict of interest rules under 736.0802. 736.0816(20). Generally, the same conflicts of interest rules apply as discussed above with respect to revocable trusts.

**Should the trustee delegate any duties or powers?**
Generally, the same rules apply as discussed above with respect to revocable trusts.

**Can the trustee shift liability for the management of the insurance policy?**
The trust instrument may refer to 736.0902 to eliminate certain duties of a trustee with respect to any contract for life insurance acquired or attained on the life of a qualified person. 736.0902(1) and (5)(a). If the trust instrument does not refer to 736.0902, the trustee may give notice that subsection applies to a contract for life insurance held by the trust. 736.0902(5)(b). The notice must be given to the qualified beneficiaries and contain a copy or restatement of 736.0902. If a qualified beneficiary delivers a written objection to the application of 736.0902 to the trustee within 30 days after receipt of the notice, the elimination of the trustee’s duties shall not apply until the objection is withdrawn. 736.0902(5)(b)4.
If 736.0902 is applicable, a trustee has no duty to (a) determine with the life insurance is, or remains, a proper investment, (b) investigate the financial strength of the life insurance company, (c) determine whether to exercise any policy option, (d) diversify the life insurance with the assets of the trust with respect to the life insurance, (e) inquire about or investigate the health or financial condition of the insureds. 736.0902(1).

A qualified person is a person who is insured or a proposed insured, or the spouse of that person, who has provided the trustee with the funds used to acquire or pay premiums with respect to a policy of insurance on the life of that person or the spouse of that person, or on the lives of that person and the spouse of that person. 736.0902(2).

**Do the beneficiaries enjoy protection from creditors?**

If the trust includes a spendthrift provision, the beneficiary may not transfer an interest in the trust and, except as otherwise provided, a creditor or assignee any of the beneficiary may not reach the interest or distribution by the trustee before receipt of the interest or distribution by the beneficiary. 736.0502(3). A spendthrift provision is unenforceable against (i) a beneficiary’s child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance, (ii) a judgment creditor who has provided services for the protection of a beneficiary’s interest in the trust, and (iii) a claim of Florida or the United States to the extent Florida law or federal law also provides. 736.0503(2).

If trust distributions are subject to the trustee’s discretion, whether or not the discretion as expressed in the form of a standard of distribution and whether or not the trustee has abused the discretion, a creditor of the beneficiary, including exception creditors, may not compel a distribution from the trust or attach or otherwise reach the interest of the beneficiary. 736.0504.
EXAMPLE #3 – DIVIDE AND CONQUER

Ned dies survived by his wife, Catelyn, and his daughters, Sansa and Arya. Ned leaves a credit shelter trust that provides for discretionary distributions to Catelyn for HEMS during her lifetime and, upon her death, it splits into separate dynasty trusts for Sansa and Arya. The credit shelter trust owns $1 million of gold, $2 million of property, and a 100% interest in a sword fighting business (that Arya now manages) valued at $2 million. Arya, being a gifted businesswoman and master sword fighter, expects to double the value of the business over the next 5 years, now that she is in control and can teach the art of sword fighting the way she wants to. Arya hates the idea that her efforts to enhance the business will benefit Sansa and Sansa’s descendants when Catelyn dies. Sansa is not impressed with Arya’s skills and wants nothing to do with the business. Further, she does not want her future inheritance to be harmed when the business fails. Thus, Sansa is demanding the trustee sell the business. Upon Catelyn’s death, if not before, there is sure to be a fight (possibly even a sword fight?) between Sansa and Arya regarding the division of the trust assets, primarily as a result of the growth or decline of the business. What can be done to save the Stark family?

1. Proposed Solution: Sever credit shelter trust into two trusts and modify the trust provisions:
   a. Trust 1: For the benefit of Catelyn and, upon her death, Sansa and descendants
      i. Fund with $500k of gold and $2m of property
   b. Trust 2: For the benefit of Catelyn and, upon her death, Arya and descendants
      i. Fund with $500k of gold and $2m business

2. Benefits of Severance and Modification
   a. Each Trust has assets of $2.5 million.
   b. Only Catelyn, Arya and her descendants will share in the success or failure of the business. The share for Sansa and her descendants is not affected by the performance of the business.
   c. Each Trust has assets that, with Catelyn’s consent, can be independently invested without the consent of the other child.
   d. Agreement can be made between Catelyn, Arya and Sansa that distributions for Catelyn will be made equally from Trust 1 and Trust 2.

3. Settlement Options
   a. Severance
      i. Fla. Stat. § 736.0417
   b. Judicial Modification
      i. Fla. Stat. § 736.04113 – Modification because of unanticipated circumstances
         1. Dispute has arisen and continuing trust on the same terms would lead to depletion of trust assets on litigation

3.42
expenses instead of preserving the assets for the benefit of the beneficiaries.

ii. Fla. Stat. § 736.04115 – Modification for best interests of beneficiaries
   1. Compliance with the existing provisions is not in the best interests of the beneficiaries because it will lead to further disputes and unnecessary trust administration expenses. It is in the best interests of the beneficiaries to sever the trust into two trusts to avoid further disputes.

c. Nonjudicial Modification
   i. Fla. Stat. § 736.0412 – Consent of trustee and qualified beneficiaries
   ii. Fla. Stat. § 736.0111 - Nonjudicial Settlement Agreement to modify the trust in the same manner that a court would under § 736.04113 and 736.04115 may be possible.
EXAMPLE #4 – DECANTING

Tywin created an irrevocable trust that provides for distributions to or for the benefit of his daughter Cersei and Cersei’s descendants for HEMS. In addition, a disinterested/independent trustee may make distributions for Cersei and Cersei’s descendants for their best interests. The trust provides that 1/3 of the assets shall be distributed to Cersei once she reaches age 45, 1/2 shall be distributed once Cersei reaches age 50, and all remaining assets shall be distributed to Cersei once she reaches age 55. If Cersei dies prior to receiving all of the Trust assets, then the balance is distributed outright to Cersei’s descendants, per stirpes.

Cersei is currently 43 and has two adult descendants, Joffrey and Tommen. Tywin did not allocate any GST exemption to the trust.

The trust investments have grown larger than Tywin anticipated and he does not want Cersei or Cersei’s descendants to receive large distributions of the trust assets outright at any age. He has concerns that Cersei, Joffrey and Tommen may lose the motivation to rule the Seven Kingdoms and further the family’s wealth if they receive a lump sum distribution from the trust. Joffrey and Tommen are not happy with distributions the trustee has been regularly making for Cersei because they feel that “mom doesn’t need the money” and she is wasting it, mostly on security guards. They are concerned that there will not be any money left for them because Cersei is the only one receiving distributions currently and the entire remaining balance is scheduled to be distributed to Cersei when she reaches 45/50/55. What can be done?

1. Proposed Solution: Decanting to one or more new trusts that eliminate mandatory principal distributions at certain ages and ensure assets are earmarked for Joffrey and Tommen.
   c. At least 25 states have decanting statutes.

2. General Tax Considerations
   a. IRS Notice 2011-101 (December 21, 2011) – IRS requested comments regarding the circumstances under which transfers by a trustee of all or a portion of the principal of one irrevocable trust to another irrevocable trust that result in a change in the beneficial interests in the trust are not subject to income, gift, estate or GST taxes.
   b. IRS has yet to issue final guidance and will not issue private letter rulings in the meantime. Therefore, the tax consequences of decanting are not settled.
   c. Several practitioners have published articles analyzing the tax issues associated with decanting.
d. General argument is that decanting should not be a taxable event to the beneficiaries because it is the result of the exercise of a trustee’s fiduciary power under state law, not an act by the beneficiaries.
e. If the decanting is made in resolution of an actual bona fide dispute, then this should strengthen the position of the beneficiaries to claim that no taxable disposition or transfer occurred for income or transfer tax purposes.
BASIC ELDER LAW – FOCUS ON CAPACITY

By

Christopher A. Likens, Sarasota
A BRIEF OVERVIEW OF CAPACITY: MEDICAL AND LEGAL

Basic Estate Planning and Probate Seminar
The Florida Bar
May 16, 2018
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Agenda

■ Part 1 – “Capacity” and the medical system:
  Medical overview of capacity, diagnostic testing, and common medical conditions of
  the elderly affecting cognition
■ Part 2 – “Capacity” and the legal system:
  Law and (in)Capacity, background, history &
  standards for varying documents
■ Part 3 – Medical decision making in Florida
  & the doctrine of Informed Consent

Disclaimers and background information

■ Training & background
■ Why? Discussion of the interrelationship of the medical and legal professions in the area of capacity, as they are
  interdependent
■ Lawyers dealing with capacity issues need to understand the background, perspective & process of medical evaluations in
  order to properly reference/give context to medical opinion.
  – “Dr.’s letter” as conclusion about client capacity.
Part 1 - Medical overview of capacity, common medical conditions of the elderly affecting cognition, and diagnostic testing

- Medical community governed by concept of “Informed Consent”
- The process by which a patient learns about and understands the purpose, benefits, and potential risks ... and then agrees to receive the treatment or participate
- 1957 first appearance of term, replacing historical concept of simple “consent”. Medical case coined the term.
- Paternalistic emphasis on patient’s best interests (as judged by clinician) replaced by emphasis on autonomy

Autonomy, Authenticity & Best Interests

- Autonomy – patient autonomy in decision making primary
- Best Interests - clinicians may oppose patient’s decisions they view as against patient’s best interests
- Authenticity – consistency of a patient’s decisions with patient’s personal values and history
  - Decisions that are neither authentic nor in patient’s best interests should trigger evaluation of decision making capacity
- So how is this done?

Capacity, Executive Function & Metacognition

- Capacity – task specific and context specific, and can fluctuate over time
- Executive Function - also known as cognitive control and supervisory attentional system are a set of cognitive processes
  - Attentional control, inhibitory control, working memory, cognitive flexibility, as well as reasoning, problem solving and planning
  - Necessary for the cognitive control of behavior; selecting and successfully monitoring behaviors that facilitate the attainment of chosen goals
- EF & Metacognition are essential to functioning, can decline at disparate rates and from memory and language functions
- Executive function is most important cognitive factor determining performance of social & instrumental activities
  - “memory loss” is most frequent presenting complaint but not usually the biggest problem
  - Cuts across diagnoses (AD, other dementias, TBI, psychiatric causes)
Capacity, Executive Function & Metacognition

- Metacognition – The act of thinking about thinking, or the cognition of cognition. It is the ability for you to control your own thoughts.
  - knowledge and regulation of cognitive phenomena which means, you can control your own thoughts.
  - the ability for you to control, 1) person variables (knowledge about one's self, and others' thinking), 2) task variables (knowledge that different types of tasks exert different types of cognitive demands), and; 3) strategy variables (knowledge about cognitive and metacognitive strategies for enhancing learning and performance)

Metacognition

- People aware of their cognitive or sensory impairments will ask others (family & friends) for advice and assistance
- People unaware won’t ask for help, refuse to accept help when offered, and may persist in exhibiting behaviors harmful or dangerous
  - Example: driving abilities and reduction of driving habits
  - Very low annual mileage associated with high risk of accidents...loss of metacognition
- Impairments in MC vary by disease
  - bvFTD, AD, RTFTD, aphasia
- Some drugs cause/contribute to cognitive impairment

Dementia

- An acquired and substantial decline in
  - Cognition (memory, attention, language, visual perception, reasoning)
  - Behavior (personality, insight, judgment, social appropriateness), or
  - Activities of Daily Living from a prior level of functioning to the point that has significantly affected functioning
- Causes: varied, including neurodegenerative diseases (Alzheimer's, Parkinson's, cardiovascular disease, stroke, trauma/CTE, oxygen deprivation, infections, vitamin deficiencies, metabolic problems, and toxins, etc.)
Alzheimer’s Disease & Mild Cognitive Impairment

- **Mild Cognitive Impairment**
  - Mild but measurable changes in cognitive abilities, noticeable by person/family/friends. Does not affect ability to perform daily activities
  - 15-20% of people over 65 have MCI, 38% progress into dementia within 5 years

- **Alzheimer’s Disease** Most common type of dementia in people over 65
  - Currently estimated more than 5.5M Americans have AD (about 1.3 in 10 over age 65), BY 2050 estimated to affect 16M
  - 13% over age 65, 44% over age 85.

Medical testing

- **Diagnostic tools**
  - Folstein MMSE
  - Montreal Cognitive Assessment test (MoCA)

- **Limitations of diagnostic instruments**
  - Patients with equal MMSE scores can show substantial differences in functional status
  - MoCA, Clock Drawing Test, Executive Interview (EXIT) are more sensitive to declining executive function
  - Gold Standard is neuropsychological testing combined with clinical observations
Part 2 – Capacity and the legal system

- Competency/Capacity is a legal presumption resting on the assumption that each of us, at adulthood, is best able to decide what is in our best interests.
- Incapacity attempts to define when the state may take actions to overcome the assumption and limit one’s right to make decisions about person or property.
- Incapacity as a “legal fiction”
  - Parens patriae doctrine
- Triggers defined by society, determined by prevailing values, knowledge, economics and political values of the time
- A shifting network of values and circumstances
Capacity and the legal system- a brief history

- Paradox in law’s approach to incapacity
  - Recognition of situation specific standards of capacity for specific transactions
  - Through case adjudication
  - Until recently Guardianship processes were the opposite
    - Sought to adjudicate status of person not specific acts

- Status Based Incapacity
  - Common law “idiots” and “lunatics” - those born without reason and who later lost capacity.

- Disabling Condition Tests
  - Incorporating medical approach and disfunction test

Capacity and the legal system- a brief history

- Disabling Condition Test (continued)
  - Requires both Diagnosis of medical condition and
  - Functional behavior – causally connected dysfunctional behavior test. Consequential behavior.
  - Second element separates clinical from legal incapacity

- Addition of “essential elements” language to 2nd prong,
  - Ability of the person to take care of the essential elements/requirements for the persons health or safety

- Cognitive function test/Functional behavior
- Necessity/least restrictive alternative

Capacity Requirements for Different Documents

- Wills : Testamentary Capacity
  - less stringent standard
  - ability to understand in a general way
    - nature and extent of property to be disposed of
    - relation to those claiming substantial benefit
    - practical effect of the will
  - determined at moment the will was executed
  - lucid moments
Capacity Requirements for Different Documents

- Gifts/Contracts: Donative/Contractual Capacity
- most stringent standard
- capacity and consent
- “capable of intelligent assent”
- does individual lack sufficient mental capacity to understand in a reasonable manner the nature of the transaction in which the person is engaging, consequences and the effect on the person’s rights and interests

Capacity Requirements for Different Documents

- Health Care Directives
  - presumes capacity unless physicians certify otherwise
- Durable Power of Attorney
  - Contractual Capacity

Why are there different levels of capacity for documents?

- Wills
  - Freedom of testation, autonomy, encouragement for productivity and accumulation, encourage loyalty, discourage abandonment
  - No ability to recreate the status quo
  - Standards developed in courts of equity
- Contracts
  - Standards developed in courts of law
  - Void or Voidable agreements
  - Ability to return parties to prior status quo
Doctrine of Undue Influence

- Recognition that capacity not a yes/no paradigm rather situational
- Ul allows courts to broaden the circumstances where states right to intervene overcomes right of individual
- Ul exists between testamentary capacity and contractual capacity on the continuum/spectrum of capacity
- Circumstantial
  - What distinguishes "undue" influence from acceptable influence?
- Ul supports the low level of capacity required for testamentary capacity

Basics of Delegating Medical Decision Making in Florida

- Governed under Chapter 765 “Health Care Advance Directives”
- Informed Consent trigger
- Designation of Health Care Surrogate (765.201)
  - Formalities of execution
  - Revocation
- Absence of Surrogate: The Health Care Proxy (765.401)
- Life-Prolonging Procedures (765.301)
  - Surrogate authority vs Proxy authority
In re ESTATE of Coketine Bray
Carpenter, Deceased.

Ben Carpenter, II, and William Bray
Carpenter, Petitioners,

v.

Mary Redman Carpenter, Respondent.
No. 40359.

Supreme Court of Florida.

Rehearing Denied Nov. 4, 1971.

Will contest. The County Judge’s Court for Orange County, Richard B. Keating, J., denied probate of will and the proponent appealed. The District Court of Appeal, 239 So.2d 506, reversed and the contestants petitioned for writ of certiorari. The Supreme Court, McCain, J., held that although presumption of undue influence was raised, burden of proof or risk of nonpersuasion was not shifted to proponent; proponent only had burden of coming forward with a reasonable explanation for her active role in affairs of testatrix and in the preparation of will, and that facts giving rise to presumption of undue influence were themselves evidence of undue influence and those facts remained in case and would support a permissible inference of undue influence.

Decision of District Court affirmed in part and quashed in part and cause remanded with directions.

1. Wills $\equiv$163(1)

Where initial burden of proving execution and attestation of will was satisfied by proponent, contestans then had burden of proving the undue influence alleged by them. F.S.A. § 732.31.

2. Wills $\equiv$166(1)

In a will contest, where sufficient facts are shown to raise presumption of undue influence and presumption remains unrebutted, county judge is required to find undue influence and deny the will probate.

3. Wills $\equiv$163(2)

If a substantial beneficiary under a will occupies a confidential relationship with testator and is active in procuring the contested will, presumption of undue influence arises.

4. Wills $\equiv$324(3)

Within broad sphere of factual situations, trier of fact is vested with discretion to determine whether or not facts show active procurement of a will by a substantial beneficiary and/or a confidential relationship between beneficiary and testator or testatrix; outside this sphere, question becomes one to be decided by trier of law in accord with established rules.

5. Wills $\equiv$155(1)

Criteria to be considered in determining “active procurement” of a will by a beneficiary are presence of beneficiary at execution, presence of beneficiary on those occasions when testator expressed desire to make will, recommendation by beneficiary of an attorney to draw will, knowledge of contents of will by beneficiary prior to execution, giving of instructions by beneficiary on preparation of will to attorney and safekeeping of will by beneficiary subsequent to execution.

6. Wills $\equiv$163(2)

Evidence that testatrix expressed to beneficiary a desire to have a will drawn leaving entire estate to her, that beneficiary secured attorney and instructed him as to what will was to contain, that beneficiary was present part of the time during which attorney questioned testatrix concerning will, that beneficiary’s relationship with testatrix was very close and that testatrix relied upon beneficiary and permitted her to make all arrangements regarding her hospitalization constituted a sufficient showing of a confidential relationship and active procurement of will to raise presumption of undue influence.
7. Wills (p. 163(1))

Where presumption of undue influence was raised by will contestants, proponent had burden of coming forward with a reasonable explanation for her active role in testatrix' affairs and specifically in preparation of will but burden of proof or risk of nonpersuasion was not shifted to the proponent. 32 F.S.A. Appellate Rules, rule 4.5, subd. c(6); F.S.A. § 732.31; F.S.A. Const. art. 5, § 4(2).

8. Wills (p. 163(1))

Facts giving rise to presumption of undue influence are themselves evidence of undue influence and those facts remain in case and will support a permissible inference of undue influence.

F. Perry Odom, LeRoy Collins and N. Sanders Sauls, of Ervin, Pennington, Varn & Jacobs, Tallahassee, and George E. Hovis, Leesburg, for petitioners.

Robert M. Sturrup and Thomas A. Thomas, of Sturrup & Della-Donna, Fort Lauderdale, for respondent.

Harlan Tuck, of Giles, Hedrick & Robinson, Orlando, for amicus curiae.

McCAIN, Justice.

By petition for writ of certiorari, we are asked to review the decision of the District Court of Appeal, Fourth District, 239 So.2d 506 (Fla.App. 4th, 1970), which reversed the order of the County Judge's Court of Orange County adjudicating that the will of Coketine Bray Carpenter, deceased, was procured by undue influence and was therefore void and not entitled to probate.

Conflict is asserted with In Re Estate of MacPhee, 187 So.2d 679 (Fla.App.2d, 1966), and In Re Estate of Reid, 138 So.2d 342 (Fla.App.3rd, 1962), pursuant to Fla.Const. Art. V, Sec. 4(2), F.S.A., and F.A.R. 4.5, subd. c(6), 32 F.S.A. We have jurisdiction.

By her last will and testament, prepared and executed four days before her death, Mrs. Coketine Bray Carpenter left her entire estate outright to her daughter, Mary Redman Carpenter. She left nothing to her three surviving sons, Ben, Sam and Bill. Ben and Bill contested probate of the will on the ground that it was procured by undue influence.

In his order adjudicating the will in question to have been procured by undue influence, the County Judge made the following findings of fact and conclusions of law:

"1. That that certain purported will of Coketine Bray Carpenter, the above decedent * * * was signed by the said decedent at the end thereof in the presence of two attesting witness who were present at the same time the testatrix signed the said will; * * *"

"3. That the decedent was a widow and the mother of a grown daughter, Mary, and three grown sons, Ben, Sam, and Bill; that of all her said children the decedent was most fond of Ben; that Ben substantially assisted the decedent, both financially and otherwise, more than her other children; that on many occasions the decedent expressed a considered intention to leave her estate equally to her four children; that there was no evidence that subsequent to such expressions of intent any event transpired which under normal circumstances would have influenced the decedent to depart from her said intention; that there was no evidence that the decedent had ever had a will other than the said purported will; that in the absence of a will the decedent's estate would, by the law of intestacy, have been divided equally among her four children, which fact the decedent is presumed to have known;"
4. That a confidential relationship existed between Mary and the decedent;

5. That Mary was active in procuring the execution of the said purported will; that Mary made all the arrangements for the preparation and execution of the said purported will; that Mary kept the execution of the said purported will by the decedent secret from the sons of the decedent, Ben and Bill; * * * that the decedent's doctor was not consulted regarding the decedent's ability to execute a will and was not informed of the said purported will until after the death of the decedent;

7. That at the time the said purported will was executed on September 1, 1966, for quite some time prior thereto and until her death thereafter, the decedent was very sick physically, depressed, and mentally impaired; that for quite some time prior to the execution of the said purported will the decedent drank alcohol daily, frequently to excess, and often as much as one-fifth gallon of whiskey per day; that the ultimate cause of the decedent's death was the breakdown of her body due to excessive consumption of alcohol; that the decedent's condition was so poor at the time the said purported will was executed that three days prior thereto her physician had concluded she was a terminal case and that four days after the said execution she expired; that the day before the execution of the said purported will the decedent informed an examining physician that she had been depressed for a long period of time; that from prior to the time Mary testified the decedent instructed her to have the said purported will prepared, to-wit: on August 29, 1966, through her death, the decedent was from time to time being given barbiturates, which drugs impair the mind of a normal person and impair the mind of a sick person even more; that at the time the said purported will was executed, the decedent stated that she was leaving her sons out of her estate because they did not love her; that there was no evidence that the decedent's sons did not love her nor was there any evidence which would lead an unimpaired mind to believe that they did not love her;

8. That a presumption has been raised that the said execution of the purported will was procured through undue influence;

9. That the proponent of the said purported will, Mary Carpenter, has not overcome the presumption nor disproved the existence of undue influence in the execution of the said purported will;

10. That the execution of the said purported will was procured by Mary Carpenter, the proponent thereof, by undue influence; * * *.

Mary, the proponent, appealed. The District Court of Appeal restated the facts in its opinion, emphasizing certain testimony not included in the findings of the trial judge, as follows:

"At the time of her death in 1966, Mrs. Carpenter was 52 years of age. Her husband had died in 1953 so that when her four children thereafter became grown and moved away, the decedent was left to live alone in the family home in Winter Garden, Florida. During the several years that she did live alone she handled all of her own business and household affairs. In the summer of 1966, Mrs. Carpenter developed cirrhosis of the liver to such an extent that she became quite ill and required hospitalization by her physician on August 28."
"Mary, oldest of the four children, was employed as a school teacher in Daytona Beach. In the summer of 1966 she attended a ten-week school session at the University of Georgia, at the completion of which she visited her mother on August 20, 1966. Mary immediately recognized that her mother was quite ill, and when she again visited her mother one week later and saw that there was no improvement, Mary arranged for her mother to be admitted to a hospital in Daytona Beach on August 28. Mrs. Carpenter had no telephone in her room, nor was one readily accessible to her. On August 30, Mary telephoned her own attorney in Orlando, Russell Troutman, Esquire, advising him that her mother wished to have a will prepared in which Mary was to be named as sole beneficiary and executrix. The following day Mary again telephoned the attorney to impress upon him the urgency of the matter.

"Following the second telephone call Mr. Troutman promptly prepared a will in accordance with these instructions and drove from Orlando to Daytona Beach with the document. When he arrived at the hospital, the testatrix recognized him and out of the presence of Mary, Mr. Troutman questioned the testatrix in detail concerning her wishes for disposition of her property, particularly to satisfy himself that she was aware that under the testamentary scheme as relayed to him, Mrs. Carpenter's three sons were being excluded from her will. After this preliminary questioning of the testatrix Mr. Troutman then arranged for two other persons to be present (one of whom was a medical doctor) during the time that Mr. Troutman read the will to the testatrix and again questioned her to satisfy himself and the witnesses that Mrs. Carpenter was aware of the contents of the document and that it was in accord with her desires. The will was then properly executed and retained by Mr. Troutman, none of the children other than Mary being aware of the will's existence until at or just shortly prior to Mrs. Carpenter's death four days later."

The conclusions of the District Court were: (1) that there was sufficient credible evidence to rebut the presumption of undue influence raised by the county judge's finding that Mary had a confidential relationship with her mother and that she actively procured the will; and (2) that without the presumption, the evidence before the county judge was insufficient as a matter of law to support a finding of undue influence. The order of the county judge was therefore reversed, and the will reinstated.

We are concerned with four interrelated issues in this case: (1) whether there was sufficient evidence before the county judge to raise a presumption of undue influence; (2) if so, whether the burden of proof, or merely the burden of going forward with the evidence, then shifted to the proponent to prove her case; (3) whether the presumption was rebutted (this issue also involves a consideration of the strength of the showing which must be made to rebut the presumption and whether the county judge or the District Court is empowered to decide this); and finally, (4) whether the evidence before the county judge, aside from the presumption, was insufficient as a matter of law, to permit him to conclude that undue influence existed. We will consider these issues in order.

[1] Preliminarily, we note that Fla. Stat. § 732.31, F.S.A., provides that the proponent of a contested will has the burden of proving, prima facie, the formal execution and attestation of the will. When this has been done, the statute shifts the burden of proof to the contestant, "to establish the facts constituting the grounds upon which the probate of such purported will is opposed or revocation thereof is sought." As both the county judge's order and the opinion of the District Court noted, the initial burden of proving execution and attestation was satisfied by the proponent
in the instant case. At that point, therefore, the contestants, Ben and Bill, had the burden of proving the undue influence alleged by them.

[2] Because of the difficulty of obtaining direct proof in cases where undue influence is alleged, the majority of courts in the United States, including Florida, have permitted will contestants to satisfy their burden initially by showing sufficient facts to raise a presumption of undue influence. If this is done, and the presumption remains unrebutted, the county judge is required to find undue influence and deny the will probate.

[3] We now turn to the preliminary problem confronting us: whether there was sufficient evidence before the county judge in the instant case to raise the presumption of undue influence. It is established in Florida that if a substantial beneficiary under a will occupies a confidential relationship with the testator and is active in procuring the contested will, the presumption of undue influence arises. Zinnser v. Gregory, 77 So.2d 611 (Fla.1955); In Re Palmer's Estate, 48 So. 2d 732 (Fla.1950); In Re Knight's Estate, 108 So.2d 629 (Fla.App. 1st, 1959); In Re Estate of MacPhee, supra; In Re Estate of Reid, supra; and In Re Starr's Estate, 125 Fla. 536, 170 So. 620 (1935).

The District Court appears to have entertained some doubt as to whether there was sufficient evidence of a confidential relationship and active procurement of the will to raise the presumption. Nevertheless, that Court accepted for purposes of its decision that a sufficient showing had been made. We agree that a sufficient showing was made, but we find it necessary to elaborate somewhat on the treatment of these issues in the opinion of the District Court.

[4] "Active procurement" and "confidential relationship" are legal concepts operating within a broad sphere of factual situations. Within this sphere, the trier of fact is vested with discretion to determine whether or not the facts show active procurement and/or a confidential relationship. Outside this sphere, the question becomes one to be decided by the trier of law in accord with established rules. The problem posed for our consideration is whether the facts in this case permitted an inference of a confidential relationship and active procurement; if so, we are bound to uphold the finding of the trier of fact; if not, we must conclude that he erred.

As the District Court noted, the leading case in Florida defining the term "confidential relationship" is Quinn v. Phipps, 93 Fla. 805, 113 So. 419 (1927). In that case we said;

"The term 'fiduciary or confidential relation,' is a very broad one * * * The origin of the confidence is immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist wherever one man trusts in and relies upon another. * * *

* * * * * *
"The relation and the duties involved in it need not be legal. It may be moral, social, domestic, or merely personal."

In the case sub judice, Mary Carpenter herself testified that her relationship with her mother was very close, and that her mother relied upon and depended on her very heavily. The fact that the deceased permitted Mary to make all the arrangements regarding her hospitalization and requested hospitalization in Daytona Beach (Mary's home) rather than Orlando (the deceased's home) bears out this conclusion. Nearly all witnesses testifying at the hearing attested to Mary's long-time close relationship with her mother. This testimony is sufficient to permit the conclusion of an inference of a confidential relationship between Mary and the deceased, especially in view of our statement in Quinn that the term "confidential relation" is a very broad one which may embrace informal relations which exist
wherever one person trusts in and relies upon another.

Several Florida cases have considered the question of "active procurement". See In Re Peters' Estate, 155 Fla. 453, 20 So.2d 487 (1945); In Re Knight's Estate, supra; Sturm v. Gibson, 185 So.2d 732 (Fla.App.2d 1966); In Re Estate of MacPhee, supra; and In Re Smith's Estate, 212 So.2d 74 (Fla.App. 4th 1968). The latest of these cases, In Re Smith's Estate, supra, contains a qualitative discussion and synopsis of the prior cases on the point. Several criteria to be considered in determining active procurement emerge from a study of these cases: (a) presence of the beneficiary at the execution of the will; (b) presence of the beneficiary on those occasions when the testator expressed a desire to make a will; (c) recommendation by the beneficiary of an attorney to draw the will; (d) knowledge of the contents of the will by the beneficiary prior to execution; (e) giving of instructions on preparation of the will by the beneficiary to the attorney drawing the will; (f) securing of witnesses to the will by the beneficiary; and (g) safekeeping of the will by the beneficiary subsequent to execution.

We recognize that each case involving active procurement must be decided with reference to its particular facts. Therefore, the criteria we have set out cannot be considered exclusive; and we may expect supplementation by other relevant considerations appearing in subsequent cases. Moreover, we do not determine that contestants should be required to prove all the listed criteria to show active procurement. We assume that in the future, as in the past, it will be the rare case in which all the criteria will be present. We have troubled to set them out primarily in the hope that they will aid trial judges in looking for those warning signals pointing to active procurement of a will by beneficiary.

In the instant case the testatrix expressed to Mary a desire to have a will drawn leaving the entire estate to Mary. Mary secured an attorney and instructed him as to what the will was to contain. She put the entire project on an "urgent" basis, met him at the hospital and was in fact present part of the time during which the attorney questioned testatrix concerning the will. Thus, at least four of the factors which have emerged from the Florida case law were present in this case. This evidence was sufficient to permit the trial judge to infer active procurement. The District Court expressed doubt that Mary's conduct amounted to active procurement because "her activity was primarily as a messenger on behalf of her mother", but it was the function of the trial court rather than the reviewing court to place such an interpretation on the facts. The trial judge determined that Mary's conduct amounted to active procurement, and we are not inclined to dispute his conclusion.

Having concluded that the evidence before the trial judge was sufficient to raise the presumption of undue influence, it becomes necessary to consider the effect of the presumption on the burden of proof. Does the presumption shift the burden of proof to the proponent, or does it merely shift a burden of going forward with the evidence? Because of conflict in the Florida decisional law on this point, we took jurisdiction of this case.

This Court has consistently held that the burden of proof shifts to the proponent when the presumption of undue influence arises. See In Re Palmer's Estate, 48 So. 2d 732 (Fla.1950); In Re Estate of Reid, supra; In Re Peters' Estate, supra; Wartmann v. Burleson, 139 Fla. 458, 190 So. 789 (1939); In Re Estate of MacPhee, supra; and In Re Auerbacher's Estate, 41 So.2d 659 (Fla.1949).

Nonetheless, in the instant case, the District Court said:

"Initially, we note that the formal execution and attestation of the will having been established, the burden of proof
shifted to the contestants to prove the undue influence alleged by them. F.S. Section 732.31, F.S.A. That burden of proof remained with the contestants at all times.” (Emphasis added)

It is apparent that the prior Florida law is in direct conflict with the quoted language from the decision of the District Court below.

In Leonetti v. Boone, 74 So.2d 551 (Fla. 1954), we stated the general rule in respect to the effect of presumptions on the burden of proof as follows:

“A presumption of law which arises upon the pleading or during the course of the trial after the introduction of evidence may aid a party in the discharge of the burden of proof cast upon him and shift to his adversary the burden of explanation or of going on with the case, but does not, as a general rule, shift the burden of proof; a presumption simply changes the order of proof to the extent that one upon whom it bears must meet or explain it away, **. A presumption which operates in the plaintiff's favor casts upon the defendant the burden of producing evidence to meet the plaintiff's prima facie case, and not the burden of proof in the sense of the risk of non-persuasion, which remains with the plaintiff throughout the trial **.”

See also Gullee v. Boggs, 174 So.2d 26 (Fla. 1965); Shaw v. York, 187 So.2d 397 (Fla. App.1st, 1966); and Seaboard Air Line R. Co. v. Lake Region Packing Ass'n, 211 So.2d 25 (Fla. App.4th, 1968).

It therefore appears that we have two rules in Florida: a rule applicable where undue influence is alleged which shifts the burden of proof to the proponent of the will when the contestant invokes the presumption of undue influence; and a “general rule” applicable to other cases which holds that the burden of proof, or risk of nonpersuasion, remains on the party who affirmatively seeks relief throughout the proceedings. We have, in fact, created an exception to the general rule which is applicable only to will contest cases. We have, moreover, done so despite Fla.Stat. § 732.31, F.S.A., which places the burden of proof in will contests on the contestant once the proponent has proved execution and attestation of the will.

Clearly, since the burden of going forward with the evidence in a given case requires only that the party on whom it rests meet the presumption or explain it away, while the burden of proof requires that a party prove by at least a preponderance of the evidence (some cases say by clear and convincing evidence) the facts alleged by him, the distinction is of considerable importance to litigants. It was important to the proponent, Mary Carpenter, in this case because it placed on Mary the burden of disproving the existence of undue influence by a preponderance of the evidence, in the absence of which the trial judge was required to find undue influence and deny the will probate.

Petitioners urge that policy considerations inherent in the difficulty of proof of undue influence dictate that the burden of proof should shift to Mary. They note that in will contests the testator is not available as a witness to tell his version of such dealings, that in fact usually the only person who is available to testify is the confidential adviser whose self-interest furnishes a motive for him to take advantage of his superior position. This is certainly true and points out the significance of a spectator to certain preambulatory events. We acknowledge that undue influence is rarely susceptible of direct proof, primarily because of the secret nature of the dealings between the beneficiary and the testator, and because of the death of one of the principals to the transaction, the testator.

[7] Nevertheless, we do not think that these considerations require that the burden of proof or risk of nonpersuasion be shifted onto the beneficiary. Because it is frequently as difficult to disprove undue influence as to prove it, the practical effect
of shifting the burden of proof is to raise the presumption virtually to conclusive status and require a finding of undue influence, as happened in the case sub judice. Thereby, much of the discretion of the trial judge to evaluate and weigh the evidence before him is lost, and with it one of the most valuable services we call on trial judges to perform in non-jury cases. We are unable to agree with any theory which vests great discretion in the trier of fact in other kinds of cases but ties his hands in will contest cases.

The better rule, enunciated by this Court in Leonetti v. Boone, supra, shifts to the beneficiary only the burden of coming forward with a reasonable explanation for his or her active role in the decedent's affairs, and specifically, in the preparation of the will, and we so hold. Such a result comports with what we conceive to be the intent of Fla.Stat. § 732.31, F.S.A., in providing that the burden of proof in will contests shall be on the contestant to establish the facts constituting the grounds upon which the probate of the purported will is opposed.

Our conclusion here has the additional benefit of lending greater credence to the traditional view in Florida that a properly executed will should be given effect unless it clearly appears that the free use and exercise of the testator's sound mind in executing his will was in fact prevented by deception, undue influence, or other means. Hamilton v. Morgan, 93 Fla.311, 112 So. 80 (1927); Parker v. Penny, 95 Fla. 922, 117 So. 703 (1928); Newman v. Smith, 77 Fla. 633, 82 So. 236 (1918), reversed on rehearing on other grounds; Gardiner v. Goertner, 110 Fla. 377, 149 So. 186 (1932); Marsdon v. Churchill, 137 Fla. 154, 187 So. 762 (1939). It has been said that mere suspicion and conjecture cannot constitute a basis on which a will may be declared invalid on the ground of undue influence. Heasley v. Evans, 104 So.2d 854 (Fla.App. 2d, 1958). It is apparent that this rule is not compatible with the requirement that the proponent of a will disprove by a preponderance of the evidence the existence of undue influence.

What will a rule shifting to the proponent only the burden of coming forward with the evidence mean in practice? First, the burden will be satisfied when the beneficiary comes forward with a reasonable explanation for his or her active role in the decedent's affairs. The precise nature of the explanation will vary depending on the facts giving rise to the presumption, and the sufficiency of the explanation to rebut the presumption will be for the county judge to determine subject to review by an appellate court. Second, when the burden is satisfied the presumption will vanish from the case and the county judge will be empowered to decide the case in accord with the greater weight of the evidence [see Rigot v. Bucci, 245 So.2d 51 (Fla.1971)], without regard to the presumption. Third, since the facts giving rise to the presumption are themselves evidence of undue influence, those facts will remain in the case and will support a permissible inference of undue influence, depending on the credibility and weight assigned by the trial judge to the rebuttal testimony.

Turning to the case sub judice, an examination of the record reveals that Mary Carpenter testified at length concerning both her relationship with her mother, and the reason for her activity in connection with the execution of the will. While this testimony is not binding on the trier of fact, we believe that it constitutes a reasonable explanation of the facts giving rise to the presumption sufficient to satisfy Mary's burden of coming forward with the evidence.

Accordingly, we agree with and affirm the District Court on the following points: (1) there was sufficient evidence before the county judge to raise a presumption of undue influence; (2) when the presumption was raised, the burden of coming forward with a reasonably credible explanation of the facts giving rise to the presumption shifted to Mary, the proponent of the
IN RE ESTATE OF CARPENTER

Cite as, Fla., 253 So.2d 407

[8] We disagree with the District Court in one respect. Having concluded that the presumption vanished from the case, the District Court determined that the evidence was insufficient as a matter of law to sustain a finding of undue influence. In this regard, we conclude that since the facts giving rise to the presumption of undue influence are themselves evidence of undue influence, those facts remain in the case and will support a permissible inference of undue influence. Therefore, it was error for the District Court to hold that no evidence tending to show undue influence was before the trial judge.

Inasmuch as in the first instance the trial judge decided this cause on the basis of the presumption, it will now be necessary for the cause to be remanded to the trial judge for determination of the issue of undue influence in accord with the greater weight of the evidence.

Accordingly, certiorari is granted, the decision of the District Court is affirmed in part and quashed in part and the cause remanded to the District Court of Appeal, Fourth District, with directions to remand to the County Judge's Court of Orange County for further proceedings and entry of an order not inconsistent with the views expressed herein.

It is so ordered.

ROBERTS, C. J., ADKINS and BOYD JJ., concur.

DEKLE, J., agrees to conclusion only.
Bright House Networks, 129 So.3d at 506. And if it fails to follow these procedures before requiring disclosure of trade secrets, it departs from the essential requirements of law. Id.; see also Ameritrust, 899 So.2d at 1207.

For that reason, the trial court departed from the essential requirements of law here. As employees of Primrose, Ms. Keller and Mr. Bennett were entitled to assert the trade secret privilege on Primrose’s behalf under section 90.506. They did so. The court did not, however, determine whether the information sought was trade secret, did not make an in camera inspection to the extent one might be required, and did not determine whether there was a reasonable necessity for disclosure. As a result, we are compelled by our precedents to grant the petition on the trade secret privilege argument. See Bright House Networks, 129 So.3d at 506; Ameritrust, 899 So.2d at 1208. Going forward, we note that if the trial court ultimately decides to require the production of trade secret information, it will also need to consider whether safeguards are required to prevent the unnecessary dissemination of that information. See Summitbridge Nat’l Invests. LLC v. 1221 Palm Harbor, L.L.C., 67 So.3d 448, 451 (Fla. 2d DCA 2011).

Accordingly, we grant the petition to the extent that the trial court failed to conduct the required analysis of the claim of trade secret privilege, deny it insofar as the petitioners argue that the discovery should have been limited in light of Mr. Bennett’s res judicata defense, and quash the order denying the motions for protective order.

Petition granted in part and denied in part; order quashed.

MORRIS and BLACK, JJ., Concur.

Jan FLANZER, Appellant,

v.

Eric KAPLAN and Raymond Dean Hau-
tamaki, as trustees of the Louis and Gloria Flanzer Philanthropic Trust, Appellees.

Case No. 2D16–2425

District Court of Appeal of Florida,
Second District.

Opinion filed November 29, 2017

Background: Daughter brought action against trustees to revoke her parents' philanthropic trust, alleging trust was result of trustees’ undue influence. The Circuit Court, Sarasota County, Charles Williams, J., dismissed claim as time-barred. Daughter appealed.

Holding: The District Court of Appeal, Northcutt, J., held that delayed discovery doctrine could apply to action. Reversed and remanded.

1. Limitation of Actions ☞103(4)

Delayed discovery doctrine, extending limitations period for actions “founded upon fraud,” could apply to daughter's undue influence claim against trustees of her parents' philanthropic trust, which sought to revoke trust on basis that trust was result of trustees’ undue influence. Fla. Stat. Ann. § 95.031(2)(a).

2. Fraud ☞31

Undue influence claims and fraud claims are distinct causes of action.

Appeal from the Circuit Court for Sarasota County; Charles Williams, Judge.
The circuit court dismissed Jan Flanzer's undue influence suit as untimely. We reverse because Flanzer's claim may be subject to the delayed discovery provisions of section 95.031(2)(a), Florida Statutes (2015).

Flanzer's parents, Gloria and Louis Flanzer, settled assets into a philanthropic trust in December 2005. By its terms, the trust became irrevocable at its creation. Louis died in June 2013; Gloria died in March 2015. In November 2015, Flanzer sued to challenge numerous estate planning documents executed by her parents, including the philanthropic trust. Flanzer alleged that during a period of time from at least 2001 until her mother's death, the Trustees maintained a fiduciary relationship with her mother and served as her personal accountant, business and financial advisor, and attorney. According to Flanzer's complaint, her mother had a diminished mental capacity during this period and was emotionally and mentally susceptible to the undue influence of the Trustees. Flanzer further alleged that the Trustees exploited their confidential relationship with Flanzer's mother to alienate and ultimately eliminate Flanzer from her mother's estate planning scheme. In Count V of her complaint, Flanzer alleged that the philanthropic trust was the result of the Trustees' undue influence, and she called for the revocation of the trust.

The Trustees asserted that Count V must be dismissed with prejudice because the trust became irrevocable at its creation in 2005 and “[t]he applicable statute of limitations to challenge an irrevocable trust is four years from the date of its creation.” The circuit court agreed and determined that the count must be dismissed with prejudice as a matter of law. The court expressly incorporated the Trustees' argument into its order and dismissed Count V. Flanzer timely appealed; we have jurisdiction.

The Florida Trust Code permits a challenge to the validity of any portion of a trust procured by undue influence. § 736.0406, Fla. Stat. (2015). An action to contest the validity of a revocable trust “may not be commenced until the trust becomes irrevocable by its terms or by the settlor’s death.” § 736.0207(2) (emphasis added). However, the Code does not specify a limitations period in which to challenge a trust. We therefore look to chapter 95, Florida Statutes, to determine when a plaintiff must bring an undue influence claim challenging a trust. See § 95.011 (“A civil action shall be barred unless begun within the time prescribed in this chapter or, if a different time is prescribed elsewhere in these statutes, within the time prescribed elsewhere.”).

The parties agree that under chapter 95 the limitations period applicable to Flanzer’s action is four years. See § 95.11(3). Indeed, a review of section 95.11 reveals that undue influence claims can only fall under subsection 95.11(3)(j), “[a] legal or dency of this appeal. In October 2017, Mr. Kaplan appointed Raymond Dean Hautamaki to succeed Mr. Trawick in accordance with Mr. Trawick's designation.
equitable action founded on fraud.” See Peacock v. Du Bois, 90 Fla. 162, 105 So. 321, 322 (1925) (“Fraud and undue influence are not, strictly speaking, synonymous, though undue influence has been classified as either a species of fraud or a kind of duress, and in either instance is treated as fraud in general.”); In re Guardianship of Rekasis, 545 So.2d 471, 473 (Fla. 2d DCA 1989) (describing undue influence as a “species of fraud” and holding that statute of limitations on undue influence claim did not begin to run until the influence terminated or someone on Rekasis’ behalf became aware of the influence).

[1] The parties disagree, however, over the application of the delayed discovery doctrine, which states:

An action founded upon fraud under s. 95.11(3), including constructive fraud, must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event an action for fraud under s. 95.11(3) must be begun within 12 years after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered.

§ 95.031(2)(a) (emphasis added). On appeal, Flanzer argues that since courts treat undue influence as a species of fraud, undue influence is therefore subject to the delayed discovery doctrine. The Trustees challenge the application of section 95.031(2)(a) by emphasizing the elements that distinguish fraud and undue influence claims. They argue that such distinctions place undue influence claims outside the meaning of actions “founded upon fraud.” We disagree.

[2] To be sure, undue influence claims and fraud claims are distinct causes of action. See GEICO Gen. Ins. Co. v. Hoy, 136 So.3d 647, 651 (Fla. 2d DCA 2013) (enumerating elements of fraud in the inducement); Greenberg v. Van Dan, 833 So.2d 810, 812 (Fla. 3d DCA 2002) (enumerating elements of undue influence). But the uses of the prepositions “founded upon fraud” and “founded on fraud” in sections 95.031(2)(a) and 95.011(3)(j), respectively, plainly countenance a broader class of claims than merely actions alleging fraud in general. As such, we see no reason why section 95.031(2)(a) would not apply to Flanzer’s claim—provided that Flanzer otherwise satisfies the requirements of that section. The Trustees point to no other legal authority supporting the circuit court’s conclusion that Flanzer must have challenged the philanthropic trust within four years of its becoming irrevocable. We therefore reverse the dismissal of Count V of Flanzer’s complaint and remand for further proceedings.

Reversed and remanded.

CASANUEVA and SLEET, JJ., Concur.

Jeffrey A. MESSING, Appellant,

v.

Karen M. NIERADKA, Appellee.

Case No. 2D16–2027

District Court of Appeal of Florida,
Second District.

Opinion filed November 29, 2017

Background: Husband filed a petition for annulment, and wife filed a counterpetition
Florida Statutes – Chapter 765


Florida Statutes – Chapter 744

http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0700-0799/0744/0744ContentsIndex.html
BASIC GUARDIANSHIP

By

Magistrate Keela Samis, St. Petersburg
I. GUARDIANSHIPS: F.S 744 AND 393 AND FLORIDA PROBATE RULES

A. Types of Guardianships
   1. Minors: F.S. 744.301, 3021 and 3025
      a. Person and Property
   2. Adult: F.S. 744.3201 - 3371
      a. Emergency Temporary Guardians: F.S. 744.3031
      b. Voluntary Guardianship: F.S. 744.341

B. Guardian Qualification: F.S 744.309
   1. Criminal and Credit background investigation: F.S 744.3135
   2. Education: F.S 744.3145

C. Powers and duties of a Guardian: F.S 744.361-462
   1. Court appointed Guardian is a fiduciary
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      a. Required to file initial inventory and plan: F.S. 744.362 - 365
      b. Required to file annual accountings and plan: F.S. 744.367 - 3679
      c. Powers of guardian upon court approval: F.S. 744.441
      d. Powers of guardian without court approval: F.S. 744.444

http://www.flcourts.org/resources-and-services/family-courts/guardianship.stml
http://elderaffairs.state.fl.us/doea/spgo.php
Florida Guardianship Practice – 9th Edition
http://www.jud6.org
POWERS OF ATTORNEY

By

Benjamin F. Diamond, St. Petersburg
FLORIDA POWER OF ATTORNEY ACT

Florida Bar Basic Estate Planning and Probate CLE
Tampa Marriott Waterside Hotel & Marina
May 18, 2018

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FLORIDA POWER OF ATTORNEY ACT
I. Introduction

A power of attorney is an incredibly powerful document. It is a legal document in which an individual – the principal – grants to another person – the agent – the power to act on the principal’s behalf. In 2011, the Florida Legislature enacted the Power of Attorney Act (“Act”), in which Florida sought to conform our power of attorney law to the Uniform Power of Attorney Act. All lawyers – regardless of the focus of their practice – should have a basic understanding of the requirements to create a valid Power of Attorney under Florida law, and a basic and practical understanding of how these important legal instruments can be used.

II. Scope

A. Application.

1. The Act only applies to powers of attorney created by individuals. The Act does not apply to powers created by corporations or other non-natural persons.

2. The Act is applicable to both durable and non-durable powers. A power is made durable by language indicating that the agent may act despite the principal=s incapacity.

B. Effective Date & Execution Requirements. Powers of attorney executed on or after October 1, 2011, are valid if the execution complies with Fla. Sat. 709.2105.

1. The agent must be a natural person who is 18 or older or a financial institution that has trust powers, has a place of business in this state, and is authorized to conduct trust business in this state.

2. Must be signed by principal and two subscribing witnesses and be acknowledged before a notary as provided in Fla. Stat. 695.03.

3. Power of attorney executed before October 1, 2011, is valid if its execution complies with the law of this state at the time of execution. Fla. Stat. 709.2402(3).

C. Non-Florida Powers of Attorney. A power of attorney executed in another state which does not comply with Florida=s execution requirements are valid in Florida only if the execution complied with the law of the state of execution. Fla. Stat. 709.2106(3).
1. Third parties may request, and rely without further investigation, an opinion of counsel as to the validity of the due execution of the power signed outside of Florida.

2. Such opinion of counsel is to be supplied at the principal=s expense.

D. Military Powers of Attorney. Military powers of attorney are valid if executed in accordance with 10 U.S.C. §1044(b), which requires notarization but not witnesses.

E. Springing Powers of Attorney. Springing powers of attorney are valid under current Florida law and existing powers will remain effective under the new Act. But contingent and springing powers executed after the effective date of the Act are invalid.

F. Electronic Copies. Unless otherwise provided in the instrument, photo copies and electronically transmitted copies have the force of an original. Fla. Stat. 709.2106(5).

G. Applicable Law.

1. The meaning and effectiveness of a power of attorney is governed by the new Act if the power of attorney is used in Florida or states that it is to be governed by the laws of Florida. Fla. Stat. 709.2107; Fla. Stat. 709.2402(2).

2. The common law of agency and principles of equity supplement the new Act. Fla. Stat. 709.2301. The remedies under the new Act are not exclusive and do not abrogate any right or remedy under any other law. Fla. Stat. 709.2303.

III. Amendment, Revocation, and Termination

A. Revocation. The principal must revoke the power of attorney in writing either by express revocation in a new power or some other writing signed by the principal. The mere execution of a subsequent power is insufficient to revoke prior powers. Fla. Stat. 709.2110(1).

B. Amendment. Powers may be amended by revoking the old power and executing a new power. There is no authority for direct, codicil type amendments.

C. Suspension. Powers of attorney are suspended upon the initiation of a proceeding to determine the principal=s capacity.
D. **Termination.** Powers of attorney terminate upon:

1. Death of principal;
2. Incapacity of principal if power is not durable;
3. Adjudication of incapacity by court, unless the court determines that certain authority is to be exercisable by the agent;
4. Principal revokes the power;
5. Power provides an event or condition of termination;
6. Purpose of power of attorney is accomplished;
7. Agent=s authority terminates but the instrument does not provide for a successor agent.

E. **Termination of Agent=s Authority.**

1. The agent=s authority terminates when the agent dies, becomes incapacitated, resigns, or is removed by a court. If the power of attorney terminates, the agent=s authority terminates.

2. If the agent is the spouse of the principal, the agent=s authority terminates when an action is filed for dissolution or annulment of the marriage, unless the power provides otherwise.

3. Termination or suspension of an agent=s authority or a power of attorney is not effective as to an agent who, without knowledge of the termination or suspension, acts in good faith under the power of attorney.

IV. **Agents**

A. **Designation of Agents.** Principal may designate a single agent or may designate two or more persons to act as co-agents. Unless the power of attorney otherwise provides, each co-agent may exercise its authority independently. *Fla. Stat.* 709.2111(1).
B. **Successor Agents.** Successor agents may be appointed if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. *Fla. Stat. 709.2111(2).*

1. An agent who does not participate in or conceal a breach of fiduciary duty by another agent, including a predecessor agent, is not liable for the actions or omissions of the other agent. However, an agent who has actual knowledge of a breach or imminent breach of fiduciary duty by another agent, must take action to safeguard the principal’s interest.
   
a. Notice to the principal is sufficient action, if agent has good faith belief that principal is not incapacitated.

b. An agent who fails to take protective action is liable to principal for reasonably foreseeable damages. *Fla. Stat. 709.2111(4).*

2. A successor agent does not have duty to review the decisions of predecessor agent. But if the successor has actual knowledge of a breach or imminent breach of fiduciary duty, the successor agent may have to take action including instituting a proceeding against the predecessor agent. *Fla. Stat. 702.2111(5).*

3. Even if the power requires that two or more persons act together as co-agents, one or more of the agents may delegate a co-agent to conduct banking transactions as provided in *Fla. Stat. 709.2208(1).*

C. **Acceptance.** The agent accepts the appointment as an agent by exercising authority or performing duties as an agent or by any other conduct indicating acceptance. The instrument may provide a specific means of acceptance. The agent’s acceptance is limited to those matters for which the agent reasonably manifests acceptance.

D. **Compensation.** Agents are entitled to reasonable compensation only if they are qualified agents as defined in the Act. Qualified agents include financial institutions, attorneys, and certified public accountants licensed in Florida. The term also includes any other natural person who is a resident of Florida and who has never been an agent for more than three principals at a time. *Fla. Stat. 709.2112(4).*

V. **Duties**

A. **Mandatory.**
1. The Act states that the agent is a fiduciary and must act only within the scope of authority granted in the power of attorney. The agent has certain mandatory duties as listed in * Fla. Stat. 709.2114(1)*:

   a. May not act contrary to the principal’s reasonable expectations actually known to the agent;

   b. Must act in good faith;

   c. May not act in a manner contrary to the principal’s best interest, with certain exceptions;

   d. Must attempt to preserve the principal’s estate plan.


3. Must keep a record of all receipts, disbursements, and transactions. Unless provided in the instrument, the agent is not required to disclose receipts and records unless ordered by the court, requested by the principal, a court appointed guardian, another fiduciary acting for the principal, a government agency having authority to protect the principal, or the personal representative or successor in interest of the principal’s estate. * Fla. Stat. 709.2114(6)*.

4. Must create an accurate inventory of the principal’s safe deposit box.

**B. Default - Modifiable Duties.** Default duties are set forth in * Fla. Stat. 709.2114(2)* and apply unless the power of attorney provides to the contrary.

1. Agent must act loyally and for the sole benefit of the principal.

2. Act in a manner that does not create a conflict of interest that impairs the agent’s ability to act impartially in the principal’s best interest.

3. Act with care, competence, and diligence, ordinarily exercised by agents in similar circumstances.

4. Cooperate with the health care surrogate to carry out principal’s reasonable expectations to the extent actually known by the agent and otherwise to act in the principal’s best interest.

**C. Accountability of Agent.**
1. An agent who acts in good faith is not liable to any beneficiary of the principal=s estate plan for failure to preserve the plan.

2. If an agent is selected because of special skills, that expertise must be considered in determining whether the agent has acted with care, competence, and diligence, under the circumstances. But absent a breach of duty of the principal, an agent is not liable if the value of the principal=s property declines. *Fla. Stat. 709.2114(4) and (5).*

3. Exoneration of Agent - A power of attorney may provide that the agent is not liable for any acts or decisions made by the agent in good faith unless the provision:

   a. Relieves the agent of liability for breach of duty committed dishonestly, with improper motive, or with reckless indifference to the purpose of the power of attorney or the best interest of the principal;

   b. Was inserted as a result of an abuse of a confidential relationship with the principal.

D. **Judicial Relief.** Standing is given to the following to construe or enforce a power of attorney, review the agent=s conduct, remove the agent, or grant appropriate relief:

1. Principal, agent, or successor agent;

2. Guardian, trustee, or other fiduciary of principal;

3. Person authorized to make healthcare decisions;

4. Other interested person if able to demonstrate to the court that they are acting in the best interest of the principal;

5. Governmental agency acting to protect the principal;

6. Third party asked to honor the power.

VI. **Reliance and Refusal to Accept Power of Attorney**

   A. **Reliance.**
1. A third party who in good faith accepts a power of attorney that appears to be executed properly may rely on the power of attorney and the agent=s action.


3. A third party may request an English translation of a power of attorney written in a language other than English.

4. A third party may request, in writing, an opinion of counsel as to any matter of law concerning the power of attorney.

5. Third parties must accept or reject powers of attorney within a reasonable time. The reasons for the rejection must be in writing. *Fla. Stat. 709.2120*.

   a. Four days, excluding Saturdays, Sundays, and legal holidays, are presumed to be a reasonable time for financial institutions to accept or reject the instrument if the instrument contains authority to conduct banking transactions or investment transactions pursuant to *Fla. Stat. 709.2208*(1) and (2).

   b. A third party may not require an additional or different form of power of attorney for authority granted in the instrument. *Fla. Stat. 709.2120*(1)(c).

6. Third parties are not required to accept powers of attorney if the third party is not otherwise required to engage in the particular transaction; the third party has knowledge of the termination or suspension of the power; the request for an affidavit, opinion of counsel, or translation is refused; third party believes in good faith the power is invalid; third party has knowledge of report to adult protective services or good faith belief of abuse or exploitation.

B. Notice.

1. Notice of revocation, termination, death of principal, suspension, or other notice is not effective until written notice is provided to the agent or third persons. *Fla. Stat. 709.2121*(2).

2. Permissible methods of delivery of notice include first-class mail, personal delivery, delivery to last known address, or properly directed facsimile or other electronic message.
3. Notice to a financial institution must contain the name, address, and last four
digits of the principal=s tax identification number. It must be directed to an
officer or manager of the financial institution in this state.

4. Notice is effective when given, though notice to a financial institution,
brokerage company, or title insurance company, is not effective until 5 days,
excluding Saturdays, Sundays, and legal holidays, after it is received.

VII. Authority and Action of Agent

A. General Authority of Agent.

1. Except as otherwise provided in the law, an agent may only exercise
authority specifically granted to the agent in the power of attorney.

2. General provisions, such as the authority Ato do all acts@, are ineffective to
grant authority to the agent. Fla. Stat. 709.2201(1).

3. As confirmation of existing law, such authorization may include authority to:
   a. Execute stock powers;
   b. Convey or mortgage homestead property. However, if the principal is
      married, the spouse must join. Joinder may be made by power of
      attorney.
   c. If specific authority is granted, the agent may make healthcare
decisions for the principal, including, but not limited to, those set forth
   in Chapter 765.

4. The new Act enumerates actions which may not be undertaken by the agent
including performing duties under a personal services contract, execution of
affidavit as to the personal knowledge of principal, vote in public election,
execute or revoke any will or codicil, and/or exercise powers as fiduciary.

B. Authority Requiring Enumeration.

1. An agent may exercise some authority only if principal signs or initials next
to each specific enumeration and the exercise is not otherwise prohibited by
another instrument. Such special authority includes:
   a. Create an inter vivos trust;
b. Amend, modify, revoke, or terminate, a trust created by or for the principal, but only if the instrument provides for such action by the settlor=s agent;

c. Make a gift. But unless the instrument provides otherwise, the gift per donee is limited to the annual gift tax exclusion amount.

d. Create or change rights of survivorship;

e. Create or change a beneficiary designation;

f. Waive the principal=s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or

g. Disclaim property and powers of appointment.

2. Notwithstanding the specific grant of authority, unless the power of attorney otherwise provides, an agent who is not an ancestor, spouse, or descendent of the principal may not exercise authority to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal=s property.

C. Banking and Investment Authority.

1. As a general rule, the Act does not permit the incorporation by reference of powers; such powers have to be specifically enumerated.

2. The exception to the general rule is for banking transactions and investment transactions. The power may authorize the agent to exercise authority to conduct banking transactions as provided in Section 709.2208(1), Florida Statutes. Such a statement allows the agent to engage in the specifically enumerated list of transactions.

3. If the power of attorney specifically includes the statement that the agent has authority to conduct investment transactions as provided in Section 709.2208(2), Florida Statutes, the agent may take action on the enumerated list.
Scope and Application

- Applies only to instruments created by individuals
- Applicable to both durable and non-durable POAs
- Durability created by indication that agent may act despite incapacity of principal

Act Does Not Apply

- Certain common agency and commercial contracts are outside scope of Act:
  - Powers created by entities
  - Proxies
  - Powers coupled with an interest
  - Stock powers
Execution Requirements

- Effective date: on or after October 1, 2011
- Agent—natural person 18 or older
- Financial institution with trust powers in Florida
- Signed by principal and two subscribing witnesses
- Acknowledged before a notary

Signature of Disabled Principal

- Procedures in Chapter 117
- Principal must direct notary to sign and initial special powers
- Notary must include reference to F.S. 117.05(14)

Non-Florida POAs

- Out of state POAs must comply with laws of state of execution
- Opinion of counsel may be requested
- Opinion at principal's expense
**Miscellaneous Powers**

- Springing Powers abolished if executed after October 1, 2011
- Springing Powers prior to effective date of new statute are grandfathered
- Military powers valid if properly executed pursuant to Federal law (Notary but no witnesses)

**Electronic Copies**

- Photo and electronic copies have force of original
- Instrument may require use of original
- Original may be required for certain real property transaction

**Applicable Law**

- Florida law applied to determine “meaning and effectiveness” if POA used in Florida
- Common law supplements Act
Revocation, Amendment
- Revocation in writing; must be express
- No partial amendment
- Suspension upon filing determination of capacity

Termination
- Death
- Incapacity of principal if POA not durable
- Adjudication by court
- Revocation by principal
- Limitation within POA
- Agent unable to act but no successor

Agents
- Single
- Co-agents (independent authority is default)
  - Delegation to co-agent
- Successor agents
  - Resignation, death or incapacity
  - Liability of joint or successor agents: actual knowledge
Acceptance

Exercise of authority or performance of duties
POA may designate specific manner
Acceptance may be partial
Liability limited to scope of acceptance

Compensation—Qualified Agents

- Spouse or heir per FS 732.103
- Financial institutions in Florida with trust powers
- Attorneys
- CPAs
- Florida resident never more than three principals at same time
Duties
- Not contrary to known expectations
- Good Faith
- Not contrary to best interest of principal
- Preserve known estate plan
- No delegation
- Record of receipts and disbursements
- Safe deposit box inventory

Modifiable Duties
- Act loyally and sole benefit of principal
- No creation of conflict of interest
- Care, competence and diligence
- Cooperate with Heath Surrogate

Third Party Reliance
- Protection if accepted in good faith
- May request full, force and effect affidavit
- English translation
- Opinion of counsel
Acceptance or Rejection

- Within reasonable time
- Four days (excluding Sat, Sun, and holidays)
- May not require different form
- No acceptance required if knowledge or good faith belief as to invalidity

“Super Powers”
Must be Initialed
Create or amend trust (but not will)
Make gift
Change beneficiary or survivorship
Disclaim property

Banking and Investments

- General rule: no incorporations by reference
- Exceptions: Banking and Investment authority
- FS 709.2208(1) and (2)
- Facilitates transactions
MEDICARE/MEDICAID/SOCIAL SECURITY

By

Ailish O’Connor, Jacksonville
Social Security, Medicare and Medicaid 101

Essential First Steps

1. The first thing to determine is **who is your client?** Often an adult child will call to set the initial appointment for a parent, but your client is the elder, not the child, (unless the elder has separate counsel) and you need to make that clear to everyone.

2. Before you set a client meeting, it is also imperative to have a protocol to gather information. Make sure that all protocols are followed, especially now that it is so easy for people to send quick, incomplete e-mails, asking short questions, or ask a “simple” question on a social networking site. You must develop your own intake questionnaire, and make it a practice NEVER to give advice until the questionnaire is complete and you have reviewed it thoroughly. Many clients do not understand why this is necessary. So many times someone has called the front desk and doesn’t want to set a formal meeting or provide information. They will say “But I have only one question.” So you soften and say, “OK, what is it?” And soon you find out the question is always, “How do I get on Medicaid?” So yes, it’s only one question, but it’s a two hour answer!

3. Make sure you find out if either spouse is a war-time veteran. There are superb benefits under the Aid and Attendance program for housebound veterans, or their surviving spouses, whose assets are low and who have medical needs in excess of their income.

4. Get the client’s GROSS monthly income. No matter how much you stress that, you still have to check at the initial meeting because often the client will fill in the “number that hits the bank account,” which is net of Medicare Part B and Part D premiums, possibly net of federal income tax withholding (for a regular pension), and which might also have unseen withholdings for life insurance or private health insurance. If you are trying to calculate whether an Income Trust is needed, you MUST know how much the gross income is.

5. On real property and bank accounts and securities accounts, it is imperative to know EXACTLY how the asset is titled. The title of the asset controls whether the asset passes outside probate, whether Medicaid may consider it an exempt asset, capital gains issues, etc. Don’t take the client’s word for it–check the statement or deed. Also, ask HOW LONG an account has been in joint name–that controls whether Medicaid may impose a gift for adding a joint owner to an account.

6. Look at Schedule B of their tax returns. Do the payers of dividends and income shown there match the investments the client has told you he has? Often you can detect an asset the client forgot to tell you about, like royalty income, or old accounts from out of state.

7. If the client has whole life insurance from a company that demutualized in the past, you will invariably find that the client also has about 50 shares of common stock in that company, which usually has a value in excess of $2,000. The client never remembers this stock and may fail to tell you about it! So ask! It will skew the Medicaid eligibility plan if you don’t.

8. Ask if the person has a long term care insurance policy.

9. Join NAELA. Join Elder Law Section of Florida Bar. Come to the Fla Bar and AFELA seminars. Join the list serv through NAELA and AFELA.
Social Security

1. Social Security is a government program that includes:
   a. Retirement income for certain “workers,” and their spouses and dependents, and
   b. Disability income for workers who are permanently and totally disabled (SSDI), and
   c. Basic sustenance income for persons over 65 or for disabled persons (SSI).

2. The federal code can be found at 42 USC 401 et seq. and 20 CFR 404 et seq.

3. This talk will briefly cover the SS eligibility issues. SS is even more importantly the gateway to Medicare and Medicaid insurance, and those topics will be covered in more depth.

4. Social Security as a retirement program was signed into law in 1935 by President Franklin Roosevelt. As early as 1912, Teddy Roosevelt advocated for social insurance to protect Americans from “the hazards of sickness, accident, invalidism, involuntary unemployment, and old age.” Previously, the only resources against such hazards were savings, family or charity.

5. Retirement benefits.
   a. A person typically vests in SS after earnings 40 quarters of coverage. A quarter of coverage is any 3 month period where a person earned–and declared as taxable income-- at least $1,320 (2018 figure). The quarters of coverage do not have to be consecutive. 40 quarters = 10 years for someone who works straight through.
   b. A retired worker’s Social Security check is based on forty years of earnings – the lowest five years are dropped, and the other 35 years are averaged.
   c. Retirement benefits can be taken as early as age 62, or as late as age 70. For each year that a worker defers claiming the benefit, the monthly check goes up – but the life expectancy goes down.
   d. “Full retirement age” was originally defined as age 65, but is now set at age 67 for anyone born after 1960.
   e. There are strategies to consider in the timing of retirement benefits. Quicken sells software that helps analyze. But there are rarely legal issues about whether a person worked, or how old they are.

6. Disability benefits
   a. By contrast to retirement benefits, if you are asked to help a person who wants to claim disability benefits, there are significant advocacy issues to determine whether a person is disabled.
   b. If a person who has worked sufficient quarters AND has worked five out of the prior 10 years, has a severe, medically determinable physical or mental impairment which has lasted, or will last for, more than a year, or to result in death AND such impairment prevents the person from engaging in substantial gainful employment, the person may qualify for disability benefits. Blindness also may be considered a disability.
   c. Social Security has a five step sequential series of questions to determine disability, which I am abbreviating here:
      i. Are you working in a substantial gainful activity? If you are, you are not disabled; otherwise go to next step.
      ii. Do you have a severe medical impairment that will last a year? If not, no disability; otherwise go to next step.
      iii. Does the impairment fall on the list of automatically severe impairments – which is more of a database of major body systems than a list–and can be found at in appendix 1 of 20 CFR 404.1525. If yes, you are disabled;
otherwise go to next step.

iv. What is your “residual functional capacity?” to do your old job? If insufficient capacity to do old job, then go to next step:

v. Do you have enough residual functional capacity considering your age, education and work experience, to start a different (gainful) job? If you can’t support yourself gainfully in a different career, you are disabled.

d. The burden is on the claimant to prove steps 1-4 above; it is on the government to prove step 5.

e. There is a six month waiting period from the time that SS determines that a disability began, to the payment of the first disability check. 20 CFR 404.316.

f. If a person qualifies for SSDI, it doesn’t matter how much other income they have or how much money they have—it is an insurance policy and you have paid for it.

7. SSI.

a. SSI stands for Supplemental Social Security Income. This is a monthly payment of a maximum of $750 from the federal government to US citizens (and certain green card aliens) who are:
   i. Over 65 or disabled; and
   ii. Whose monthly income is less than $750, and
   iii. Whose countable assets (for a single person) are less than $2000 (some resources are excluded such as a home, a car, and $1,500 toward funeral).

b. Eligibility for SSI means automatic eligibility for Medicaid.

c. SSI is a means-tested, poverty based benefit that you have to qualify for, and stay qualified for.

d. Clients rarely have ANY idea whether they are getting SSDI or SSI. You have to make them bring you the benefit letter. It comes up in practice when someone getting SSI is about to receive a settlement from a lawsuit or an inheritance, and needs to make a plan to protect continuing Medicaid eligibility.

Medicare

1. Medicare is a health insurance program for age 65 and above, and for some disabled people. It is administered by the Centers for Medicare and Medicaid Services (CMS).

2. Medicare is something that you earn through your status as a worker or a dependent of a worker. If you are receiving Medicare, it doesn’t matter how much income you receive or how great your assets are. Medicare is insurance and you have paid for it. However, you will find the clients confuse Medicare and Medicaid all the time and they are vastly different. Medicaid is a needs-based program that covers many disabled or poor people.

3. When is Medicare going to come up in your practice?

a. It is unlikely that you are going to take a Medicare appeal for denial of coverage, unless your specialty is health law.

b. However, it is very likely that you are going to need to know:
   i. What is a “spell of illness” is so that you can help your clients figure out how many Medicare days they have left in a nursing home?
   ii. What the consequence is of somebody not being admitted to the hospital but simply kept in “observation status?”
   iii. What to do when the nursing home tells the patient “we are discontinuing
Medicare-paid rehabilitative therapy because you aren’t improving ...

4. The Medicare program is found in Title XVIII of the Social Security Act, 42 USC. Regulations are found in CFR Title 42. CMS (previously “HCFA”) has a very useful website that contains links to its program manuals, transmittals, and regulations http://www.cms.gov

a. See Planning for the Elderly in Florida and Tax, Estate & Financial Planning for the Elderly

b. Use Center for Medicare Advocacy as a resource: http://www.medicareadvocacy.org. Also, Medicare.gov (consumer oriented site)

5. There are several types of Medicare.

a. Medicare Part A is the hospital insurance program. It covers hospital care, limited posthospital skilled nursing facilities, limited home health care and hospice care. It is financed by Social Security payroll tax deductions. It is free (as long as you paid in) and anyone who turns 65, even if they are covered by other insurance, should enroll in Part A.

b. Medicare Part B is a voluntary supplemental insurance program that covers physicians, diagnostic tests, medical equipment, ambulance services, outpatient physical and speech therapy, and limited prescription drugs. It is financed partially by monthly premiums paid by the enrollee and partly by the federal government. The monthly premiums range from $134 per month (typical), to a maximum of $482.60 month for persons with very high income (rare).

c. Medicare Part C, also called MEDICARE ADVANTAGE, means that the person is Not Enrolled in Medicare Part A or B anymore. Be careful of Medicare Part C. It is much more like an HMO:

i. There may be no monthly premiums at all (except the person still has to pay the equivalent cost of Medicare Part B, usually withheld from the Social Security check).

ii. But there can be deductibles and co-pays, and a very limited network of providers, who may be subject to capitation, and may be very hard to get an appointment with. The Advantage plans cannot offer less coverage than Medicare, but the co-pays, and limited physicians and hospitals and nursing homes frustrate many enrollees.

iii. These are HMO and PPO-type insurance plans run by private insurance companies-- developed as a cost-saving and risk-shifting decision by the federal government. They must include all of the standard benefits of Part A and Part B. Most Medicare Advantage plans include prescription drug coverage, instead of a separate Part D. There can be huge costs for going out of network.

(1) These plans can offer add-ons such as vision or dental or wellness perks.

(2) The medical provider does not bill Medicare – they bill the Medicare Advantage private insurance company.

(3) There is a limited window for disenrolling in a Medicare advantage plan– but there are exceptions for moving out of the area or becoming eligible for Medicare and Medicaid.
iv. There are 57 million people on Medicare. The Kaiser Foundation does an annual study of overall enrollment in Medicare Part C plans. In Florida, 42% of Medicare beneficiaries enrolled in Medicare Part C.

d. Medicare Part D is the prescription drug program, which is optional and has a monthly premium. There are penalties for late enrollment.

e. Application for Medicare is handled through Social Security and can be filed online at https://secure.ssa.gov/iClaim/rib

6. Who is Eligible for Medicare/Part A?

a. Persons age 65 and older who are entitled to receive Social Security retirement benefits or railroad retirement benefits as an insured worker, or as the dependent or survivor of an insured worker. Benefits start on the first day of the month in which the person turns 65. 42 CFR 406.10

b. A disabled person under 65, who has received Social Security disability or railroad disability for a full 24 months, is eligible for Medicare.

c. The disabled widow or widower of an insured worker may claim Social Security benefits starting as early as age 50 – and they are eligible for Medicare 24 months later.

d. Persons age 18 or over who receive Social Security children’s benefits (one parent is retired or deceased) and they are disabled before reaching age 22 (24 month wait for Medicare).

e. Certain federal and state employees who paid into Social Security.


g. Persons with ALS (Lou Gehrig disease) who are receiving disability benefits from Social Security are eligible for Medicare starting the first month that the person receives a Social Security check.

i. This means the person has to have filed for and been approved for SSDI.

ii. So it could be a six-month wait from the time disability determined.

h. Every once in a great while you will meet an elderly person who never worked, and was never married to an insured worker (or was married, but for less than 10 years), and isn’t poor, and hasn’t gotten sick or didn’t think it was important to enroll in Medicare. So for them, there is one more option: anyone age 65 or over who doesn’t meet the usual criteria may voluntarily purchase Part A coverage. They must be eligible for, and enrolled in, Part B. The monthly premium for purchased Part A is $422/month (2018 figure).

i. They must enroll during a general enrollment period from January 1 to March 31 of each calendar year, and Medicare coverage starts July 1. 42 C.F.R. § 406.21(c).

7. Eligibility for Part B

a. An individual age 65 or over is eligible for enrollment in Part B if the individual is:

i. entitled to hospital insurance under Part A; or

ii. an American citizen (or a permanent resident alien who has resided in the United States for the five years immediately before the month of application for enrollment) and resides in U.S. who purchases coverage.
b. Eligibility for Part B does not depend on Part A eligibility.
c. What about people age 65 who still work?
   i. If a person is age 65 and still working, they should still sign up for Part A—it is free, and their employer may require it. But they don’t need Part B until they retire if they have health insurance through work.
   ii. There will be a "special enrollment period” to sign up for Part B when the person retires and loses their employer-based plan.
   iii. COBRA doesn't count as employer-based coverage.
d. Open enrollment periods
   i. Recommend that your clients buy a Medigap policy during the 6-month Medigap open enrollment period after initial eligibility, because a person can buy any Medigap policy sold in Florida, even if with health problems. After this 6 month window ends, the insurance company can deny coverage, or charge more.
   ii. Advise clients to select an excellent supplement within the six month window after becoming eligible for Medicare, and not to be tempted by the Medicare Advantage freebies.

8. Charges for delayed enrollment in Part B;
   a. Unless an enrollee has creditable coverage, failing to sign up for Part B when first eligible causes a late enrollment penalty for as long as the enrollee has Part B.
   b. The monthly premium for Part B increases 10% for each full 12-month period that the enrollee could have had Part B, but didn't sign up for it.
      i. For example, if Joe could have signed up for Part B on January 1, 2012, but inexcusably failed to sign up until January 1, 2014, he will pay a 20% penalty surcharge for the rest of his life – 10% for each 12 month period that he wasn’t enrolled.
      ii. They do not want you to “wait until you are sick” to sign up.
      iii. Also, Joe may have to wait until the General Enrollment Period (from January 1 to March 31) to enroll in Part B, and coverage will start July 1 of that year.

9. Purchasing a Medigap policy (Medicare supplement)
   a. These plans are standardized from Plan “A” to “N.”
   b. Each carrier must offer the same benefits within each Letter-Plan, but the cost can be different. The Medicare website has a chart that shows the coverage requirements for each plan. For instance a "Plan A" policy is usually the worst coverage --because it doesn't pick up the skilled nursing co-pay, or the Parts A and B deductibles.
   c. Plans E, H, I, and J are no longer offered for sale, but if you have one, you can usually keep it.
   d. You have to pay the Medicare Part B premium AND the private Medigap policy premium.

10. Medicare premiums, deductible amounts and coinsurance amounts for 2018
   a. Part A –hospital. Joe has regular Medicare Part A and no Medigap supplement. He has a heart attack and is hospitalized. Many complications ensue and he remains in the hospital for a long time. Here’s what he owes (2018 figures):
i. A $1,340 deductible *per spell of illness*. (If it isn’t his first illness of the year, he could pay this deductible more than once)

ii. For the first 60 days, he owes $0 copay.

iii. If he has an extraordinarily long hospitalization, for hospital days #61-90 he will owe $335 *per day* co-insurance.

iv. Hospital Days 91 and beyond: $670 *per day* coinsurance for 60 days – and these are his nonrenewable lifetime reserve days, so this is assuming they have not previously been used.

v. Beyond lifetime reserve days: Joe pays all costs.

vi. It’s extraordinary that someone would be in the hospital for that long, and it is also likely that the person *would* have a Medicare supplement that would cover some of the above coinsurances.

vii. Also, the deductible and the coinsurances for Hospital Days 1-90 apply *per spell of illness*. So if Joe keeps going in and out of the hospital and his spell of illness never resets, the costs will get high.

b. **Medicare Part A skilled nursing facility**: Finally Joe leaves the hospital after several weeks and goes to a nursing home for rehab. Here’s what he owes:

i. Days 1-20, Medicare pays everything.

ii. Days 21 -100, Joe has a daily co-pay of $167.50, which would be covered if he had a Medicare supplement (except Plans A and B).

iii. Note that if somebody has Federal Employees Blue Cross Blue Shield, there is a *30 day cap* on Medicare rehabilitation days. Not 100.

c. **Medicare Part B**

i. The monthly premium for Part B is $109 for some people (although new enrollees or people who are billed directly will pay $134/mo)

ii. However, if the person’s modified adjusted gross income as shown on their federal income tax return *two years previously* is above $85,000 (single) or $170,000 (married filing jointly) then the premiums start increasing. There is a handy chart at the Medicare.gov website if you want to look up the exact premium as it may change each year. The maximum monthly premium is $428.60.

iii. There is also a Part B annual deductible of $183 (2018 figure).

   (1) After the deductible is met, patient pays 20% of the Medicare-approved amount for most doctor services (including most doctor services while inpatient in a hospital), outpatient therapy, and durable medical equipment.

   (2) Most Medicare supplement (Medigap) policies cover the deductible and the 20% co-pay.

d. **Medicare Part D**

i. **Regular costs for Part D**

   (1) The Part D premium is set by the plan. It is paid monthly. The payment can be automatically deducted from a Social Security check.

   (2) The plan can also charge a yearly deductible. Many plans do not.

   (3) In addition, the plan can charge a co-payment for each prescription.
They can also set up “tiers” of medications and charge different co-pays for the different tiers.

ii. **The Medicare Part D Doughnut Hole**

1. For 2018, the “doughnut hole” aka “coverage gap,” starts at $3,750.

2. From $0 to $3,750, the Medicare beneficiary and the plan will allocate the cost of prescriptions between themselves, depending on the plan. The Medicare recipient may have a co-pay or deductible, and the plan shoulders much of the drug cost.

3. Once the Medicare recipient and their plan have paid $3,750 in covered prescription costs, there is a coverage gap, often called the doughnut hole.

4. Medicare recipients who get “Extra Help” paying Part D costs don’t have a coverage gap.

5. Included in the calculation of how to get to $3,750 are the deductibles paid by the Medicare recipient, and the portion of the drug cost paid by the Part D plan. A running calculation is kept on the Explanation of Benefits.

6. Once the combined expenditure reaches $3,750, the Medicare recipient will pay 35% of the cost for brand-name drugs and 44% of the cost for generic drugs (2018 figures). The “cost” is set between the pharmacy and the plan; there is a benefit to choosing a pharmacy that offers the lowest cost.

7. A portion of the amount paid by the Medicare recipient counts to get them out of the doughnut hole.

8. Once the person has spent $3,750 in prescription drug costs, the coverage gap ends (2018 figure).

9. By 2020, the co-pays for generic and brand-name drugs are both 25%, and the doughnut hole is supposed to end the following year.

10. [http://www.q1medicare.com/PartD-PartDCoverageGapCalculator16Xphp.php](http://www.q1medicare.com/PartD-PartDCoverageGapCalculator16Xphp.php) is an online Part D calculator—there are others online too; that would help a person calculate their actual prescription costs and how the doughnut hole affects them.

11. **Spell of Illness.**

   a. Issues with the Spell of Illness.

   b. The “spell of illness” is a central concept in Medicare for hospital and skilled nursing facility care. A “spell of illness” begins on the day that the patient first receives inpatient hospital care. It ends when the patient has not been hospitalized or receiving skilled nursing care in a facility for 60 consecutive days.

   c. It does not matter how many actual illnesses occur during a “spell of illness.” It is still the same spell.

   d. The spell of illness is not the same thing as an individual illness and it applies in both a hospital situation and a skilled nursing facility situation:

   i. For example, Sam has a heart attack on June 15 and goes to the hospital. After surgery, he is sent to a skilled nursing facility on June 20 for
rehabilitation. On July 30, he is discharged from the skilled nursing facility and goes home. The next day, he breaks his hip and goes back to the hospital. This is still the same spell of illness, even though the source of the illness is different. If he is again sent to a nursing home, he will have at most only 60 days left of rehabilitation, because he used 40 days on his first stay and it still the same spell of illness.

12. What does Part A cover?
   a. Part A covers customary care and services in hospital— a (semiprivate) room, nursing services, drugs, supplies. It does not cover physician’s services. Beneficiaries are entitled to 90 days of benefits per spell of illness, plus lifetime reserve of 60 days of hospital care. 42 C.F.R. § 409.10(a) and 42 C.F.R. § 403.720.
   b. There is a limit of 190 days per lifetime for psychiatric hospital care.
   c. The spell of illness begins with the first day of inpatient hospital or extended care services by a qualified provider. A new spell of illness will not occur until the person has been 60 days not needing hospital care or skilled nursing care or home health care. Thus, a patient who is discharged and then readmitted within the 60-day period is within the same “spell of illness.”
   d. Part A includes 100 home health visits per spell of illness. 42 CFR 409.42
   e. Part A includes skilled nursing facility coverage. 42 USCS § 1395x
      i. The person must have been admitted to a hospital for at least three midnights prior to being admitted to the skilled nursing facility.
      ii. The person must required skilled nursing or rehabilitation, which services are needed for medical improvement or to prevent or delay further deterioration or preserve current capabilities. 42 CFR Section 409.32 (c).
      iii. The patient must be admitted to the skilled nursing facility within 30 days of discharge from the hospital.
      iv. Part A covers the first 20 days in a skilled nursing facility; days 21-100 have a co-pay, which may be covered by the Medicare supplement.

13. Observation status
   a. To qualify for Medicare coverage in a post-hospital SNF stay, a Medicare beneficiary must first spend three (3) consecutive midnights as an admitted patient in a hospital; observation days don’t count towards that requirement.
   b. New trick: person goes to hospital with chest pains. Is taken to a hospital bed and hooked up to the usual tubes and wires for more than three days. But is not “admitted.” Instead the doctors say that although services are being provided, they are more in line with “monitoring” and they are akin to outpatient services. The bad news is when the person is released from the hospital and expects to go home with home health care, or go to a skilled nursing facility for rehabilitation services, Medicare doesn’t pay for either one because the person is was only “observation” status at the hospital.
   c. Days spent in the hospital as “observation” don’t count towards the three midnight requirement for skilled nursing facility rehabilitation coverage. So if the person is “observed” for two days and “admitted” for two days and then sent to a nursing home, that will not meet the three midnight requirement.
d. A new law may help. It is called the Notice of Observation Treatment and Implication for Care Eligibility Act (“NOTICE Act”). The NOTICE Act requires hospitals to notify Medicare patients when they are receiving “observation care” but have not been admitted to the hospital.

14. The Medicare Savings programs and Extra Help: QMB and SLMB and QI1

Between premiums and deductibles, a Medicare recipient can spend a lot each month: $0 for Medicare Part A, $134 (at least) for Part B, $75/mo (average) for Part D ... and then the co-pays and donut hole for prescription drugs of almost $4,000 per year, and probably about $300-500/mo average for a typical Medicare supplement. So if they just need help paying those bills-- and their assets and income are low-- consider the following programs which make the person dually eligible for Medicare and Medicaid. Application for these programs is through Florida Department of Children and Families (DCF) and the provider has to be willing to take Medicaid. Eligible individuals may apply for medical assistance through the Medicare Savings Program with DCF. These programs help Medicare beneficiaries with low income and assets pay all or some of Medicare’s cost sharing amounts (ie. premiums, deductibles and copayments). To qualify, an individual must be eligible for Medicare and must meet certain income and asset guidelines which change annually.

a. QMB (Qualified Medicare Beneficiary Program)
   i. Pays the Medicare Part B premium, AND CO-PAYS AND DEDUCTIBLES related to Medicare.
   ii. This includes the rehab co-pay for days 21-100 in a nursing home.
   iii. See the 2018 “SSI-Related Programs - Financial Eligibility Standards” at https://www.dcf.state.fl.us/programs/access/docs/ssi_fin_elig_chart.pdf
   iv. A pooled trust can be used to reduce countable income and assets. Fla. Medicaid Policy Manual 1640.0576.09. For example:
      (1) Client has no Medicare supplement (or wants to disenroll from a Medicare Advantage plan).
      (2) Is incurring significant physician services.
      (3) Has no assets but has monthly income of $2,000.
      (4) Is nowhere near open enrollment for selecting a Medigap policy, and/or not likely to clear underwriting.
      (5) Solution: join a pooled trust and deposit the monthly income there and claim QMB. (Income deposited in the pooled trust does not count as income of the beneficiary.)

b. SLMB (Specified Low-Income Medicare Beneficiary Program)
   i. Pays the Medicare Part B premium only, a savings of $134/mo at least.
   ii. The monthly income limit in 2018 is $1,206 (single) and $1,624 (couple).
   iii. Asset cap = $7,390.00 (single) and $11,090 (couple).

c. QI1 (Qualified Individual)
   i. Pays Medicare Part B premium only.
   ii. Also has asset and monthly income test— see SSI-Related Programs sheet.
   iii. Must apply every year for QI benefits.

d. Extra Help is a Medicare program to help people with limited income and resources pay Medicare prescription drug costs. Everyone who receives benefits
under QMB, SLMB or QI1 automatically qualifies. Social Security estimates that the value is about $4,000 per year to eligible recipients. Income and resources must be below limits – see SSI-Related Programs sheet “Low Income Subsidy” column.


15. **Medicare Assignment**
   a. Assignment – if a medical provider accepts “Medicare assignment,” they must accept the Medicare reimbursement rate as full payment.
   b. Not all medical providers accept “assignment.”
   c. If someone goes to a doctor who doesn’t take Medicare at all (a private contract), Medicare will not pay for any of the services, even if they would have been paid for by a Medicare provider. Amendment 4507 of the Balanced Budget Act of 1997. There are very specific rules of how to enter into a private contract with a physician. The physician cannot accept some patients as Medicare and not others, and cannot render some services under Medicare but not others. Any such arrangement is completely excluded from Medicare reimbursement or rules.

16. **Medicare and Hospice.**
   a. Terminally ill Medicare recipients are entitled to hospice services for two 90-day periods and unlimited number of subsequent periods of 60 days each. 42 CFR 418.200 et seq.
   b. Services include nursing care, physician’s services, medical social services, counseling, medical supplies and appliances, drugs, home health and homemaker services, therapy, and respite care.
   c. The purpose of hospice is to provide support and palliative care, and not to try to restore the person to health.
   d. As a rule, hospice will not meet with a person who is receiving Medicare covered rehabilitation in a nursing home. They will usually wait to make their assessment until the rehabilitation days are over.
   e. Note that if your clients are going to an actual hospice facility, that there may be a charge for room and board. It’s the other services rendered in the facility that Medicare pays for.
   f. In the alternative, if someone receives hospice care in a nursing home or in their own home, hospice care is provided by Medicare, and the other living expenses are either private pay or Medicaid.

17. **The Medicare card**
   a. If you are looking at somebody’s actual Medicare card, you will notice that the number on the card ends with a capital letter. The person’s social security number is not necessarily the number on their Medicare card– it depends on whose work history they are drawing benefits.
   b. If the last letter on the Medicare card is a capital A, then the person is drawing benefit on their own work history. But if it ends in a B, the person is drawing spousal benefits, and the Social Security number on the card will be the number for the wage earner, not the spouse.

7.11
c. There are actually more than 30 capital letter sequences that cover everything from “Young Wife with Child in Care” to a “Child of Disabled Claimant” so if the letter looks unfamiliar, look it up.

d. If someone draws Medicare at age 65 based on his own work record but is deferring claiming Social Security retirement benefits, his card will have a code letter “T”: he has elected to collect only health insurance (Medicare) benefits for now, although he is fully insured for Social Security. When he actually starts collecting Social Security benefits as well, he will get a new Medicare card and it will end with A.

Medicaid

1. Program Basics. The Medical Assistance Program ("Medicaid") is a joint federal-state, needs-based, health insurance program which is administered by the states. Congress created the program by enacting Title XIX of the Social Security Act of 1965, 42 USC §1396 et seq. A state need not participate in the program but once it does, it must comply with applicable federal law. Federal law sets certain minimum standards of coverage. Since each state develops its own guidelines, eligibility and coverage requirements vary dramatically from state to state. The Agency for Health Care Administration is Florida’s state Medicaid agency. Eligibility for Medicaid is determined by the Florida Department of Children and Families (DCF).

2. Medicaid is a health program, but unlike Medicare, it is not an entitlement. Individuals must apply and meet eligibility criteria. The Medicaid program generally applies to

a. The laws, regulations, and policies pertaining to Medicaid are:
   i. Title XVI of the Social Security Act, 42 USC §1381;
   ii. Title XIX of the Social Security Act, 42 USC §1396r;
   iii. Florida Statutes Chapter 409;
   v. Florida Administrative Code, Chapter 65A; and
   vi. The Florida Medicaid Program Policy Manual which can be found at http://www.myflfamilies.com/service-programs/access-florida-food-medical-assistance-cashprogram-policy-manual

b. The Department of Children and Families determines initial and ongoing eligibility. Applications can be made online at https://dcf-access.dcf.state.fl.us/access/index.do

c. The Agency for Health Care Administration (AHCA) administers the program. AHCA now directs approved Medicaid applicants into managed care through several large insurance company networks.

d. Programs and services for developmentally disabled persons has been transferred to the Agency for Persons with Disabilities (APD). See www.apd.myflorida.com

e. There are multiple Medicaid programs, including home-based services, community Medicaid and institutional care (nursing home) Medicaid. A summary sheet is attached.

f. The Medicaid program that pays for nursing home care is most sought-after. The program discussed herein provides benefits to skilled nursing home residents and is titled the “Institutional Care Program” (ICP).
3. **Medicaid Eligibility.** Eligibility requirements may differ depending on whether the person is single or married. In these materials, the applicant is sometimes called Medicaid Beneficiary or Institutional Spouse, and if they have a spouse living at home, the spouse is called the Community Spouse. The applicant must meet all of the following eligibility requirements:

a. The easy requirements:
   i. Must be a US Citizen (with some exception for green card holders)
   ii. A Florida resident.
   iii. 65 years of age or older, blind, or disabled.
   iv. Residing in and requiring medical care provided at a skilled nursing, Medicaid provider facility within 45 days of application. Not an ALF!
   v. Must apply for all other benefits to which the applicant may be entitled. Other available benefits might include Social Security Disability Income, long term care insurance benefits (if they have a policy) and Veteran’s benefits.

b. Income
   i. The applicant’s **gross** monthly countable income cannot exceed $2,250 per month (300% of the SSI benefit for 2018). That number changes with the Social Security COLAs (cost of living adjustment). If an applicant’s gross income exceeds $2,250, a Qualified Income Trust (QIT) must be created and funded to hold the excess income.
   
   ii. To determine countable income, **all** income of the applicant is considered. See Fla Admin Code (FAC) 65A-1.713 SSI-Related Medicaid Income Eligibility Criteria. Deductions withheld from gross income must be included in the determination. Therefore, premiums for a Medicare supplement insurance, or life insurance, as well as deductions for federal income taxes, optional deductions will be included.
   
   iii. Certain income is not counted. See Medicaid Program Policy Manual 1840.0900. For example, the portion of a VA pension allocable to “Aid and Attendance” is excluded, as well as Agent Orange payments, Indian Tribe or Alaska Native Claims payments, German Reparations, Japanese and Aleutian Restitution payments. Also excluded are infrequent or irregular payments.
   
   iv. If the applicant is married, the income owned solely by the community spouse is **not considered** when determining whether the applicant's income is within program standards. 65A-1.701 FAC. However, once Medicaid eligibility has been determined, the community spouse's income is considered for the purpose of determining whether any of the institutionalized spouse’s income needs to be diverted to the community spouse for his or her minimal support. This is called the Minimum Monthly Maintenance Needs Allowance. 65A-1.716 (5)(c) FAC. This year the minimum spousal needs allowance is $2,030 per month, and there are extra costs that might bring it as high as $3,090 per month. There is a worksheet available through the Medicaid manual http://www.myflfamilies.com/service-programs/access-florida-food-medic...
al-assistance-cashprogram-policy-manual to calculate what the expected
diversion will be to the spouse.

v. Income derived from jointly owned assets is considered available to whom
it is paid unless the controlling instrument indicates otherwise. If the
payment is made solely to the community spouse, the income is available
only to the community spouse. If the income is payable to both spouses,
half of the income is considered available to each spouse. However, if the
income payment is made to the institutionalized spouse, the community
spouse and to others, income is considered available in proportion to each
person's interest in the asset. Consider transferring the ownership interest
to the well spouse prior to applying for Medicaid.

c. Countable assets
i. An individual applicant may have no more than $2,000 in countable
resources. 65A-1.712(1) FAC. If the applicant has a spouse living at
home (a community spouse), a community spouse is allowed to retain up
to $123,600 in countable assets in 2018. 42 USC 1396r-5;
65A-1.716(5)(c).

ii. Resources are defined as assets, liquid or non-liquid, or items of value
owned (solely or jointly) by an individual who has access to the cash value
upon disposition. The countable value of an asset is the equity value.

d. Noncountable assets
i. There are numerous noncountable, exempt or excluded resources
65A-1.712(2) FAC and at the Medicaid Policy Manual 1640.0000
SSI-Related Medicaid, State Funded Programs, such as:

(1) An applicant’s homestead property is exempt if the applicant has
an intent to return to it, no matter how remote the possibility AND
if it has equity of $572,000 or less; or, if the community spouse (or
dependent relative) is residing in the home.

(2) One automobile is exempt; as are additional automobiles that are 7
years of age or older and are not luxury cars.

(3) A prepaid, irrevocable funeral policy is exempt.

(4) A savings account specifically designated for funeral or burial is
exempt up to $2,500 if the applicant does not have life insurance
with cash value in excess of $2,500.

(5) Cemetery plots for the applicant or applicant’s family.

(6) Certain income-producing property if it is producing income
consistent with its fair rental value (although the income earned
from the Property will be considered income to the applicant and
will be paid to the nursing home.

(7) Life estate interests in real property.

(8) Life insurance policies with a combined face value of $2,500 or
combined cash surrender value of $2,500.

(9) Certain annuities may be excluded, but only if the state of Florida
is listed as beneficiary up to the amount of Medicaid benefits
expended. This essentially means that annuities are not helpful for
a single individual.

(10) Promissory notes and mortgages which cannot be converted to cash within twenty (20) days are not counted. These assets are considered income-producing property and the income generated is counted toward the income limitation.

(11) Household goods and personal effects up to $2,000 of value are excluded from counting as a resource.

(12) One wedding ring/one engagement ring.

(13) Jointly owned property described above.

(14) Real estate listed for sale on the market, provided no reasonable offer has been refused; and of course if the real estate sells subsequently, the plan must be made to spend down the proceeds.

(15) Funds placed in a Pooled Trust.

4. Transfers.

a. The rules regarding asset transfers changed considerably with the enactment of OBRA '93 and the Deficit Reduction Act of 2005.

b. Federal law requires the states to deny Medicaid eligibility for a period of time when an applicant or an applicant's spouse transfers certain resources or income to a nonspouse prior to applying for or receiving Medicaid benefits. The period of ineligibility is triggered when a countable resource or income is transferred for less than fair market value to a nonspouse or other non-exempt recipient under the law and the transfer occurred during or after the 60-month period immediately before the date of the application for benefits. There is no ineligibility period for transfers between spouses.

c. However, some transfers are not penalized. The following transfers in accordance with 42 USC 1396p(c)(2)(B) are exempt from the transfer rules:

i. Transfers of assets to an applicant's spouse or to another for the sole benefit of the spouse, as well as transfers from the applicant's spouse for the sole benefit of spouse;

ii. Transfers to the applicant's blind or disabled child or to a trust for that child's benefit; and

iii. Transfers to a trust established for the sole benefit of an individual under age 65 who is disabled.

d. In addition, the transfer of an applicant's home will be exempt pursuant to 42 USC 1396(c)(2)(A) only when it is transferred to:

i. applicant's spouse;

ii. a dependent child who is under the age of 21 or is blind or disabled;

iii. a sibling with an equity interest in the home who has resided in the home for one year prior to the applicant's admission into a nursing home facility; or

iv. a child of the applicant who has lived in the home for the two year period immediately prior to the applicant's institutionalization and has been caring for the applicant.

e. The transfer rules specifically relating to trusts are found at 42 USC 1396p(d). A transfer of assets to a revocable trust by the applicant or applicant's spouse is not
penalized because the corpus of such a trust is still considered to be an available resource of the applicant or applicant's spouse. Likewise, payments from the trust are considered income. If, however, any part of the trust corpus or income is used for any purpose other than for the benefit of the applicant or applicant's spouse, a transfer of assets has occurred.

f. The transfer of assets by an applicant into an irrevocable trust will trigger the transfer rules. Even if no payments are allowed to an applicant after a certain time or upon the occurrence of a specified event, a transfer will have occurred either on the date of establishment of the trust or at the later foreclosure date. The period of ineligibility is calculated using the standard formula.

g. Personal Service Contracts. This involves transferring funds for fair market value, in exchange for a personal service contract between the Elder and the Provider; the Provider promises to deliver personal care services to the Elder for the rest of their life. The Personal Service Contract has to be between the Medicaid applicant and some other person that is not the Medicaid applicant’s spouse. That other person can be a child, other family member or friend. The Elder pays these funds in a lump sum prior to becoming eligible for Medicaid, in advance of providing services. The contract in this case must be designed to provide assurance of continued quality of care. The payment should not be treated as an uncompensated transfer giving rise to Medicaid disqualification. When one transfers assets under the contract, one is receiving a fair market value return on the investment, and is not a gift. It is taxable income to the Provider, subject to self-employment tax.

5. Planning

a. Planning for Medicaid benefits must begin with a full and complete understanding of: 1) the Medicaid ICP program; 2) gift, income and estate tax; 3) the client and the client’s family; 4) the client’s assets and 5) the client’s care needs and wishes.

b. There are two very basic types of planning tools: asset conversions and asset transfers:

i. Asset Conversion.

   (1) Asset conversions occur when liquid assets are converted into illiquid (and therefore exempt) form.

   (2) Examples of asset conversions are:
   
   (a) Improvements. An applicant’s homestead property is exempt and therefore improvements, repairs or replacements made to it are allowable expenditures which incur no penalties.

   (b) Upgrading an automobile is a valid expenditure, even if the person in the nursing home doesn't have a driver's license. They are still permitted to own a car.

   (c) Rental Real Property. A community spouse could purchase rental real estate provided a reasonable rate of return is received. If such a return is received, the value of the property is exempt from the community spouse’s countable resources. A community spouse’s income is not considered for his/her spouse’s eligibility.
Other exempt assets can be purchased such as irrevocable funeral policies, burial plots, burial funds.

Fund a Pooled Trust to have supplemental funds for the institutionalized person.

ii. Asset Transfers. Asset divestiture is another common Medicaid planning approach.

(1) There is no penalty for transfers between spouses, so assets can be freely transferred between them with no negative consequences.

(2) Transfers to non-spouses cause penalties for Medicaid purposes.

6. Planning when there is a Community Spouse.

a. There is an exception to the spousal asset threshold of $123,600 (2018 figure). The “well” spouse can have assets in his or her name in excess of the $123,600 threshold and can simply tell Medicaid that he or she refuses to use those assets to pay any of the “ill” spouse’s nursing home bill.

i. Florida abolished the “Doctrine of Necessaries.” Accordingly, Medicaid cannot penalize the well spouse for failing to pay the ill spouse’s nursing home bill. At present, the ill spouse can transfer the non-exempt assets into the sole name of the well spouse, prior to applying for Medicaid. However, accurate planning is important, because in a spousal refusal scenario, no assets can be transferred between spouses after the assignment of support rights is signed and the Medicaid application is filed.

ii. This tactic is commonly called Spousal Refusal.

iii. The ill spouse (or the ill spouse’s agent under a durable power of attorney) will be required to sign a statement authorizing the State to bring a suit for support against the refusing spouse. The State has not pursued such a suit, and at this time there are no grounds for such a suit, because there is no obligation of support between spouses. However this may change in the future.

iv. Once the “well” spouse refuses to pay, the State looks only at the countable assets in the ill spouse’s name. Provided that nursing home spouse only owns the exempt house, the exempt car(s), exempt IRAs, or other exempt assets, that spouse would be eligible for Medicaid benefits.

v. The policy reasons against repealing spousal refusal as a planning technique, is that it would encourage divorce, which the State doesn’t want to do, but Tallahassee is tracking all applications where this tactic is used.

vi. In Spousal Refusal the well spouse is not eligible to receive any income diversion from the ill spouse. So if the person going into a nursing home has $5,000 per month in income and the spouse at home only receives $1,000 per month in income, the long-term consequence of using spousal refusal will be a very poor outcome.

vii. Once Medicaid approves the application for the ill spouse, they do not revisit the assets of the well spouse, which can then grow to any level.

viii. Medicaid is extraordinarily thorough when reviewing a spousal refusal case. You can expect to be required to produce between three years and...
five years’ worth of statements on every single account, and be challenged on any expenditure over $500, including religious tithes and holiday gifts. It is a more difficult application to process.

b. There is a different way to proceed to avoid using spousal refusal if and when the ill spouse has much higher income than the well spouse. If they used spousal refusal, all of the ill spouse’s income would go to the nursing home as a co-payment and the well spouse would get none of it.
   i. Annuities are considered exempt assets but only if the State of Florida is named as the primary beneficiary up to the amount of benefits paid out for the ill spouse. If the well spouse purchases an annuity in his/her own name with the assets in excess of $123,600, he or she will have to name the State of Florida as primary beneficiary for the term of the annuity.
   ii. But if they pick a short term annuity, such as one year or two year annuity, we can count on the very likely scenario that the well spouse will survive the annuity term.
   iii. Provided the well spouse survives the term of the annuity, he/she does not owe anything to the State of Florida. If the well spouse were to die during the annuity term, it just means that the State of Florida would be the beneficiary up to the amount of care it provided for the ill spouse. This is an alternative that would assure the well spouse a more comfortable income. There is a tiny bit of risk, of course, that the well spouse would be hit by a bus, but the risks are much smaller than the potential benefits.

c. As a different plan when there are two spouses, and you are more worried about income than assets: It is possible to petition a family law judge and ask for a court order establishing monthly support for the well spouse from the ill spouse based on the well spouse’s limited income and assets. It is a support order but is not connected to a divorce. Medicaid must honor a court-order of support.

7. Estate Recovery.
   a. OBRA ‘93 mandated that states enact estate recovery systems. Medicaid’s right to estate recovery is limited to the value of medical services provided to the medicaid recipient.
   b. Commonly, the recipient has no assets at death and there is nothing for Medicaid to recover against. But suppose a recipient dies having received Medicaid because his or her only asset was an income-producing rental property. The person may be eligible for benefits during his or her lifetime, but at death, the State has a claim against the estate. AHCA has contracted with Xerox to collect funds from a deceased Medicaid beneficiary’s estate.
   c. If a person receiving Medicaid benefits dies and estate administration is required, the State, as a creditor, must be notified. Florida law requires a copy of the Medicaid-recipient's death certificate be sent to: Florida Medicaid TPL Recovery Program, P.O. Box 12188, Tallahassee, FL 32317-2188.
   d. “Conduent Payment Integrity Solutions” is the subcontracted collection agency for AHCA. It calculated the Medicaid debt and files a claim once the probate estate is opened. If there is a surviving spouse, if the decedent was under the age of 55 years, or if there are minor or blind or disabled children of the decedent,
Conduent/AHCA will withdraw their claim.

e. Medicaid has a Class 3 priority claim against the decedent’s estate in accordance with Florida Statute §733.707.

f. If there are no cash assets available to satisfy the Medicaid estate-recovery claim, Medicaid may force the sale of non-exempt personal property or real property (not homestead) if the costs of sale do not exceed expected proceeds.

g. Medicaid cannot recover from property that is exempt from creditors (e.g. homestead property), but they still have to be given notice of the probate.

h. Medicaid cannot recover from an estate under probate if the Medicaid estate recovery would result in an undue hardship for qualified heirs.

i. Planning to avoid a probate, through beneficiary designations, or joint tenancy with right of survivorship, or a ladybird deed, is important. Assets in a revocable living trust can be accessed by creditors if there are insufficient assets to cover debts in the deceased's estate, and if a probate is opened within two years of the decedent's death. Two years after someone dies, if no probate estate has been opened, creditors claims are time-barred.

j. Following are different sequence of death scenarios, and the recovery system for each.

i. If there is a surviving spouse. If the recipient dies survived by a spouse, Medicaid does not seek recovery either from the recipient’s estate or from the spouse, nor does it attempt recovery against the surviving spouse’s estate, upon his or her later death.

ii. If there is no surviving spouse or the recipient was never married. If the recipient dies and the spouse has predeceased or the recipient was never married, Medicaid will file a claim against the recipient’s estate. However, if there is no probate administration, there is no source from which to satisfy Medicaid’s claims.

iii. If a Qualified Income Trust was established. If the recipient dies having created and funded a Qualified Income Trust, whether or not the recipient was ever married, the State of Florida must be notified of the death of the recipient, and the State must be paid the funds remaining in the trust, less any amount owing to the nursing home for the month, to the extent of benefits paid to the recipient.
Gathering Data about Client

- Develop an intake questionnaire
- Make sure it includes income and assets
- You need asset and income for both spouses, even if only one of them is applying for benefits
- Find out if either spouse is a war-time veteran

Social Security

- Has Benefits for Retired Workers who paid into the system
- Has Benefits for Vested and Recent Workers who paid into the system and became disabled (SSDI)
- Has Benefits for disabled persons who do not have sufficient work credits and whose assets and income are very low (SSI)
Medicare
A happy easy place

Medicare

• Health Insurance for persons 65 or older and some disabled people
• Medicare Part A
• Medicare Part B
• Medicare Part C
• Medicare Part D

Premiums for Medicare Parts:

A • Generally free
B • Somewhere between $134/mo and $428.60/mo
D • Somewhere between $20/mo and $97/mo

(Part C is usually free but has limited networks)
The Spell of Illness

- A “spell of illness” begins on the day that the patient first receives inpatient hospital care.
- It ends when the patient has not been hospitalized or receiving skilled nursing care in a facility for 60 consecutive days.
- It does not matter how many actual illnesses occur during a “spell of illness.” It is still the same spell.
There are multiple Medicaid programs. The one that you are most likely to be asked about is ICP--the Institutional Care Program.

Ways to pay a monthly nursing home bill that could be $10,000 or more per month:

- Personal Savings
- Long Term Care Insurance (few clients have it)
- VA Benefits – for a nonservice-connected war-time veteran, the max monthly benefit is not enough to pay a nursing home (but maybe helpful for ALF)
- Medicare if admitted from a 3+day hospital stay
  - Day 1-20 100% covered
  - Day 21-100 Covered, but daily co-pay of $167.50
  - Day 101+ No more Medicare
- Medicaid

Big Picture Medicaid ICP:

- US Citizen (or certain aliens)
- Florida Resident
- Over age 65 or disabled
- Applied for all other benefits for which eligible
- Not under a gifting penalty
- Sick enough to need nursing home
- Meets income requirements
- Poor enough in terms of assets
### The Income Test

<table>
<thead>
<tr>
<th>Gross Income</th>
<th>Net “what hits the bank account”</th>
</tr>
</thead>
<tbody>
<tr>
<td>$2,250 monthly cap</td>
<td>= 3x Social Security poverty level</td>
</tr>
</tbody>
</table>

If above the cap (and 90% of my clients are):

- Must establish and fund each month a Qualified Income Trust
- Spouse Income?
  - The income of the community spouse does not count except to calculate a spousal support income allowance

### Assets

- The person in the nursing home may have $2,000 in countable assets
- The spouse at home (if any) may have $123,600 in countable assets
- Many assets are **excluded**, such as homestead with a value under $572,000 (unless a spouse lives there and then no upper value), a car, certain funeral plans, IRAs if distributing the RMDs, life insurance, personal property, rental property, property listed for sale...

### Transfers

- 5 year lookback on gifts (=uncompensated transfers)
- It doesn’t matter what the IRS excludes as an annual exclusion—Medicaid is a different agency
- No penalty on transfers between spouses (unless using spousal refusal, and then the rule is no transfers AFTER the application is filed)
- Some transfers are ok
- Purchasing things or services for FMV may be ok
Medicaid Lien after death

- Lien limited to the value of services rendered, in most circumstances only the services provided after age 55
- No lien if person survived by a spouse
- Must notify AHCA of estate administration
- AHCA has a Class 3 claim against estate
- 2 year time bar on all claims, whether Medicaid or any creditor
- Try to structure assets so there is no probate (JTROS, Ladybird deed, named beneficiary)
- Undue hardship exception