FIDUCIARY LIABILITY AND MORE: MODIFICATION, REFORMATION AND CONSTRUCTION OF TESTAMENTARY INSTRUMENTS

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This outline will address select concepts involving fiduciary liability and then explore the contours of modification, reformation and construction of testamentary instruments.

FIDUCIARY LIABILITY

The general duties owed by a personal representative ("PR") and trustee to interested persons and beneficiaries, respectively, are the same. Section 733.602(1), Florida Statutes, provides that a "personal representative is a fiduciary who shall observe the standards of care applicable to trustees." *Wohl v. Lewy*, 505 So. 2d 525 (Fla. 3d DCA 1987)(same). Those duties are good faith, loyalty, impartiality, reasonable care, skill and caution. Sections 736.0801, 736.0802, 736.0803, 736.0804, Fla. Stat. The Prudent Investor Act is applicable to both a PR and trustee and is specifically incorporated into the Probate Code. Sections 518.10, 733.612(4), Fla. Stat.

Certain acts of fiduciary administration often become alleged grounds for liability. An attempt to remove the fiduciary often accompanies alleged liability. The alleged grounds usually revolve around investments, self-dealing, fiduciary and/or attorney compensation, creditor claims, and use of agents.

INVESTMENTS

What to look for?

When considering an investment liability claim, you should review and analyze the fiduciary's own documents to determine what plan, if any, existed when the investments were made. Look for what process was followed, if any; whether the fiduciary considered and analyzed more than one alternative; whether the plan was consistent with the terms and purpose of the will or trust; whether the needs of the beneficiaries and the purposes of the will or trust were considered; whether the plan was based on reasonable judgment; and whether a personal conflict of interest may have affected the plan.

The absence of documentation for an investment plan is problematic and may create a presumption against a fiduciary. *Beck v. Beck*, 383 So. 2d 268, 271 (Fla. 3d DCA 1980). When a fiduciary either co-opts the beneficiaries into the investment process, or makes full disclosure before implementing a plan, defenses of consent, release, ratification and equitable estoppel will be encountered and

probably will be effective. Section 736.1012, Fla. Stat. (defenses of consent, release and ratification).

Basic duties of the fiduciary

The Prudent Investor Act (section 518.11) provides guidelines for fiduciary investment conduct. The fiduciary has a duty to invest and manage investment assets as a prudent investor, not a speculative one. The standard requires the exercise of reasonable care and caution in the context of the investment portfolio as a whole. This takes into account an overall investment strategy that must consider risk and return objectives reasonably suited to the situation. Section 518.11(1)(a), Fla. Stat. A fiduciary who has special skills investing assets must use those skills and is therefore held to a higher standard of care than one who does not possess special skills. *Id.*

Test of fiduciary conduct

The rule by which the fiduciary is judged on investments is a "test of conduct and not of resulting performance." *Id*. at (1)(b); *Matter of Banker's Trust Co*., 219 A.D. 2d 266, 636 N.Y.S. 2d 741 (1995). Importantly, the fiduciary is not an insurer of the assets invested. Section 736.1003, Fla. Stat. ("Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit."); *Fulton v. First National Bank of Fort Myers*, 290 So. 2d 498 (Fla. 2d DCA 1974)(The personal representative was

not liable for a decline in the value of securities.); *Barnett v. Barnett*, 424 So. 2d 896 (Fla. 1st DCA 1983)(A trustee is not liable for decline in value of securities).

Our courts have pointed out that they will not interfere with the exercise of a fiduciary's power and discretion when the fiduciary acts in good faith, from proper motives and exercises reasonable judgment. *Cohen v. Friedland*, 450 So. 2d 905 (Fla. 3d DCA 1984); *DeMello v. Buckman*, 916 So. 2d 882 (Fla. 4th DCA 2005).

Addressing preexisting investments

Fiduciaries should act reasonably promptly after accepting office to assess existing investments. A fiduciary has a duty to act within a reasonable time after acceptance of the trust or estate to review the portfolio and implement decisions concerning the retention and disposition of original preexisting investments. Section 518.11(1)(d), Fla. Stat. A fiduciary who does not fulfill this duty when the market is turbulent may be assuming significant personal risk of liability for losses to the portfolio based on a breach of duty. *In re JP Morgan Chase Bank, N.A.*, 981 N.Y.S. 2d 636 (Surr. Ct. 2013)(finding diversification should be implemented in a very short time frame after the fiduciary has control); *but see In re JP Morgan Chase Bank, N.A.*, 133 A.D. 3d 1292 (N.Y. S. Ct. Fourth Dept. 2015)(trustee not liable for not diversifying a concentration of stock in a short period of time).

Diversifying the portfolio

The fiduciary has a duty to diversify investments. In diversifying the portfolio, the fiduciary must consider both reasonable production of income and safety of capital consistent with the fiduciary's duty of impartiality and the purposes of the estate or trust. Section 518.11 (e); *In re Estate of Feldstein*, 292 So. 2d 404 (Fla. 3d DCA 1974)(A personal representative will be surcharged for failure to produce income from estate assets during administration.*); In re Estate of Saxton*, 686 N.Y.S. 2d 573 (Surr. Ct. 1998); *In re Estate of Janes*, 681 N.E. 2d 332 (N.Y. App. Ct. 1997); *In re Judicial Settlement of Intermediate Accounts of HSBC Bank USA, N.A.*, 149 A.D. 3d 1494 (N.Y. S. Ct., App. Div. 4th Dept. 2017) (surcharge is assessed to put the estate or trust in "no worse-but not better-position than the one it would have occupied if the trustee had duly sold [the Woolworth stock]").

Courts in other states have criticized a fiduciary who holds few securities and over concentrates the portfolio. *In re McFadden Testamentary Trust*, 2013 WL 8563470 (Pa. Ct. Common Pleas 2013); *In re Duffy Matter*, 885 N.Y.S. 2d 401 (NY Surr. Ct. 2009). Lesser concentrations in particular securities may constitute over concentration, but several factors must be considered. *HSBC Bank USA, N.A. v. Knox*, 947 N.Y.S. 2d 292 (App. Div. 2012); *Greenberg v. JP Morgan Chase Bank, N.A.*, 2014 WL 1682831 (N.Y. S. Ct. 2014)(prudence is determined

based on the facts and circumstances and there is no blanket prohibition to retaining stocks in a concentrated manner).

Fiduciaries often are sued over investments when the stock market significantly declines. When the stock market rises and some portfolios lag, some beneficiaries have challenged fiduciaries for not gaining enough. This type of challenge failed to work in *Fiegel v. Wells Fargo Bank, N.A.*, 2011 WL 860470 (S.D. Fla. 2011). There the court found no fiduciary liability when there was no actual loss of value in the securities, but the gain did not equal the applicable benchmark. *In re Trust for Pope*, 1995 WL 17963961 (N.Y. Surr. 1995)(no breach as to trust funds that did not appreciate and were held to provide liquidity for taxes, expenses of administration and funding of continuing trusts over a few years).

Investment provisions in the instrument--are they clear?

The governing instrument must be closely read and analyzed to determine if it varies from the prudent investor rule and how. The reason for this is that the prudent investor rule may be expanded, restricted or avoided by express provisions in a will or trust. Moreover, the fiduciary is exonerated from liability to any person "for the fiduciary's reasonable reliance on those express provisions." Section 518.11 (2), Fla. Stat. Look for ambiguous provisions in the will or trust related to investments. The more ambiguous a provision that is relied on, the less likely a court will find the fiduciary could reasonably rely upon it. A construction action or

request for instructions will be wise for the fiduciary seeking to bolster reliance on a will or trust provision as grounds for deviating from the prudent investor rule.

Delegation of the investment function

Because proper investment of fiduciary managed assets can be challenging and often poses significant risk, fiduciaries sometimes delegate the function to an agent. Section 518.112, Fla. Stat. So long as the investment agent was properly selected and the fiduciary reasonably monitors the agent's conduct, the fiduciary is not liable for the investment performance. *Id*. In connection with delegation, the fiduciary should recognize that its fiduciary compensation may be reduced by the cost of the investment agent. When the investment agent accepts appointment, the agent is subject to jurisdiction in Florida. *Id.* at (5). It is not clear under Florida law whether an investment agent has any duty to inform or account directly to a beneficiary.

6 month limitations period after disclosure

As time ticks away and investments go up and down, a fiduciary should issue periodic account statements and limitations notices that start the 6 month limitations period for suits against the fiduciary. Sections 736.0813, 736.08135 and 736.1008, Fla. Stat. If there is investment activity that is not easily or fully explained using the standard form of account statement, the fiduciary should consider using footnotes or a cover letter to explain one or more transactions in

detail. *Turkish v. Brody*, 221 So. 3d 1206 (Fla. 3d DCA 2016)(collateral facts not subject to quantification were found to be necessary for "adequate disclosure" to trigger the limitations period). The more disclosure that is made, the more likely it is that the 6 month limitation period will be triggered and bar actions brought against the fiduciary.

FIDUCIARY CONFLICTS OF INTEREST

A fiduciary's conflict of interest is often a primary reason for surcharge and removal. A conflict of interest together with one or more breaches of duty makes the situation worse for the fiduciary. *Landau, etc. v. Landau*, 2017 WL 4158841 (Fla. 3d DCA 2017)(alleged conflict and trustee's admitted failure to furnish timely and accurate annual accountings to beneficiaries resulted in freeze order). This situation is yet more aggravated when the conflict involves fiduciary compensation. *McCormick v. Cox*, 118 So. 3d 980 (Fla. 3d DCA 2013).

In *McCormick*, the trustee (an attorney) obtained a low valuation of real property, incurred fees for a like kind exchange of newly purchased real property and then took extraordinary fiduciary compensation without first disclosing it to the beneficiaries. Apparently, the fiduciary claimed that his real estate acumen resulted in a dramatic increase in the value of the trust assets. The fiduciary was surcharged for $5.3 Million consisting of the like kind exchange fees,

extraordinary and regular fiduciary compensation and attorney fees paid to his own law firm. The order directed disgorgement of the fees paid.

In a rather unusual ruling, the court preemptively removed the fiduciary's sons (attorneys) who were nominated successor trustees in the instrument. The court did so because of their participation with their father in the law firm and knowledge of, or acquiescence in, the breaches of fiduciary duty committed.

Situations involving breaches of duty and a conflict of interest often result in the imposition of harsh remedies against the fiduciary. For example, the court in *Brigham v. Brigham*, 11 So. 3d 374 (Fla. 3d DCA 2009), imposed harsh remedies against the fiduciary who was an attorney for not strictly complying with the then existing statute requiring advance court approval for a conflict of interest transaction. *See also Aiello v. Hyland*, 793 So. 2d 1150 (Fla. 4th DCA 2001)(removal of fiduciary based on conflict of interest); *Barnhart v. Hovde*, 490 So. 2d 1271 (Fla. 5th DCA 1986)(trustee breached her fiduciary duty by failing to obtain prior court approval of a sale of property when she had a conflict of interest).

A PR must observe the requirements of section 733.610, Florida Statutes, governing conflict of interest transactions. A conflict of interest transaction by the PR is voidable except if the interested person has consented after fair disclosure unless the will expressly authorized the transaction or the transaction is approved

by the court after notice. *Id*. The statute governing conflict of interest transactions of a trustee is found at section 736.0802. Trust transactions tainted by a conflict of interest are voidable unless they fit into one of the exceptions listed in the statute. The common exceptions are that the conflict was authorized by the trust, approved by the court, time barred, consented to, ratified or previously released.

A conflict of interest transaction by a PR is voidable, even if the PR did not have a bad motive and did not recognize the conflict. *In re Estate of Salomon*, 791 So. 2d 1150 (Fla. 3d DCA 2001). The fiduciary's use of estate assets to fund litigation not involving that particular estate will result in personal liability to the fiduciary. *Lehman v. Lucom*, 78 So. 3d 592 (Fla. 4th DCA 2011)(The ancillary PR used ancillary estate assets to pay litigation fees involving the domiciliary estate in Panama.). After a conflict of interest transaction occurs that may be voidable, the passage of time might render the transaction valid. *M.L. Builders, Inc. v. Reserve Developers, LLP*, 769 So. 2d 1079, 1082 (Fla. 4th DCA 2000).

While the phrase "conflict of interest" may sound piercing when raised, it is not necessarily so because some conflicts are permitted. *State of Delaware v. Belin*, 456 So. 2d 1237, 1241 (Fla. 1st DCA 1984); *Turkish v. Brody*, 221 So. 3d 1206)(Fla. 3d DCA 2016)(trustee did not breach his fiduciary duty by exercising discretion to make distributions to himself as beneficiary to the exclusion of his sister who was a beneficiary). In *Turkish*, the trustee's potential conflict of interest

in making distributions to himself did not constitute a breach of fiduciary duty because the grantor's conduct evinced an intent to finance the extravagant lifestyle of the trustee/beneficiary.

In *Belin*, the court stated that "[w]e agree with the trial court's determination that potential conflict in and of itself is not necessarily improper." It went on to say that there was no evidence that the trustees used their office for personal gain. Moreover, the decedent's plan evidenced an intent that the trustees also be officers of the businesses owned by the trust and thus the conflict of interest had been pre-approved by the decedent. *See also Gregory v. Moose*, 590 S.W. 2d 665, 670 (Ark. Ct. App. 1979)(trustee benefited from the sale of trust property, but that was contemplated by the provisions of the will and his dual role as trustee and beneficiary).

Of course, a PR can cleanse a transaction from a conflict of interest by seeking and obtaining court approval, *Floridstone N.V. v. Fitzpatrick*, 606 So. 2d 513 (Fla. 4th DCA 1992), especially when the beneficiaries oppose the action in court. *Iandoli v. Iandoli*, 547 So. 2d 666 (Fla. 4th DCA 1989). Even without opposition of any substance, the PR should consider presenting evidence at a hearing on a petition to approve a transaction involving a conflict of interest because the appellate courts require more than rubber stamping. *Taylor v. Hopkins*, 472 So. 2d 1355, 1356 (Fla. 5th DCA 1985)(findings of fact required); *In*

re Estate of Collin, 279 So. 2d 48 (Fla. 4th DCA 1973)(PR has burden of proof and trial court must make factual finding based on evidence.).

If the PR fails to comply with section 733.610, the PR may be responsible for attorney fees of the party harmed by the PR's action. *Estate of Salomon*, 791 So. 2d 1150, 1153 (Fla. 3d DCA 2001); *Brake v. Murphy*, 749 So. 2d 1278, 1282 (Fla. 3d DCA 2000).

Section 736.0802(10), Florida Statutes, sets forth detailed guidelines for a trustee who uses trust assets to defend against allegations of a breach of trust. In those breach of trust actions, the trustee must give notice to qualified beneficiaries before using trust assets to pay fees. The beneficiary may then seek a court order to prevent the use of trust assets during the action. The beneficiary is required to prove that there is a reasonable basis to conclude that there has been a breach of trust. The court has the power to disgorge fees paid to the attorney if the beneficiary makes the proper showing.

ADDRESSING CREDITORS AND THEIR CLAIMS

In general, a fiduciary must defend and protect against creditor claims for which there is a reasonable basis to dispute the claim. A PR owes an established or undisputed creditor certain duties as an interested person, but those duties do not extend to contingent creditors. A PR's failure to object to a creditor's claim so that it is deemed allowed when a basis exists to dispute the claim is actionable. *In re*

Estate of Freedman, 180 So. 2d 370 (Fla. 3d DCA 1965); *Goggin v. Shanley*, 81 So. 2d 728 (Fla. 1955). A PR is not liable for objecting to a claim that is later found to be valid. *Landon v. Isler*, 681 So. 2d 755 (Fla. 2d DCA 1996). A PR who failed to give an ascertainable creditor notice and then made distributions to beneficiaries was liable for surcharge when there were insufficient estate assets to pay the creditor. *Miller v. Estate of Baer*, 837 So. 2d 448 (Fla. 4th DCA 2002). A PR who in good faith gives notice to a person who may be a creditor is not individually liable, even if it is later determined that notice was not required. Section 733.2121(3)(b), Fla. Stat.

When a discretionary trust is involved, a fiduciary must pay close attention to the so-called "exception creditors". Those are persons who are a beneficiary's former spouse or child and who have a judgment or court order against the beneficiary for support or maintenance. Under certain circumstances, exception creditors may obtain a continuing writ of garnishment against the trustee. In such instance, the trustee may be required to reserve funds to satisfy the obligation to the exception creditor on a continuous basis prior to making distributions to the beneficiary. *Berlinger v. Casselberry*, 133 So. 3d 961 (Fla. 2d DCA 2013). A trustee who does not reserve assets for a continuing future obligation to satisfy the exception creditor might be subject to surcharge for making an improper distribution.

REMEDIES[1]

The fiduciary is answerable for loss or damage caused by a breach of duty. Section 733.609, Fla. Stat. (PR is liable to an interested person for damage resulting from a breach of fiduciary duty). The PR also can be removed for maladministration, or a conflict of interest. Section 733.504(5),(9) Fla. Stat.

A trustee is subject to the basic remedies outlined in section 736.1001, Florida Statutes: compel performance of duties; enjoin a breach of trust; compel redress by paying money or restoring property by other means; account; appoint a special fiduciary; suspend the trustee; reduce or deny compensation; impose a lien or constructive trust on trust property; and any other appropriate relief.

The measure of damages for a breach of trust is the greater of what is required to restore the trust to the value it would have been but for the breach, or the profit made by the trustee as a result of the breach. Section 736.1002, Fla. Stat. If more than one person is liable to the beneficiaries for breach of trust, each person liable is entitled to pro rata contribution based upon the degree of fault. *Id*. at (2), (3).

In addition, a trustee or PR may be liable for attorney fees under sections 736.1004 or 733.609, Florida Statutes, following the rule in chancery. *In re Estate of Simon*, 549 So. 2d 210, 212 (Fla. 3d DCA 1989)("[i]n chancery or equity

[1] An exculpatory clause is often a potential defense of the fiduciary. Sections 733.620 and 736.1011, Florida Statutes, describe the limits on use of these clauses.

actions, the well-settled rule is that 'costs follow the judgment unless there are circumstances that render application of this rule unjust'"); *Snyder v. Bell,* 746 So. 2d 1100, 1103 (Fla. 2d DCA 1999).

MODIFICATION OF TRUSTS

Our jurisprudence now more than ever recognizes that the written terms of a will or trust are not always set in stone after the death of the settlor. A disgruntled heir or beneficiary often looks to modify a trust if its existing terms are not satisfactory. Of course, the trust is irrevocable, but our law provides options for modifying its terms.

Purpose of the trust not being fulfilled

A trust can be modified if the settlor's purpose is not being fulfilled. Section 736.04113(1), Fla. Stat. A trustee or qualified beneficiary must show that: (a) the purposes of the trust have been fulfilled or become illegal, impossible, wasteful, or impracticable to fulfill; (b) because of circumstances not anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of a material purpose of the trust; or (c) a material purpose of the trust no longer exists.

The court's power in this regard is very broad. The court may amend or change the terms of the trust, terminate the trust in whole or in part, direct or permit the trustee to do acts that are not otherwise authorized by the trust, or

prohibit acts that are required by the trust. While the court has discretion in deciding whether to modify a trust, it must consider the following: (a) the terms and purposes of the trust; (b) the facts and circumstances surrounding the creation of the trust; (c) extrinsic evidence relevant to the proposed modification; and (d) spendthrift provisions, which do not prevent a modification. Section 736.04113(3), Fla. Stat.

Modify the trust for best interests of beneficiaries

Irrevocable trusts created after December 31, 2001 and revocable trusts that became irrevocable after December 31, 2000 can be modified based on the best interests of the beneficiaries. Section 736.04115(c)(3), Fla. Stat. A settlor can opt-out of the statute if: (1) she does not use the 360 year rule against perpetuities and (2) she expressly prohibits judicial modification in the trust. *Bellamy v. Langfitt*, 86 So. 3d 1170 (Fla. 3d DCA 2012). Otherwise, the trust can be modified for the best interests of the beneficiaries.

The court's authority to modify or terminate a trust and the circumstances to be considered are the same as that described above when the settlor's purpose is not being fulfilled. The trust can be modified by the court if compliance with its terms is not in the best interests of the beneficiaries.

Modify the trust to achieve tax objectives

The court may modify the terms of a trust to achieve a settlor's tax objectives if the modification is not contrary to the settlor's probable intent. Section 736.0416, Fla. Stat.

Nonjudicial settlement agreements and modification of trust

Interested persons may enter into a binding settlement agreement without instituting a judicial proceeding with respect to any matter involving the trust under certain conditions. First, the terms and conditions of the agreement could be properly approved by the court if court approval was sought; and second, the agreement does not produce a result that is not authorized under the Florida Trust Code, including but not limited to, terminating or modifying the trust in an impermissible manner. Section 736.0111(1)-(3), Fla. Stat.

Interested persons are defined as those whose interest would be affected by the settlement. Those interested persons may request court approval of the settlement agreement. The matters that may be resolved include, among other things, approval of a trustee's report or accounting, the resignation of a trustee, the liability of a trustee relating to the trust and fiduciary compensation. Section 736.0111(4), Fla. Stat.

A settlement agreement that does not include all beneficiaries may be enforceable in certain circumstances. *Losey v. Norwest Bank of New Mexico N.A.*,

80 P. 3d 98 (N.M. Ct. App. 2003); *Saunders v. Muratori*, 251 P. 3d 550 (Colo. Ct. App. 2010)(approval of settlement over objection by a non-consenting beneficiary).

Modification by a trust protector

A trust instrument may permit a third party trust protector to modify the terms of a trust after the settlor's death to effectuate the settlor's intent. *Minassian v. Rachins*, 152 So. 3d 719 (Fla. 4th DCA 2014). In *Minassian*, the trustee of a family trust was being sued for accountings and breach of fiduciary duty and the trustee then appointed a trust protector to modify the trust's provisions. The Fourth District reversed the trial court and found that trust provisions were ambiguous and the trust protector could modify the provisions to effectuate the settlor's intent.

The court found that section 736.0808(3) "expressly allows a trust to confer the power to direct modification of the trust on persons other than trustees." *Id*. at 724. It also ruled that sections 736.0410-736.04115 and 736.0412 do not provide the exclusive means to modify a trust insofar as a trust grants a trust protector the power to do so.

REFORMATION OF WILLS AND TRUSTS

The intent of a testator or settlor is usually significant in disputes over testamentary instruments. While many courts are resistant to reforming an instrument, the law permits reformation under proper circumstances.

A claim for reformation of a trust existed in the common law and is codified in Florida law. Section 736.0415, Fla. Stat. Upon clear and convincing evidence that a trust does not correctly reflect the settlor's intent, a trust shall be reformed to conform to the settlor's intent. *Megiel-Rollo v. Megiel*, 162 So. 3d 1088 (Fla. 2d DCA 2015)(reformation may be available to correct scrivener's errors and more complex, substantive drafting errors); *Popp v. Rex*, 916 So. 2d 954 (Fla. 4th DCA 2005)(affirming reformation of trust to correct drafting error); *Davis v. Rex*, 876 So. 2d 609 (Fla. 4th DCA 2004); *Schroeder v. Gebhart*, 825 So. 2d 442 (Fla. 5th DCA 2002)(reformation for scrivener's error); *In re Estate of Huls*, 732 So. 2d 1206 (Fla. 2d DCA 1999)(reformation was not available when there was no proof of a drafting mistake); *Robinson v. Robinson*, 720 So. 2d 540 (Fla. 4th DCA 1998)(reformation available to correct drafting error).

Section 736.0415 has broad scope and is a remedial statute so that it should be liberally construed. *Megiel*, *supra*, at 1098. In *Megiel*, the court concluded that reformation was available to correct an alleged drafting error resulting from the

omission to prepare and incorporate into the trust a contemplated schedule of beneficial interests.

After *Megiel*, the Second District held that a trust amendment's improper execution could not be corrected by reformation or by the imposition of a constructive trust. *Kelly v. Lindenau*, 223 So. 3d 1074 (Fla. 2d DCA 2017). This holding makes it clear that *Megiel* cannot be used to reform an instrument that was not executed with the proper formalities.

The requirements in section 736.0415 for reformation involving mistakes by a drafter should produce an identical result when applying common law reformation. *Schroeder, supra* at 446. Extrinsic evidence concerning the intent of the settlor and the existence and effect of a drafting mistake is considered, even if the trust is unambiguous. *Id*. at 443-44 (testimony of drafter); *Robinson, supra*; *Rex, supra* at 610-11(testimony of drafter and financial advisor); *Megiel* (affidavit of draftsman regarding mistake).

It is usually important to establish a mistake in the expression of the settlor's intent for success with a claim of reformation. The drafter's testimony is often critical, although malpractice consequences that follow an admission of a mistake by the drafter may affect the drafter's credibility. *Schroeder, supra*; *Brinker v. Wabaco Trust Limited*, 610 S.W. 2d 160 (Tex. Ct. App. 1980).

If there is a lack of clear and convincing proof of a mistake, and the provision of the trust is unambiguous and was understood by the settlor, reformation has been denied. *Reid v. Estate of Sonder*, 63 So. 3d 7 (Fla. 3d DCA 2011*); In re Estate of Huls*, 732 So. 2d 1206 (Fla. 2d DCA 1999). In *Reid*, the drafter admitted a mistake, but reformation was nevertheless denied. In *Huls*, the court found the record was completely devoid of a reason for reformation.

Qualified beneficiaries have standing to seek reformation of a trust, and a trustee also has such standing. *Reid v. Temple Judea*, 994 So. 2d 1146 (Fla. 3d DCA 2008).

Time limit for seeking reformation

Like other causes of action, one for reformation has a time limit within which it must be brought. Because reformation is an equitable claim, it is generally governed by the doctrine of laches. However, in certain circumstances a comparable statute of limitations in an action at law may apply. *Corinthian Investments, Inc. v. Reeder*, 555 So. 2d 871 (Fla. 2d DCA 1989); *Niagara Fire Ins. Co. v. Allied Electrical Co*., 319 So. 2d 594 (Fla. 3d DCA 1975); section 95.11(6), Fla. Stat. (codifies statutory laches); *Corya v. Sanders*, 155 So. 3d 1279 (Fla. 4th DCA 2015)(applying statutory laches to claim for trust accountings).

The court in *Corinthian* found that there was no comparable action at law to reformation and declined to apply a statute of limitations to bar reformation. In

Ryan v. Gonzalez, 841 So. 2d 510 (Fla 4th DCA 2003), the court discussed the statute of limitations in section 95.11, Florida Statutes, as applicable to a reformation claim where the party apparently conceded in the trial court that it applied.

Reformation of a will

While not as frequently employed, Florida law permits reformation of a will in the same manner as a trust. The court may reform a will, even if unambiguous, to conform the terms to the testator's intent. Section 732.615, Fla. Stat. The interested person seeking reformation must prove by clear and convincing evidence that both the accomplishment of the testator's intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement. The court may consider evidence of the testator's intent even though it contradicts the apparent plain meaning of the will. *Id*.

A will may be modified to achieve the testator's tax objectives in a manner that is not contrary to the testator's probable intent in the same manner as a trust. Section 732.616, Fla. Stat.

CONSTRUCTION OF A WILL OR TRUST

A claim to construe a will or trust has existed in the common law as long as instruments have been written and ambiguous provisions have found their way into the instruments. The construction principles are generally the same. The settlor or

testator's intent is the polestar for interpretation. *McKean v. Warburton*, 919 So. 2d 341 (Fla. 2006). It must be ascertained from the language in the document taken together. A contrary intent in a will may override the common law or statutory rules of construction. Section 732.6005(1), Fla. Stat. Parol evidence is not admissible if the will or trust is unambiguous. Simply because each party argues a different meaning to a provision does not mean the language is ambiguous and opens the door to parol evidence. *Minassian v. Rachins*, 152 So. 3d 719, 724-25 (Fla. 2d DCA 2014).

The grantor's intent should not be determined by isolated words or phrases, but by construction of the instrument as a whole and the general plan. *Vigiliani v. Bank of America, N.A.*, 189 So. 3d 214 (Fla. 2d DCA 2016); *Pounds v. Pounds*, 703 So. 2d 487 (Fla. 5th DCA 1997); *Roberts v. Sarros*, 920 So. 2d 193 (Fla. 2d DCA 2006). The court may consider all circumstances surrounding the execution of the will, the condition, nature and extent of the property devised, the testator's relationship and attitudes toward the members of the family and to the beneficiaries, their financial condition and the relationship between all parties involved. *Pancoast v. Pancoast*, 97 So. 2d 875, 876 (Fla. 2d DCA 1957); *Kernkamp v. Bolthouse*, 714 So. 2d 655 (Fla. 5th DCA 1998).

The meaning applied cannot lead to absurd results. *Bryan v. Dethlefs*, 959 So. 2d 314 (Fla. 3d DCA 2007). Courts prefer any reasonable construction of a

will rather than intestacy or partial intestacy. *SPCA Wildlife Care Center v. Abraham*, 75 So. 3d 1271 (Fla. 4th DCA 2011). A court may transpose, insert, or eliminate words to effectuate the testator's intent. *In re Estate of Reese*, 622 So. 2d 157 (Fla. 4th DCA 1993); *In re Estate of Wood*, 226 So. 2d 46, 50 (Fla. 2d DCA 1969). The cases hold that a construction issue is usually one of law.

In most instances, the testimony of a draftsperson is very important in a construction proceeding. After all, the draftsperson usually knows the most specific information about their client's testamentary intent. However, the draftsperson of a will was not permitted to testify about his or her own interpretation of language used in a will because the testator's intent, not the draftsman's intent, is the polestar of construction. *In re Estate of Lenahan*, 511 So. 2d 365 (Fla. 1st DCA 1987).

There are several statutory rules for construction of wills. Sections 732.601(simultaneous death law); 732.603(ademption); 732.603(failure of testamentary provision); 732.605(change in securities, accessions); 732.606 (nonademption of specific devises in certain situations); 732.607(exercise of power of appointment); 732.608 (construction of terms); 732.609 (ademption by satisfaction); 732.611 (devises to multigenerational classes are per stirpes); 732.517 (penalty clause in will).

With respect to ambiguous instruments, the court in *Garcia v. Celestron*, 2 So. 3d 1061 (Fla. 3d DCA 2009), sets out the procedure in which determinations are properly made to admit parol evidence and construe a will. A latent ambiguity is present when the language of a will applied to the subject matter of a devise or devisee creates an ambiguity. *Kernkamp v. Bolthouse*, 714 So. 2d 655 (Fla. 5th DCA 1998). Because the ambiguity is disclosed by reference to facts that do not appear in the will, extrinsic evidence is admitted to resolve the latent ambiguity. *Harbie v. Falk*, 907 So. 2d 566 (Fla. 3d DCA 2005).

A patent ambiguity is more obvious and arises when provisions of a will are conflicting or not clear. The Third District does not accept the distinction in ambiguities and permits extrinsic evidence whenever an ambiguity exists. *Campbell v. Campbell*, 489 So. 2d 774 (Fla. 3d DCA 1986). Other districts have found that extrinsic evidence is admissible to resolve ambiguities, but has not directly addressed whether extrinsic evidence should be admitted to resolve a patent ambiguity. *See e.g. Dutcher v. Estate of Dutcher*, 437 So. 2d 788 (Fla. 2d DCA 1983).

Attorney fees in a construction proceeding

In construction proceedings, you should bear in mind that attorney fees may be awarded from the estate or trust if the attorney's services benefited the estate or

trust and the testator or settlor's intent was carried out. Sections 733.106(3); 736.1005, Fla. Stat.