FLORIDA FELLOWS INSTITUTE
THIRD ANNUAL INSTITUTE

February 6, 2019
Tampa, Florida

***SUNSHINE ON A CLOUDY DAY*: HISTORY AND HIGHLIGHTS OF THE FLORIDA PROBATE CODE**

John C. Moran, Esq.
Gunster, Yoakley & Stewart, P.A.
West Palm Beach, FL 33401
jmoran@gunster.com

as Supplemented by
Charles Ian Nash, Esq.
Nash & Kromash, LLP
Melbourne, Florida 32901
charlie@n-klaw.com

Introduction

Where does the Florida Probate Code come from? Why do we even have a "probate code"? Has Florida adopted the Uniform Probate Code ("UPC")? What about the Florida Probate Rules? What's the difference between the "Code" and the "Rules"? Why am I asking these questions? Does it even matter?

Although the UPC was intended for adoption by all 50 states, the original 1969 version of the code was adopted in its entirety by only the following sixteen states: Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota, and Utah. You will notice that Florida is on that list – but that's not the end of the story.

The Uniform Law Commission no longer lists Florida as one of the states that has adopted the UPC. Our *Florida-ized* version departs from the UPC in a myriad of ways. By way of example, consider *Payne v. Stalley*, 672 So. 2d 822 (Fla. 2d DCA 1995), in which a Michigan lawyer relied on the official text of the UPC and failed to check the statute as it had been adopted in Florida. As a result, the lawyer missed a filing deadline on a $3,760,909.49 claim. As the Second DCA pointed out, "[w]e cannot rewrite Florida probate law to accommodate a Michigan attorney more familiar with the Uniform Probate Code." Ouch.

How many of you have read the Florida Probate Code from beginning to end? Even if you have, I think you would be surprised to find things that you forgot were in there. The goal of these materials is to give you slightly more than a "one-hour tour" of the Florida Probate Code, with an emphasis on the key issues involved in administering a Florida estate.

Chapter 731 – Probate Code: General Provisions

I. Statutes, Substantive Rights, and Procedures

A. Statutes. The Florida Probate Code, which is found in Florida Statutes Chapters 731-735 ("Code"), sets forth the basic substantive law that applies to a probate proceeding. F.S. § 731.105. The legislature enacts the laws that govern substantive rights. F.S. § 731.011.

B. What Provisions Apply? The Code originally became effective on January 1, 1976. F.S. § 731.011. The Code was revamped effective January 1, 2002. F.S. § 731.155 provides that substantive rights that vested prior to January 1, 2002 are determined as provided by the former provisions of the Code. Thus, if a decedent died before January 1, 2002, you must be careful to apply the proper provisions.

C. Rules. The Florida Probate Rules ("Rules") govern the procedural aspects of a probate proceeding. The Florida Constitution vests the Florida Supreme Court with the power to adopt rules for practice and procedure in all courts. Thus, the Rules are promulgated by order of the Florida Supreme Court. If there is a conflict between the Code and the Rules, the Rules control over any procedural provisions located in the Code.

1. General Rule. The Florida Rules of Civil Procedure only apply as provided in the Rules. The Rules provide that the Florida Rules of Civil Procedure apply with respect to discovery and the issuance of a subpoena. Rule 5.010, Rule 5.080.

2. Exception. If a proceeding is an adversary proceeding or declared an adversary proceeding, as set forth in Rule 5.025, then the proceeding is conducted similar to suits of a civil nature, and the Florida Rules of Civil Procedure apply.

D. Construction against implied repeal. The Code is intended as a unified coverage of its subject matter. No part of it shall be impliedly repealed by subsequent legislation if that construction can be reasonably avoided. F.S. § 731.102.

II. Evidence as to death or status -- F.S. § 731.103; Rule 5.171

A. Death Certificate. An authenticated copy of a death certificate is prima facie proof of the death. F.S. § 731.103(1); Rule 5.171(a).

B. Governmental Documents. A copy of any record or report of a governmental agency, domestic or foreign, evidencing that a person from the facts related is presumed dead, is prima facie evidence of the status of death. F.S. § 731.103(2); Rule 5.171(b).

C. Lapse of Time. A person who is absent from the place of his or her last known domicile for a continuous period of 5 years and whose absence is not satisfactorily explained after diligent search and inquiry, is presumed dead. His or her death is presumed to have occurred at the end of the period unless there is evidence establishing that death occurred earlier. F.S. § 731.103(3); Rule 5.171(c).

D. Circumstantial Evidence. In *Woods v. Estate of Woods*, 681 So.2d 903 (Fla. 4th DCA, 1996), the decedent was a member of a crew whose ship sank during a hurricane. The Coast Guard conducted an extensive search and found some survivors, but the decedent was not among the survivors. The Fourth DCA held that the death could be proven by circumstantial evidence. The standard of proof to be applied is "whether the circumstantial evidence amounts to a preponderance of all reasonable inferences that can be drawn from the circumstances in evidence to the end that the evidence is not reasonably susceptible to two equally reasonable inferences." This concept was codified in 2007, as F.S. § 731.103(4) statutorily permits proof of death by direct or circumstantial evidence.

III. Application of the rules of evidence -- F.S. § 731.1035; Rule 5.170

The rules of evidence in civil actions apply unless the Code or Rules provide otherwise.

IV. Verification of documents -- F.S. § 731.104; Rule 5.020; Rule 5.330

A. Verification. If a document is required to be verified it must include the following oath or affirmation provided in Rule 5.020 (e): "Under penalties of perjury, I declare that I have read the foregoing, and the facts alleged are trust, to the best of my knowledge and belief." The following probate filings must be verified:

1. Petition for Appointment of Curator – Rule 5.122
2. Petition for Administration – Rule 5.200
3. Petition to Probate a Will Without Administration – Rule 5.210
4. Statement Regarding Creditors – Rule 5.241
5. Inventory – Rule 5.340
6. Safe Deposit Box Inventory – Rule 5.342
7. Petition for Order Authorizing Search of Safe Deposit Box – Rule 5.3425
8. All Accountings – Rule 5.345, 5.346
9. Petition to Continue Unincorporated Business or Venture – Rule 5.350
10. Petition to Sell Real Property Where No Power Conferred – Rule 5.370

11. Petition to Determine Homestead – Rule 5.405

12. Petition to Determine Exempt Property – Rule 5.406

13. Petition to Determine Family Allowance – Rule 5.407

14. Petition for Resignation of Personal Representative – Rule 5.430

15. Statement of Claim (Creditor) – Rule 5.490

16. Petition for Summary Administration - Rule 5.530

B. Documents that must be signed by the Personal Representative. Pursuant to Rule 5.330, the following documents must be signed by the personal representative:

1. inventory;

2. accountings;

3. petition for sale or confirmation of sale or encumbrance or real or personal property;

4. petition to continue business of decedent;

5. petition to compromise or settle claim;

6. petition for distribution and discharge; and

7. resignation of personal representative.

V. In rem proceeding -- F.S § 731.105

A. Exclusive jurisdiction over estates of decedents in Florida is vested in the Circuit Courts. Art. V. § 20(c)(3), Fla. Con.; F.S. § 26.012(2)(b).

B. Jurisdiction over a decedent's estate is "in rem" jurisdiction. Thus, the Court has jurisdiction over the res (property of the estate) and, after reasonable notice, the court can also decide the rights of the person to the property.

C. "In personam" jurisdiction is needed in order to obtain a personal judgment or order of a person. Although probate proceedings are generally in rem, "in personam" jurisdiction may be acquired in several instances after some form of personal notice/service is provided or there is a waiver or voluntary appearance (i.e. elective share, exempt property, will contest, determination of beneficiaries, family allowance, or proceedings to compel the personal representative to account or distribute). Generally, the personal representative becomes subject to the "in personam" jurisdiction of the court upon filing the petition for appointment.

D. A personal judgment may not be entered against a person unless the court has "in personam" jurisdiction. However, a judgment affecting the property rights may be entered.

VI. Assets of Nondomiciliaries – F.S. § 731.106

A. Debts. A debt in favor of a nondomiciliary, other than one evidenced by investment or commercial paper or other instrument, is located in the county where the debtor resides or, if the debtor is not an individual, at the place where the debtor has its principal office. Commercial paper, investment paper, and other instruments are located where the instrument is at the time of death.

B. Florida Property. When a nonresident decedent, whether or not a citizen of the United States, provides by will that the testamentary disposition of tangible or intangible personal property having a situs within Florida, or of real property Florida, shall be construed and regulated by the laws of Florida, the validity and effect of the dispositions shall be determined by Florida law. The court may, and in the case of a decedent who was at the time of death a resident of a foreign country the court shall, direct the personal representative appointed in this state to make distribution directly to those designated by the decedent's will as beneficiaries of the tangible or intangible property or to the persons entitled to receive the decedent's personal estate under the laws of the decedent's domicile.

C. The *Saunders* Issue. When Florida adopted the Uniform Probate Code in 1975, it included section 731.106, which states, in subsection (2), that when a nonresident decedent provides by will that property located in Florida, including real property, shall be governed by Florida law, then Florida law shall apply. As it related to real property, the statute was merely restating the well-known common law principle of lex loci rei sitae. The way the statute was worded, however, gave rise to a possible negative implication: if a testator could mandate that Florida law govern the disposition of real property in Florida, then in the absence of such a direction the law of the decedent's domicile would apply.

The First DCA, in *Saunders v. Saunders*, 796 So.2d 1253, 1254 (Fla. 1st DCA 2001), applied that negative implication to reach its decision. The court held that the laws of the nonresident decedent's domicile govern the disposition of the Florida real property when the will of a nonresident testator does not provide that Florida law shall determine the validity and effect of the disposition of the nonresident testator's Florida property. In reaching its holding, the court stated that "[t]he common law is changed where a statute clearly, unequivocally, and specifically prescribes a different rule of law from a common law rule, as does section 731.106(2). *Saunders*, 796 So.2d at 1254.

D. Disposition of Florida Real Property

In light of the ruling in *Saunders*, the 2016 Florida Legislature passed legislation which clarifies that Florida common law regarding the Florida real property of nonresident decedents was not changed, but rather codified, by the enactment of F.S. § 731.106(2). Newly created F.S. § 731.1055 confirms that Florida law governs the validity and effect of the disposition of Florida real property, whether owned by resident or nonresident, and regardless of any directive in a will:

> F.S. 731.1055. Disposition of real property. – The validity and effect of a disposition, whether intestate or testate, of real property in this state shall be determined by Florida law.

In order to avoid confusion, Chapter 2016-189 of the Laws of Florida also included a corresponding amendment to existing statute F.S. § 731.106(2) as follows:

> (2) When a nonresident decedent, whether or not a citizen of the United States, provides by will that the testamentary disposition of tangible or intangible personal property having a situs within this state~~, or of real property in this state,~~ shall be construed and regulated by the laws of this state, the validity and effect of the dispositions shall be determined by Florida law. The court may, and in the case of a decedent who was at the time of death a resident of a foreign country the court shall, direct the personal representative appointed in this state to make distribution directly to those designated by the decedent's will as beneficiaries of the tangible or intangible property or to the persons entitled to receive the decedent's personal estate under the laws of the decedent's domicile.

VII. Caveat; proceedings – F.S. § 731.110; Rule 5.260

A. Who May File. Any interested person, including a creditor, may file a caveat with the court. F.S. § 733.110(1); Rule 5.260(a).

B. When Can a Caveat be Filed? The caveat of an interested person, other than a creditor, may be filed before or after the death of a person for whom the estate will be, or is being, administered. The caveat of a creditor may be filed only after the person's death. F.S. § 733.110(1).

C. Effect of Filing.

1. Interested person. If a caveat is filed by an interested person (as opposed to a creditor) the court cannot admit the will to probate or appoint a personal representative until the interested person receives formal notice of the submission of a will for probate. Rule 5.260(f). If the will is challenged, the trial court is required to rule on the challenge to the will before proceeding to probate or appointing the personal representative designated by the contested will. *Grooms v. Royce*, 638 So.2d 1019 (Fla. 5th DCA 1994).

2. Creditor. If a caveator is a creditor, the clerk must notify the caveator in writing of the date of issuance of letters of administration. Rule 5.260(e).

D. Expiration of Pre-Death Caveat. A caveat filed before the death of the person for whom the estate will be administered expires 2 years after filing. F.S. § 731.110.

VIII. *Select* General Definitions – F.S. § 731.201

A. Beneficiary. As a general rule, a beneficiary of a trust is not a beneficiary of the estate of which that trust is a beneficiary. However, if each trustee is also a personal representative of the estate, the beneficiary or beneficiaries of the trust are treated as beneficiaries of the estate.

B. Claim. The term claim includes funeral expenses. The term claim does not include expenses of administration or taxes.

C. Devisee. As a general rule, in the case of a devise to a trust, the trustee of the trust is considered the devisee for purposes of the Code. However, if each trustee is also a personal representative of the estate, then the beneficiaries of the trust are considered devisees of the estate.

D. Interested Persons. The meaning may vary from time to time during the estate proceeding. It is important to note that a creditor of the estate is an interested person to the extent the outcome of a particular proceeding may affect the creditor's rights.

E. Protected Homestead. Protected Homestead does not include real property that is owned as tenants by the entirety. It applies only to real property that at the death of the owner the exemption under the Constitution inures to the owner's surviving spouse or heirs. Thus, if the decedent is not survived by a spouse and the decedent devises the homestead to someone other than an heir at law the homestead is not "Protected Homestead".

IX. Notice F.S. § 731.301; Rule 5.040; 5.041; 5.042

A. Formal Notice.

1. When required. Unless formal notice is specified by the Code or Rules, formal notice is not required. However, formal notice may be given in lieu of informal notice at the option of the person giving notice. Rule 5.040(d). If optional formal notice is used, then formal notice must be given to all interested persons entitled to notice. Rule 5.040(d)

2. Method. Formal notice is given by serving a copy of the pleading or motion on an interested person, or the person's attorney, if the person has appeared through an attorney or requested that notice be sent to his or her attorney. A notice must accompany the pleading or motion stating that the person served must file and serve written defenses within 20 days after service and informing the person served that failure to serve written defenses within the time required may result in a judgment or order being entered for the relief demanded, without any further notice. Rule 5.040(a)(1).

3. Manner of Service. Formal notice must be served by one of the following methods:

a. Any commercial delivery service requiring a signed receipt (i.e. FedEx).

b. Any form of mail requiring a signed receipt (i.e. certified mail).

c. As provided in the Florida Rules of Civil Procedure or as otherwise provided by Florida law for service of process (i.e. service of process).

4. Proof of Service. Proof of service is accomplished by filing a verified statement of the person giving the notice along with the signed receipt or other evidence of satisfactory proof of service. Service is complete upon receipt of the notice.

5. Effect. Formal Notice is sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the person's interest in the estate. If the person fails to serve a written answer or defense within the 20-day period, the court is authorized to consider the pleading or motion *ex parte* as to that person. The failure to file a response does not allow for the entry of a default against the person. Formal notice also does not afford "in personam" jurisdiction. Formal notice is only a method of service.

6. September 1, 2016 Amendment to Rule 5.040. On September 1, 2016, the Florida Supreme Court amended Rule 5.040 to add a new subdivision (e). This subdivision provides that if a document is served in the manner provided for in service of formal notice, service will be deemed complete when the document is received, and that proof of service shall be made in the manner set forth in Rule 5.040(a)(4). See *In Re: Amendments to the Florida Probate Rules*, 199 So. 3d 835 (Fla. 2016).

X. Waiver and Consent – F.S. § 731.302

Subsequent to the filing of a petition for administration, an interested person, including a guardian ad litem, administrator ad litem, guardian of the property, personal representative, trustee, or other fiduciary, or a sole holder or all coholders of a power of revocation or a power of appointment, may waive, to the extent of that person's interest or the interest which that person represents, subject to the provisions of F.S. §§ 731.303 and 733.604, any right or notice or the filing of any document, exhibit, or schedule required to be filed and may consent to any action or proceeding which may be required or permitted by the Code.

XI. Representation -- F.S. § 731.303

A. Common-law Doctrine of Virtual Representation. Under common law, unknown, unborn, unascertained, and sometimes minor beneficiaries can be represented by one or more persons who have identical, similar, or greater interest with no disabling conflicts and who appear to the court to represent adequately the interests of the otherwise unrepresented person.

B. Representation Under the Code. The Code expands the definition of persons who can be bound by a court order that binds others who are not parties to the proceedings.

1. Under the Code, persons are bound by orders binding others in the following cases:

a. takers under a power of appointment or revocation are bound by orders binding the holders of the power, F.S. § 731.303(1)(a);

b. a ward is bound by orders binding the guardian of the property, F.S. § 731.303(1)(b)1;

c. beneficiaries of a trust are bound by orders binding the trustee, F.S. § 731.303(1)(b)2;

d. beneficiaries of an estate are bound by orders binding the personal representative F.S. § 731.303(1)(b)3;

e. unborn, or unascertained persons, or a minor or any other person under a legal disability, who is not otherwise represented, is bound by an order to the extent that person's interest is represented by another party having the same or greater quality of interest F.S. § 731.303(c); and

f. takers under a power of appointment or revocation are bound by agreements, waivers, consents, approvals, accounts, trust accounting and other written reports that adequately disclose matters set forth therein that are binding on the holders of the power. F.S. § 731.303(5)

2. Both common law and the Code recognize that a conflict of interest between the representative person and the represented person will disqualify the representative person from binding the interest of the represented person. In any case in which the court determines that representation of the interest would be inadequate, a guardian ad litem for the represented person may be appointed. F.S. § 731.303(4).

3. Notice must be given as prescribed by the Rules to every interested person or the representative person who can bind the interested person, or both. § 731.303(3)(a). Notice is given to unborn or unascertained persons who are not otherwise represented by giving notice to all known persons whose interest in the proceedings are the same as, or of a greater quality than, those of the unborn or unascertained persons. F.S. § 731.303(3)(b).

XII. Arbitration of Disputes – F.S. § 731.401

A provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or a part of a will or trust, between or among the beneficiaries and a fiduciary under the will or trust, or any combination of such persons or entities, is enforceable. Unless otherwise specified in the will or trust, a will or trust provision requiring arbitration is presumed to require binding arbitration under chapter 682, the Revised Florida Arbitration Code.

Chapter 732 – Intestate Succession and Wills

I. Part I. - Intestate Succession – F.S. §§ 732.101 – 732.111

An entire chapter of a book could be written on intestate succession in the State of Florida. Indeed, one has. See Michael D. Simon, William T. Hennessey, John C. Moran, and Jamison C. Evert, *Intestate Succession*, Litigation under Florida Probate Code, 10th Ed. (2015).

A. Generally

Any part of the estate of a person that is not disposed of by will is controlled by the intestacy provisions of the Florida Probate Code, F.S. § 732.101–732.111. A testator may choose

to dispose of only a portion of his or her estate by will, allowing the balance to descend under the laws of intestate succession. *Aldrich v. Basile,* 136 So.3d 530 (Fla. 2014).

Under F.S. § 732.101(2), it is the event of the decedent's death that vests the heirs' right to intestate property. That right, however, is subject to the right of the personal representative to possession of the estate under F.S. § 733.607. See *In re Estate of Slater*, 437 So.2d 1110 (Fla. 5th DCA 1983); *Ray v. Rotella*, 425 So.2d 94 (Fla. 5th DCA 1983). There is no distinction in Florida between vesting in realty or personalty.

In cases involving intestacy, persons qualifying as beneficiaries of the decedent's estate are known as "heirs" or "heirs at law." F.S. § 731.201(2), (20). See also F.S. § 731.201(6) and (9) (defining "collateral heir" and "descendant" respectively).

B. Spouse's Share of Intestate Estate

Florida Statute 732.102 provides for the share of the spouse in an intestate estate. If there are no surviving descendants of the decedent, the spouse takes the entire estate. F.S. § 732.102(1). However, if there are surviving descendants of the decedent, it must be determined whether they are all lineal descendants of the surviving spouse.

If the decedent is survived by a spouse and descendants, all of whom were also descendants of the surviving spouse (*e.g.*, children or grandchildren of the one marriage), and the spouse has no other descendant, the surviving spouse takes the entire intestate estate. F.S. § 732.102(2). The share passing to the surviving spouse changed significantly under this scenario as part of the 2011 legislative session. Under prior law, the surviving spouse would have taken $60,000 plus one half of the balance of the intestate estate. F.S. § 732.102 (2010). The 2011 legislative change recognized that, in most instances, when all lineal descendants of the spouses are of the same marriage, spouses generally tend to leave most of their assets to the surviving spouse. The new legislation is applicable to the estates of decedent's dying on or after October 1, 2011. Ch. 2012-109, §2, Laws of Fla.

If there are surviving descendants of the decedent, one or more of whom are not the lineal descendants of the surviving spouse (*e.g.*, children or grandchildren from a previous marriage), the surviving spouse takes one half of the intestate estate. F.S. § 732.102(3). Likewise, if there are one or more descendants of the decedent, all of whom are also descendants of the surviving spouse, *and the surviving spouse has one or more descendants who are not descendants of the decedent*, the surviving spouse receives one-half of the intestate estate. F.S. § 732.104. In other words, if either spouse has children or more remote descendants that are not also descendants of the other spouse, the surviving spouse's share is one-half of the intestate estate. The surviving spouse is also entitled to take a number of entitlements before the spouse's share is computed from the remaining assets of the estate. The surviving spouse, for example, could take the maximum family allowance and personal property exemption as well as receive a life estate in any homestead property.

C. Share Of Heirs Other Than Spouse

Florida Statute 732.103 controls the shares passing in intestacy to all heirs other than a surviving spouse. If there is no surviving spouse, the decedent's descendants share the entire estate. F.S. § 732.103(1). In the absence of a surviving spouse and descendants, the decedent's property passes according to the following hierarchy:

1. To the decedent's father and mother equally, or to the survivor of them. F.S. § 732.103(2).

2. To the decedent's brothers and sisters and their descendants, per stirpes. F.S. §§ 732.103(3), 732.104.

3. If the decedent was not survived by descendants, parents, brothers and sisters, or descendants of brothers and sisters, the estate is divided into two distinct shares. One share goes to the maternal kindred and the other share goes to the paternal kindred in the following order:

a. To the decedent's grandparents equally, or to the survivor of them. F.S. § 732.103(4)(a).

b. To uncles and aunts and descendants of deceased uncles and aunts, per stirpes. F.S. § 732.103(4)(b), 732.104.

c. If there are no kindred on one side of the family who can take, the entire estate will pass through the other side of the family. F.S. § 732.103(4)(c).

4. To the kindred of the last deceased spouse of the decedent. F.S. § 732.103(5).

5. To the state, by escheat. F.S. § 732.107. However, if any of the descendants of the decedent's great-grandparents were Holocaust victims as defined in F.S. § 626.9543(3)(a), the descendants of the great-grandparents are entitled to the estate. This latter provision applied only to proceedings filed before December 31, 2004. F.S. § 732.103(6).

Thus, subject to the "last deceased spouse" rule, there is generally no inheritance by persons more remotely related to the decedent than grandparents or descendants of grandparents. This is called the "laughing heir" rule. It eliminates inheritance by persons so remotely related to the decedent that they suffer no sense of loss, only gain, at the news of the decedent's death.

D. Inheritance Per Stirpes

Florida Statute 732.104 provides that all intestate property passes per stirpes, whether to descendants or collateral heirs. A majority of jurisdictions allow property to pass per capita by representation, whereby the estate is initially divided into primary shares at the first generation level where the nearest successor is found. However, in Florida, distribution is "strict per stirpes," meaning that Florida makes the division into primary shares at the first level of relationship to the decedent regardless of whether anyone is alive on that level. *In re Estate of Davol*, 100 So.2d 188 (Fla. 3d DCA 1958). Thus, even though the decedent is survived by equally related takers, the estate will be divided into primary shares at the first level of relationship in common between the decedent and the heirs. *See id.* For example, in the case of descendants, this first level of relationship will be the decedent's children, whereas with

collaterals, the first level would be the closest common ancestor.

E. Half Blood Inheritance

Persons related by the half blood are those who have either the same father or the same mother, but not both parents in common. F.S. § 732.105 provides that if there are collateral kindred of the intestate and some of those collateral relatives are related by the whole blood to the intestate and some are related by the half blood, those of the half blood will inherit only one half as much as those of the whole blood. If all are of the half blood, however, they each inherit whole portions. *Id.*

The question may be raised as to the application of F.S. § 732.105 if the decedent's estate is divided one half to the decedent's paternal kindred and one half to the decedent's maternal kindred. If the grandparents on the maternal side are dead, leaving descendants who are related only by half blood to the intestate, there is a question as to whether the half blood relatives would take the whole share intended for the maternal side or whether that share would be divided again into halves, half of it going to the paternal side with the other share. In accordance with the ruling in *Estes v. Nicholson*, 39 Fla. 759, 23 So. 490 (1898), the proper solution is for the maternal and the paternal heirs each to receive a whole share, regardless of whether they are related to the intestate by half blood or by whole blood.

F. Afterborn Heirs

Under F.S. § 732.106, heirs of a decedent conceived before the decedent's death, but born after the death, inherit as if they had been born during the decedent's lifetime. This rule reflects the common-law doctrine of *en ventre sa mere* ("in its mother's womb"). The problem posed by this rule is the determination as to the exact time of conception. A person could be conceived on the same date as the date of death of the decedent from whom the person would inherit. Expert medical testimony might be necessary to establish the time of conception if the issue were disputed. The Uniform Parentage Act, which has not been adopted in Florida, provides that a deceased husband is presumed to be the father of a child born to his surviving wife within 300 days after the husband's death. Uniform Parentage Act §204(a)(2). The right to distribution is governed by the law in force at the time of the decedent's death. See *In re Ruff's Estate*, 159 Fla. 777, 32 So.2d 840 (1947), 175 A.L.R. 370.

Interestingly, advancements in technology and artificial insemination have added a new wrinkle to this topic. Under F.S. § 742.17(4), a child conceived from the eggs or sperm of a person who died before the transfer of that person's eggs, sperm, or preembryos to a woman's body is not eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will. See, e.g., *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012)(holding that children of deceased insured wage earner and his spouse, who were conceived through in vitro fertilization *after* wage earner's death, were not entitled to surviving child's insurance benefits under the Social Security Act, where they did not qualify for inheritance from wage earner under Florida's intestacy law (Fla. Stat. 732.106) or satisfy any of the statutory alternatives to that requirement); *Capato ex rel. B.N.C. v. Comm'r Soc. Sec.*, 532 F. App'x 251 (3d Cir. 2013)(holding that Claimant was not entitled to surviving child's insurance benefits under the Social Security Act for twin children who were conceived through in vitro

fertilization after the death of her husband while he was domiciled in Florida, because Florida intestacy law precluded children's claim against husband's estate absent provision for children in husband's will).

G. Escheat

Under F.S. § 732.107, when a person dies leaving an estate without being survived by any person entitled to a part of it, that part of the estate escheats to the state. Property that escheats is to be sold as provided in the Florida Probate Rules and the proceeds paid to the Chief Financial Officer of the state and deposited in the State School Fund.

At any time within 10 years after the payment to the Chief Financial Officer, a person claiming to be entitled to the proceeds may reopen the administration to assert entitlement to the proceeds. If no claim is timely asserted, the state's rights to the proceeds become absolute.

The Department of Legal Affairs has standing to represent the state in all proceedings concerning escheated estates.

H. Adopted Persons and Persons Born Out of Wedlock

1. Children Born Out Of Wedlock

a. Establishing Paternity

For purposes of intestate succession, a child is regarded as a descendant of the mother and one of the natural kindred of all members of the mother's family. F.S. § 732.108(2). However, the child cannot inherit from or through the father unless (1) the natural parents have participated in a marriage ceremony before or after the child's birth (even if the marriage is void); (2) paternity is established by adjudication either before or after the father's death; or (3) the father acknowledges paternity in writing. *Id.*; *Breedlove v. Estate of Breedlove*, 586 So.2d 466 (Fla. 1st DCA 1991). Marriage of the mother and reputed father of a child born out of wedlock results in the child being deemed legitimate in all respects. F.S. § 742.091. However, interested persons can raise the question as to whether a reputed father who participates in a marriage ceremony is in fact the natural father of the child, in the absence of a specific acknowledgment of paternity. Therefore, the better practice would be for the father to acknowledge paternity in writing, in addition to participating in the marriage ceremony. *See Barnett v. Barnett*, 336 So.2d 1213 (Fla. 1st DCA 1976), *aff'd* 360 So.2d 399.

"The paternity of the father may be established in a proceeding to determine intestate succession." *Fagan v. Cramer*, 877 So.2d 945, 946 (Fla. 4th DCA 2004) (citing *In re Estate of Smith*, 685 So.2d 1206 (Fla. 1996)); *see also Glover v. Miller*, 947 So.2d 1254 (Fla. 4th DCA 2007). However, when a paternity action has previously been brought, any resulting determination of paternity has the effect of determining the issue for purposes of intestate succession. *In re Estate of Smith*; *Glover*.

Florida Statute 732.108 specifically provides that the statutes of limitation in Chapter 95 shall not apply in proceedings to determine paternity in probate. F.S. § 732.108(2)(b) (abrogating the holdings in *In re Estate of Smith* and *Thurston v. Thurston*, 777 So.2d 1001 (Fla. 1st DCA 2001), which found that a probate proceeding to establish paternity must be filed within the four-year statute of limitations set forth in F.S. § 95.11(3)(b). *See* Ch. 2009-115, Laws of Fla. (amending Fla. Stat. § 732.108(2)(b) to provide that "Chapter 95 shall not apply in determining heirs in a probate proceeding under this paragraph.").

b. Presumptions

When a child is born in wedlock and the father disputes his paternity, "one of the strongest rebuttable presumptions known to the law is required to be overcome before the child can be bastardized." *Barnett v. Barnett*, 336 So.2d 1213, 1218 (Fla. 1st DCA 1976), *aff'd* 360 So.2d 399; *Daniels v. Greenfield*, 15 So.3d 908, 913 (Fla. 4th DCA 2009), *approved* 51 So.3d 421. The presumption that the child is legitimate must be overcome by "clear and satisfactory testimony," and the evidence presented must show more than a "strong suspicion" of illegitimacy. *Eldridge v. Eldridge*, 153 Fla. 873, 16 So.2d 163, 164 (1944); see, e.g., *Blitch v. Blitch*, 341 So.2d 251 (Fla. 1st DCA 1976) (emotional outburst by wife that her husband was not father was not sufficient). "The presumption is so strong that it 'can defeat the claim of a man proven beyond all doubt to be the biological father.'" *Nevitt v. Bonomo*, 53 So.3d 1078, 1081 (Fla. 1st DCA 2010) (quoting *Dept. of Health & Rehabilitative Services v. Privette*, 617 So.2d 305, 308 (Fla. 1993)).

"The presumption of legitimacy is codified in [*F.S.*] 382.013(2)(a)." *Dept. of Revenue ex rel. Preston v. Cummings*, 871 So.2d 1055, 1059 (Fla. 2d DCA 2004). The presumption may be overcome with a clear and compelling reason "based primarily on the child's best interests." *J.T.J v. N.H.*, 84 So.3d 1176, 1179 (Fla. 4th DCA 2012).

The primary concern in any paternity action is the best interest of the child. If the child is born in wedlock, there is a strong presumption that the husband is the father of the child. *Sacks v. Sacks*, 267 So.2d 73 (Fla. 1972). "The presumption of legitimacy is a constitutional right afforded to every child born into a marriage granting the child the right to remain legitimate, both legally and factually, if doing so is in the child's best interest." *Parker v. Parker*, 950 So.2d 388, 394 (Fla. 2007) (citing Art. I, §9, Fla. Const.); *D.P. v. C.L.G.*, 37 So.3d 897 (Fla. 1st DCA 2010) (father who married child's mother after child's birth but before final judicial termination of his parental rights acquired same status as if he had married child's mother before child's birth and was not required to file claim of paternity with Florida Putative Father Registry to preserve his rights).

In *Dept. of Health & Rehabilitative Services v. Privette*, 617 So.2d 305, 309 (Fla. 1993), the Florida Supreme Court held "that there must be a clear and compelling reason based primarily on the child's best interests to overcome the presumption of legitimacy *even after* the legal father is proven not to be the biological father" by HLA or other scientific tests [emphasis added]. The court found that the burden of proof in such cases would have to be at least the equivalent of the burden of proof in proceedings to terminate the legal father's parental rights. Thus, the legal father must be given notice of the hearing and an opportunity to be heard.

Before a putative father can be ordered by the court to submit to an HLA blood test to establish paternity, the mother has the burden of proving by clear and convincing evidence that (1) the complaint is factually accurate, brought in good faith, and likely to be supported by reliable evidence, and (2) the child's best interest will be better served even if the blood test later proves factual illegitimacy. *Privette*; see also *Parker*; *Benac v. Bree*, 590 So.2d 536 (Fla. 2d DCA 1991). A claim of estoppel may similarly be asserted. *Marshek v. Marshek*, 599 So.2d 175 (Fla. 1st DCA 1992).

Florida Statute 732.108(2)(b) provides that paternity may be established after the death of the putative father. Chapter 95 does not apply to proceedings to determine paternity in probate. F.S. § 732.108(2)(b). The statute abrogated the holdings in *In re Estate of Smith*, 685 So.2d 1206 (Fla. 1997), and *Thurston v. Thurston*, 777 So.2d 1001 (Fla. 1st DCA 2001), which found that a probate proceeding to establish paternity must be filed within the four-year statute of limitations set forth in F.S. § 95.11(3)(b). A putative heir who is trying to establish paternity through adjudication after the father's death under F.S. § 732.108(2)(b) must do so through evidence that is "clear, strong and unequivocal, that is, the person born out of wedlock should prove paternity by clear and convincing evidence." *Breedlove v. Estate of Breedlove*, 586 So.2d 466, 467 (Fla. 1st DCA 1991).

Early cases held that a mother of a child born in wedlock is not competent to testify that the child actually is illegitimate. *Gossett v. Ullendorff*, 114 Fla. 159, 154 So. 177 (1934). This general rule, however, has been modified to permit a woman who was married to one man when her children were conceived or born to sue another man to establish that the latter was the father of her children. F.S. § 742.011; *Gammon v. Cobb*, 335 So.2d 261 (Fla. 1976) (distinction between married and unmarried women was unconstitutional); *Holliman v. Green*, 439 So.2d 955 (Fla. 1st DCA 1983); *In re Estate of Jerrido*, 339 So.2d 237 (Fla. 4th DCA 1976); but see *R.H.B. v. J.B.W.*, 826 So.2d 346 (Fla. 2d DCA 2002) (questioning whether such action is appropriate when mother and presumptive father remain married).

If a child wishes to bastardize himself or herself for the purpose of inheriting from a putative father, the courts will allow such an action to proceed. *In re Estate of Robertson*. Although there is an extremely strong presumption that children born within a marriage are legitimate, such a presumption is rebuttable. *Id*.

In *Estate of Maher v. Iglikova*, 138 So.3d 484 (Fla. 3d DCA 2014), the court held that a child who was born before decedent executed his will, but legitimized by an adjudication of paternity after the execution of the will, was not a pretermitted child, so as to be entitled to an intestate share of decedent's estate under F.S. § 732.302. The Third DCA in the *Estate of Maher* rejected the argument that an adjudication of paternity should be equated with an adoption that took place after the execution of the will on the basis that adoption and adjudication of paternity are legally distinct, noting that "adoption" means the act of creating the legal relationship between parent and child where it did not exist, whereas an adjudication of paternity merely acknowledges an existing relationship.

2. <u>Adoption</u>

a. Effect of Judgment

For purposes of inheritance by intestacy, Florida law makes no distinction between adopted and natural persons. See F.S. § 732.108(1). An "adopted person is a descendant of the adopting parent and is one of the natural kindred of all members of the adopting parent's family." *Id.*

The adopted person is not a descendant of his or her natural parents or any of their kindred, or any prior adoptive parents' family, except in three limited instances:

- Adoption of a child by a stepparent has no effect on inheritance rights between the child and the spouse of the stepparent (the natural parent) or the spouse's family, F.S. § 732.108(1)(a).

- Adoption of a child by the spouse of a natural parent who marries the natural parent after the death of the other natural parent has no effect on the inheritance rights between the child and the family of the deceased natural parent, F.S. § 732.108(1)(b).

- Adoption of a child by a "close relative" after the deaths of the natural parents does not affect the relationship between the child and the families of the deceased natural parents, F.S. § 732.108(1)(c).

A "close relative" is the "child's brother, sister, grandparent, aunt, or uncle." F.S. § 63.172(2).

Generally, stepchildren have no inheritance rights. Therefore, if the stepparent fails to adopt the child, no legal relationship exists between them for inheritance purposes. However, under the right facts, the child may be able to establish adoption by estoppel.

A judgment of adoption endows the adopted person with the same family relationship that would have existed if he or she were a legitimate blood descendant of the adopting parent. See F.S. § 732.108; *Korbin v. Ginsberg*, 232 So.2d 417 (Fla. 4th DCA 1970).

Florida Statute 732.108(1) is similar to F.S. § 63.172 regarding the effect of a judgment of adoption. See also *Turner v. Weeks*, 384 So.2d 193 (Fla. 2d DCA 1980); *In re Estate of Carlton*, 348 So.2d 896 (Fla. 4th DCA 1977).

Adopted persons include adult adoptees. *See* F.S. § 63.042(1)("Any person, a minor or an adult, may be adopted."); See also *Dennis v. Kline*, 120 So.3d 11, 18 (Fla. 4th DCA 2013)(noting that "[t]he public policy of Florida expressly permits the adoption of adults.")

b. Death of Party to Proceeding

An adoption cannot be decreed posthumously. *In re Adoption of R.A.B.*, 426 So.2d 1203 (Fla. 4th DCA 1983). Adoption is a creature of statute, and one of the key elements is that the person to be adopted must be capable of being adopted and the person seeking to adopt must be capable of adopting. *See Korbin v. Ginsberg*, 232 So.2d 417 (Fla. 4th DCA 1970). It necessarily follows that both parties to the adoption must be living at the time of the judgment of adoption, notwithstanding that the proceedings may have been pending before the death of one or the other. *Id.*

c. Adoptee's Status as Pretermitted Child

A child adopted after the execution of a will is considered to be a pretermitted child under F.S. § 732.302, which may entitle him or her to take a child's intestate share. See *In re Estate of Frizzell*, 156 So.2d 558 (Fla. 2d DCA 1963).

d. Effect of Foreign Judgment; "De Facto," "Virtual," Or "Equitable" Adoption

The laws of other jurisdictions can introduce a wide range of factual situations in which foreign adoptions will be recognized for purposes of determining inheritance rights in Florida, even when they do not meet the technical requirements of the Florida statutes on adoption. The validity of a foreign adoption depends on whether the adoption in fact took place under the laws of the jurisdiction in question and whether the judgment of adoption was issued in accordance with due process of law. See F.S. § 63.192. If these tests are met, Florida courts will recognize the validity of the adoption pursuant to Article IV, §1, of the United States Constitution, the full faith and credit clause. See F.S. § 63.192; see also *Mott v. First Nat. Bank of St. Petersburg*, 98 Fla. 444, 124 So. 36 (1929). Florida courts will recognize adoption decrees of foreign jurisdictions even when the adoption is against the established policy of the state, so long as the adoption was accomplished properly under the laws of the foreign jurisdiction. *Embry v. Ryan*, 11 So.3d 408 (Fla. 2d DCA 2009) (giving full faith and credit to Washington same-sex adoption); *Florida Dept. of Children & Families v. Adoption of X.X.G.*, 45 So.3d 79, 99 (Fla. 3d DCA 2010)(rejecting a claim that the Washington adoption was contrary to Florida public policy under § 63.042(3)); *but see Kupec v. Cooper*, 593 So.2d 1176 (Fla. 5th DCA 1992) (court refused to recognize German "adoption" in which there was no court judgment of adoption and no showing that German adoption law is similar to Florida's and deserving of Florida's recognition).

In some jurisdictions, there are certain instances in which adoption by a deed, contract, or notarial act has been authorized by statute. This is known as "de facto," "virtual," or "equitable" adoption. When the statute is complied with, the legal status of the parties is no different from that which results from a decree of adoption in a judicial proceeding. This type of adoption could be recognized in Florida by virtue of the statutory and constitutional provisions cited above, unless the rights flowing from the adoption "are not contemplated by or are repugnant to the laws or public policy" of the state on the subject. *Mott*, 124 So. at 37. Each state possesses the sovereign power to prescribe its own laws as to adoptions, as well as its own laws for the descent and distribution of property within its limits. *Id.* In the exercise of this power, a state may deny the rights of inheritance in that state to one adopted under the laws of another state, or may refuse to recognize an adoption under the laws of the foreign state for the purpose of transmitting title by inheritance. *See Id.*; RESTATEMENT (SECOND) OF CONFLICT OF LAWS §261 (ALI-ABA 1971). In the absence of a statute authorizing the adoption of a child by deed, contract, or notarial act, there cannot be a legal adoption.

The virtual adoption concept has been recognized in Florida. *In re Estate of Musil*, 965 So.2d 1157 (Fla. 2d DCA 2007). Virtual adoption is an equitable doctrine designed to protect the interests of a minor child who was supposed to have been adopted but whose adoptive parents failed to undertake the legal steps necessary to formally accomplish the adoption. *Miller v.*

Paczier, 591 So.2d 321 (Fla. 3d DCA 1991); *McMullen v. Bennis*, 20 So.3d 890 (Fla. 3d DCA 2009). It allows the "supposed-to-have-been-adopted" child to take as a beneficiary of an estate. See *Williams v. Dorrell*, 714 So.2d 574, 575 (Fla. 3d DCA 1998). Thus, the concept of equitable adoption is not applicable on behalf of a putative adoptee who was an adult at the time the contract was made, because to do so would be contrary to the fundamental basis of the doctrine and might lead to fraudulent claims. *See Miller*; 2 AM.JUR.2D *Adoption* §16.

A child who is able to prove that he or she is an equitably adopted child of the decedent is deemed to have an enforceable contract right against the decedent's estate. *In re Heirs of Hodge*, 470 So.2d 740 (Fla. 5th DCA 1985). The child may sue for specific performance of the contract to adopt, which would establish the right of inheritance in the decedent's estate. *Sheffield v. Barry*, 153 Fla. 144, 14 So.2d 417 (1943). The elements of a virtual adoption are

- an agreement between the natural and adoptive parents;
- performance by the natural parents (by giving up custody);
- performance by the child (by living with the adoptive parents);
- partial performance by the adoptive parents (by taking the child into their home and treating him or her as their child); and
- the intestacy of the foster parents.

Id.; *In re Estate of Musil*; *Williams v. Estate of Pender*, 738 So.2d 453 (Fla. 1st DCA 1999); *Dorrell*; *In re Estate of Wall*, 502 So.2d 531 (Fla. 4th DCA 1987); *Hodge*. The elements of "virtual adoption" must be proved by clear and convincing evidence. *In re Estate of Musil*; *Estate of Pender*. It is not essential that a contract to adopt be shown by direct evidence; the agreement to adopt may be inferred by acts, conduct, and admissions of the adopting parent. *Hodge*.

A lawsuit for specific performance of a contract to adopt under the virtual adoption theory must be distinguished from an action for specific performance to declare the adoption effectual. *Sheffield*. The action does not give the child the status of a legally adopted child. *Tarver v. Evergreen Sod Farms, Inc.*, 533 So.2d 765 (Fla. 1988); *In re Adoption of R.A.B.*, 426 So.2d 1203 (Fla. 4th DCA 1983). For example, in *Grant v. Sedco Corp.*, 364 So.2d 774 (Fla. 2d DCA 1978), the court ruled that an equitably adopted child could not recover as a survivor under the Florida Wrongful Death Act. The court observed that the "nature of equitable adoption is a remedy in equity to enforce a contract right, not to create the relationship of parent and child." *Id.* at 775. The doctrine usually does not apply to testate estates, although a virtually adopted child could be treated as a pretermitted child. *Wall*. Moreover, the doctrine may not be utilized prior to the death of the adoptive parent. *Tarver*.

The Third DCA has held that a virtually adopted child is also considered an "heir" for purposes of entitlement to homestead property. *Dorrell*.

In *McMullen*, the court held that a petition to determine beneficiaries concerning whether a child has been virtually adopted is not ripe until the validity of the decedent's will is resolved.

The trial court agreed to conduct a preliminary hearing on the issue of virtual adoption. The appellate court reversed, finding that such a proceeding amounted to an improper advisory opinion and that it was premature until the decedent's will is admitted to probate. In *Platt v. Osteen*, 103 So.3d 1010 (Fla. 5th DCA 2012), the court held that a beneficiary of will who was listed therein as a daughter of testator, but who was not testator's biological daughter and was never legally adopted by him, was nevertheless entitled to an evidentiary hearing to determine whether she had been "virtually adopted" and had standing to contest the will.

I. Termination of Parental Rights

For the purpose of intestate succession by a natural or adoptive parent, 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 is treated as if the parent predeceased the child. F.S. § 731.1081.

J. Debts of the Decedent

A debt owed to the decedent cannot be charged against the intestate share of any person except the debtor. If the debtor does not survive the decedent, the debt shall not be taken into account in computing the intestate share of the debtor's heirs. F.S. § 732.109

K. Aliens

Florida Statute 732.1101 provides that "[a]liens shall have the same rights of inheritance as citizens." An alien is a citizen or subject of a foreign country who has not been naturalized.

L. Dower and Curtesy Abolished

Dower and curtesy are remnants of the common law. Dower refers to the portion of a decedent's estate to which a surviving wife is entitled. Curtesy refers to what a man may claim. Florida Statute 732.111 clarifies that these concepts are abolished in Florida.

II. Part II - Elective Share of Surviving Spouse -- F.S. §§ 732.201 - 732.2155; Rule 5.360

This topic is being covered separately by Debra Boje.

Nevertheless, it's worth mentioning that during the 2016 legislative session, the Real Property, Probate, and Trust Law Section of the Florida Bar learned of at least one instance in which a trial court applied the elective share laws to create a ceiling, or maximum amount, that the surviving spouse may receive upon the filing of an election to take the elective share. In that case, transfers to the surviving spouse under the decedent's estate plan in excess of the amount of the elective share were declared invalid. See *In Re: Estate of Robert Michael Richardson*, Miami-Dade County, Florida, File No. 12-4534, Adversary Proceeding No. 14-2481 CP 03, April 17, 2015 *Order Determining Amount of Elective Share* & April 17, 2015 *Order Confirming Payment of Elective Share and Determining Withdrawal To Be Untimely*. This result appeared to be contrary to the intent of the elective share laws, and resulted in the imposition of a penalty on surviving spouse for filing the election in good faith.

While the Florida Probate Code provides for a surviving spouse to withdraw the election for elective share within 8 months after the decedent's death and before the court's order of contribution, that provision was included merely to assure certainty for the decedent's estate tax return as to the existence of a spousal share. *See* F.S. § 732.2135(3). In practice, an election may not be filed for several months following the decedent's death and it can often take several additional months to make a final determination of the value of all assets in the elective estate and to determine if the elective share will exceed the value of the assets received by the surviving spouse under the decedent's estate plan, thereby prohibiting the surviving spouse from withdrawing the election. If filed in good faith, the election was intended to simply provide a minimum amount and was merely ignored if it was ultimately determined that the surviving spouse received more under the decedent's estate plan, including the transfer of non-probate assets.

After learning of the case in which the elective share laws were applied to create a maximum amount that the surviving spouse may receive upon the filing of an election to take the elective share, the RPPTL's Elective Share Review Committee analyzed the issue and proposed legislation to confirm that the original intent of the statute was to ensure that a minimum share of the decedent's estate would be payable to the surviving spouse if the election was properly filed. The proposal further clarified that the elective share laws are not intended to limit or reduce the surviving spouse's share of the decedent's assets.

As a result of 2016 legislation, F.S. § 732.201 was amended as follows:

> F.S. 732.201. Right to elective share**.** - 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. <u>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.</u>

Chapter 2016-189 of the Laws of Florida also includes the following statement of the Florida Legislature's intent:

> Section 4. It is the intent of the Legislature that the amendment to s. 732.201, Florida Statutes, made by this act is to clarify existing law.

III. Part II -- Rights in Community Property - Florida Uniform Disposition of Community Property Rights at Death Act -- F.S. § 732.216 - 732.228

A. <u>Introduction</u>. In 1992, Florida adopted its own version of the Uniform Disposition of Community Property Rights at Death Act ("Uniform Act"). The Florida act, known as the Florida Uniform Disposition of Community Property Rights at Death Act ("Florida Act"), is set forth in the F.S. §§ 732.216 – 732.228. The Florida Act is very similar to the Uniform Act, but there are differences.

B. Personal Property. Pursuant to F.S. § 732.217(1), the Florida Act applies to personal property, wherever located, if the property:

1. was acquired as, or became and remained, community property under the laws of another jurisdiction;

2. was acquired with rents, issues, or income of, or the proceeds from, or in exchange for, community property; or

3. is traceable to that community property.

Thus, under the above definition, if a couple lives in Texas and acquires personal property while domiciled in Texas, then sells the personal property, and moves to Florida where the couple subsequently buys new personal property in Florida with the proceeds from the Texas sale, then the new personal property would be considered community property.

C. Real Property.

1. The General Rule. Pursuant to F.S. § 732.217(2), the Florida Act applies to real property, except real property held as tenants by the entirety, which is located in this state, and which:

a. was acquired with the rents, issues, or income of, the proceeds from, or in exchange for, property acquired as, or which became and remained, community property under the laws of another jurisdiction; or

b. is traceable to that community property.

2. The Florida Act only pertains to real property "located" in the State of Florida. The rationale for this limitation is that the laws of the state in which real property is located generally govern the disposition of that real property.

3. Tenants by the Entirety Property.

a. The Florida Act does not apply to real property held as tenants by the entirety. This is one of the main deviations from the Uniform Act and has a sweeping impact. Thus, if real property (other than homestead property) is titled as tenants by the entirety, then the property loses any community property status it may have had. Or does it?

b. Arguably, community property can never become tenants by the entirety property in the first place. The two forms of ownership are mutually exclusive because community property rights do not maintain all five unities (time, title, interest, possession, and marriage) necessary to create tenants by the entirety property. "Interest" is missing and the unity of "title" is probably also missing from community property. Thus, community property never can be owned as tenants by the entirety in the first place unless there is an express, written, and informed waiver of community property rights.

4. Homestead Property.

a. Prior to 2003, F.S. § 732.217 also exempted "homestead" property from the Florida Act. The exclusion for homestead property in F.S. § 732.217 created an inconsistency within the Florida Act itself, as F.S. § 732.225 creates a conclusive presumption for homestead property. Thus, many questioned, "How does the Florida Act clarify the treatment of homestead property if the Florida Act does not apply to homestead property?" The solution was to remove the reference to homestead property from F.S. § 732.217, thus, making homestead property subject to the Florida Act.

b. F.S. § 732.225 of the Florida Act reads as follows:

> Sections 732.216-732.228 do not prevent married persons from severing or altering their interest in property to which these sections apply. The reinvestment of any real property to which these sections apply located in this state which is or becomes homestead property creates a *conclusive presumption* that the spouses have agreed to terminate the community property attribute of the property reinvested. (emphasis added).

c. In Florida, the general consensus of practitioners is that the second sentence of F.S. § 732.225 defeats any community property rights that may otherwise attach to homestead property. Thus, if a husband and wife sell their community property residence in Texas and move to Florida and subsequently use the proceeds from the Texas sale to buy homestead property titled in the husband's sole name, then a conclusive presumption is created that the spouses have agreed to terminate the community property aspects of the property. Thus, when the husband dies, the wife receives a life estate in the homestead property as opposed to an outright one-half interest in the property and a life estate in the remaining one-half interest in the property. If the husband is not survived by minor children, then husband could devise the homestead property outright to the wife. The example assumes the husband is survived by either minor children or dies intestate survived by his wife and one or more lineal descendants.

d. Some practitioners, however, have opined that this conclusion is incorrect for two reasons:

(i) It is unconstitutional to attempt to defeat vested community property rights without due process; and

(ii) The language of the statute is meaningless in its application. If one reads the statute carefully, the statute applies to property that is characterized "at the time of death" as community property. F.S. § 732.217(2). The second sentence of F.S. § 732.225 proceeds to say that property to which the Florida Act applies (e.g. property that is determined to be community property at the time of death) which is reinvested in property which is or becomes homestead property creates a conclusive presumption that the spouses agreed to terminate the community property status of the property. Any reinvestment that occurs with respect to homestead property happens before the death of the first spouse. Thus, by its own terms, the conclusive presumption that is created does not apply to the homestead property on the death of the first spouse.

D. Rebuttable Presumptions under the Florida Act. F.S. § 732.218 creates rebuttable presumptions that apply in determining whether property is subject to the Florida Act.

1. Presumption 1: If property is acquired during marriage by a spouse of that marriage while domiciled in a jurisdiction under whose laws property could then be acquired as community property, then that property is presumed to have been acquired as, or to have become and remained, property to which the Florida Act applies. F.S. § 732.218(1).

> Example: Decedent acquires 100 shares of IBM stock in decedent's own name while decedent and decedent's surviving spouse are married and domiciled in Texas. Decedent and decedent's surviving spouse move to Florida where decedent subsequently dies still owning the 100 shares of IBM. There is a rebuttable presumption that the Florida Act applies to the 100 shares of IBM.

2. Presumption 2: Real property located in Florida (other than homestead real property held as tenants by the entirety) and personal property wherever located acquired by a married person while domiciled in a common law jurisdiction that is titled in a form which creates rights of survivorship is presumed not to be subject to the Florida Act. Thus, the property would pass to the survivor. F.S. § 732.218(2).

> Example: Decedent while domiciled in Florida takes title to a piece of real property in decedent's and decedent's daughter's names with rights of survivorship. There is a rebuttable presumption that the Florida Act does not apply and the property would pass by operation of law to the decedent's daughter upon decedent's death.

E. Disposition of Community Property Upon Death Under the Florida Act

1. F.S. § 732.219 provides for the disposition of property to which F.S. §§ 732.216 – 732.228 applies. Pursuant to F.S. § 732.219, one-half of the property is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession ("Surviving Spouse's Interest"). The other one-half is property of the decedent and may be devised or descend by intestacy ("Decedent's Interest").

2. Elective Share. The Decedent's Interest is not subject to the elective share. F.S. §§ 732.219, 732.2045(1)(f). However, to the extent the Decedent's Interest is paid to or for the benefit of the surviving spouse, the Decedent's Interest is applied toward satisfaction of the elective share. F.S. § 732.2075(1)(c).

F. Method of Perfecting Title.

1. Perfection of Title of Personal Representative or Beneficiary – F.S. § 732.221.

a. If title to the property is held by the surviving spouse, then the personal representative or a beneficiary of the decedent may institute an action to perfect title to the Decedent's Interest.

b. The personal representative does not have a fiduciary duty to discover whether any property held by the surviving spouse is property to which the Florida Act applies unless a written demand is made by:

- a beneficiary within three months after service of a copy of the notice of administration on the beneficiary; or
- a creditor within three months after first publication of the notice to creditors.

2. Perfection of title of surviving spouse – F.S. § 732.223. If title to the property is held by the decedent, then the surviving spouse may perfect title in the Surviving Spouse's Interest by:

a. an order of the probate court; or

b. by execution of an instrument by the personal representative or the beneficiaries of the decedent with the approval of the probate court.

3. The personal representative has no duty to discover whether property held by the decedent is subject to the Florida Act unless the surviving spouse makes a written demand within three months after service of a copy of the notice of administration.

G. Purchaser for Value or Lender – F.S. § 732.222. With respect to property in which the Florida Act applies, purchasers for value and lenders are protected in relying on apparent title of the surviving spouse, the personal representative or beneficiaries, as the case may be. Moreover, the purchaser for value or a lender need not inquire whether a vendor or borrower acted properly.

IV. Part III -- Pretermitted Spouse and Children -- F.S. §§ 732.301; 732.302; Rule 5.025

A. Pretermitted Spouse -- F.S. § 732.301; Rule 5.025

1. General Rule: If a testator marries *after* executing a valid will, the surviving spouse is referred to as a pretermitted spouse. As a general rule, the pretermitted spouse is entitled to receive a share in the estate equal in value to that which the spouse would have received if the testator had died intestate.

2. Exceptions:

a. Provision has been made for, or waived by, the spouse by prenuptial or postnuptial agreement;

b. The spouse is provided for in the will (case law has expanded this exception to require the provision in the will to have been made in contemplation of marriage). See *Estate of Ganier*, 418 So.2d 256 (Fla. 1982); or

c. The will discloses an intention not to provide for the spouse.

3. Caution. If a testator executes a will after marriage, but that will is held to be invalid because of undue influence, thereby bringing back to life a prior will that was executed before the marriage, the spouse can become a pretermitted spouse. *Hoffman v Kohns*, 385 So.2d 1064 (Fla. 2d DCA 1980), *disapproved on other grounds* 460 So.2d 895.

4. Notice. A petition to determine status as a pretermitted spouse is listed as an automatic adversary proceeding under Rule 5.025. Thus, formal notice must be given to all interested person.

5. Deadline. There is no time deadline for filing a petition to determine pretermitted spouse. Thus, presumably the right can be asserted by the spouse anytime before the estate is closed.

B. Pretermitted Children -- F.S. § 732.302

1. General Rule. A child born or adopted after the execution of a will is considered to be a pretermitted child under F.S. § 732.302, which may entitled him or her to take a child's intestate share.

2. Exceptions.

a. By way of advancement, the child has received a part of the decedent's property equivalent to the child's intestate share;

b. It appears from the will that the omission was intentional; or

c. 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.

3. Notice. A petition to determine status as a pretermitted child is listed as an adversary proceeding under Rule 5.025. Thus, formal notice must be given to all interested person.

4. Deadline. There is no time deadline for filing a petition to determine pretermitted child. Thus, presumably the right can be asserted by the child anytime before the estate is closed.

V. Part IV. Exempt Property and Allowances

A. Homestead - F.S. § 732.401 – 732.4015; Rule 5.405. This topic (which we could literally talk about for days) is being covered separately by Shane Kelley.

B. Exempt Property - F.S. § 732.402; Rule 5.406.

1. Prerequisites.

a. The decedent must be domiciled in Florida at the time of death.

b. The decedent must be survived by a spouse or children.

2. Who is entitled to claim the exemption?

a. If there is a surviving spouse, the spouse is entitled to claim the exemption.

b. If there is no spouse (or the spouse has waived his or her right), the children are entitled to claim the exemption.

3. What constitutes exempt property?

a. Household furniture, furnishings, and appliances in the decedent's usual pace of abode up to a net value of $20,000 as of the date of death.

b. Two motor vehicles which do not, individually as to either vehicle, have a gross weigh in excess of 15,000 pounds, held in the decedent's name and regularly used by the decedent or members of the decedent's family as their personal motor vehicles.

c. Certain prepaid college contracts and Florida college savings agreements.

d. Benefits paid pursuant to F.S. § 112.1915

4. Specifically or demonstratively devised property.

a. General rule. Property that is specifically or demonstratively devised is excluded from exempt property.

b. Exception. If exempt property is specifically or demonstratively devised to a person who would otherwise be entitled to the exempt property, then the court may declare the property to be exempt.

5. Procedure and timing for filing.

a. A verified petition must be filed.

b. The petition must be filed on or before the later of the date that is 4 months after the date of service of the notice of administration or the date that is 40 days after the

date of termination of any proceeding involving the construction, admission to probate, or validity of the will or involving any other matter affecting any part of the estate subject to a claim for exempt property. But see *In re: Estate of Dubin*, 536 So. 2d 1186 (Fla. 4th DCA 1989)(personal representative's failure to serve a copy of the inventory as required under the rule and statutes operates to toll the limitations under F.S. § 733.402(6)).

6. Effect.

a. Property that is determined to be exempt property is excluded from the value of the residuary estate and the value of the estate for purposes of determining the pretermitted or elective shares.

b. Property that is determined to be exempt property is exempt from all claims of the estate except perfected security interests thereon.

C. Family Allowance -- F.S. § 732.403; Rule 5.407

1. Prerequisites.

a. The decedent must have been domiciled in Florida at the time of his or her death.

b. The decedent must be survived by a spouse or lineal heirs that the decedent was supporting or was obligated to support. "Lineal heirs" includes lineal ascendants and descendants.

2. Amount of allowance. The allowance cannot exceed $18,000.

3. Procedure for claiming.

a. Effective January 1, 2004, Rule 5.407 governs the procedure for claiming a family allowance.

b. A verified petition must be filed.

4. Payment.

a. If there is a surviving spouse, the family allowance is payable to the spouse for the use of the spouse and dependent lineal heirs.

b. If any lineal heir does not live with the surviving spouse, the allowance may be apportioned based upon need.

c. If there is no surviving spouse, the family allowance is paid to the lineal heirs or the person having their care or custody.

5. Attorney Fees. Attorneys' fees may be awarded to the successful petitioner for family allowance. *Hoyt v Hoyt*, 814 So.2d 1254 (Fla. 2d DCA 2002).

6. Effect. The family allowance is not chargeable against any benefit or share otherwise passing to the surviving spouse or to the dependent lineal heirs, unless the will otherwise provides. The family allowance is entitled to class 5 priority. Thus, beware of payment of the family allowance if there are not sufficient funds in the estate to pay all claims.

VI. Part V- Wills – *Select Provisions*

A. Execution of wills -- F.S. § 732.502.

1. Requirements.

a. The will must be signed at the end by the testator or by someone signing the testator's name in the presence of the testator and at the testator's direction.

b. The will must be signed or acknowledged in the presence of two subscribing witnesses and the witnesses must sign in the presence of the testator and each other.

2. Special Types of Wills.

a. Nuncupative Wills. A nuncupative will is an oral will of personal property declared by a testator in the presence of witnesses at the time of the testator's last illness. *In re Estate of Vaughn*, 165 So.2d 241 (Fla. 1st DCA 1964). Florida does not recognize oral wills, thus a nuncupative will is invalid. F.S. §§ 731.201(36); 732.502(2); see also *In re Estate of Corbin*, 645 So.2d 39 (Fla. 1st DCA 1994). A nuncupative will of a non-Florida resident is also invalid in Florida even if the state in which the individual resides allows nuncupative wills. F.S. § 732.502(2). See also *Malleiro v. Mori*, 2015 WL 5714701 (Fla. 3d DCA 2015).

b. Holographic Wills. A holographic will is a will in a testator's handwriting signed by him, but which is not otherwise executed in accordance with the statutory requirements. Holographic wills are not valid in Florida. Likewise, a holographic will executed by a non-Florida resident is not valid in Florida even if the state in which the decedent is a resident recognizes holographic wills. F.S. § 732.502(2). See also *Lee v. Estate of Payne*, 148 So. 3d 776 (Fla. 2d DCA), *review denied*, 132 So. 3d 221 (Fla. 2013).

c. Military Wills. A will executed as a military testamentary instrument in accordance with 10 U.S.C. s. 1044d, Chapter 53, by a person who is eligible for military legal assistance is valid as a will in the State of Florida not withstanding any other provisions of the Florida Probate Code. F.S. § 732.502(3).

B. Self-proof of will -- F.S. § 732.503. The Code allows for a will or codicil to be self-proving. If the will is "self-proved", which means it was proved at the time it was executed by the acknowledgment of the decedent 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 the form required by law, then the order admitting the will to probate can be entered with no further proof.

C. Revocation by writing -- F.S. § 732.505

1. Inconsistency. There may be certain occasions where multiple wills exist at the time of the decedent's death. If a subsequent will or codicil does not expressly revoke the previous will or codicil, both documents must be looked at to determine the appropriate disposition. To the extent the documents are inconsistent, the inconsistent provisions of the earlier document are deemed revoked. The remaining provisions of the earlier document, however, remain in effect.

2. Expressed Revocation. A subsequent will, codicil, or other writing executed with the same formalities required for the execution of a will expressly revoke the will.

D. Revocation by act – F.S. § 732.506. 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 with the intent, and for the purpose, of revocation.

E. Effect of subsequent marriage, birth, adoption, or dissolution of marriage – F.S. § 732.507:

1. Subsequent marriage, birth, or adoption of lineal descendants does not revoke a prior will made by a testator. A subsequent wife or child however, may be entitled to a pretermitted share of the estate. F.S. § 732.507(1).

2. A provision in a will for a spouse that the testator subsequently divorces is null and void. Similarly, if a marriage is annulled after a will is executed any provision for the spouse in the will is null and void. In both instances, the will is construed as if the spouse had died at the time of the dissolution, divorce or annulment of the marriage, unless the will or the dissolution or divorce judgment expressly provides otherwise. F.S. § 732.507(2).

F. Revival by revocation -- F.S. § 732.508.

1. The revocation of a later dated will does not revive a prior dated will. F.S. § 732.508(1).

2. The revocation of a codicil to a will does not revoke the will. Moreover, the provisions in the will that were changed by the codicil are presumed to be reinstated unless there is evidence to the contrary. F.S. § 732.508(2).

G. Incorporation by reference – F.S. § 732.512.

1. Reference to Writing. A writing in existence when a will is executed may be incorporated by reference into the will if the language of the will manifests this intent and describes the writing sufficiently to permit its identification. F.S. § 732.512(1).

2. Reference to Acts. A will may dispose of property by reference to acts and events which have significance apart from their effect upon the dispositions made by the will, whether they occurred before or after the execution of the will or before or after the testator's death. The

execution or revocation of a will or trust by another person is such an event. F.S. § 732.512(2). Similarly, a devise of the "contents of my safe deposit" is an example of a devise by incorporation by reference.

H. Separate Writing – F.S. § 732.515. A written statement or list referred to in the decedent's will shall dispose of items of tangible personal property, other than property used in trade or business, not otherwise specifically disposed of by the will. To be admissible 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.

I. Penalty clause for contest – F.S. § 732.517: 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.

VII. Part VI - Rules of Construction – *Select Provisions*

A. Antilapse, deceased devisee; class gifts – F.S. § 732.603

1. Whether a devise under a will or testamentary trust lapses if the beneficiary: (i) is dead when the will is executed or at the termination of a trust interest created by the will; (ii) does not survive the testator; or (iii) is required by the will or by operation of law to be treated as having predeceased the testator depends on the relationship of the testator to the beneficiary.

2. Grandparent or lineal descendant of a grandparent. Absent a provision in the will to the contrary, if the devisee or beneficiary is the grandparent or lineal descendant of a grandparent of the testator, the descendants of the devisee or beneficiary take per stirpes in place of the deceased devisee or beneficiary.

3. All other cases. In all other cases, absent a provision in the will to the contrary, the testamentary disposition lapses.

B. Change in securities; accessions; nonademption – F.S. § 732.605: If the testator makes a devise of specific securities rather than their equivalent value the specific devisee is entitled to:

1. As much of the devised securities as is part of the estate at the time of the testator's death;

2. Any additional or other securities of the same entity owned by the testator because of action initiated by the entity, excluding any acquired by exercise of purchase options; and

3. Securities of another entity owned by the testator as a result of a merger, consolidation, reorganization or other similar action initiated by the entity;

4. Securities of the same entity acquired as a result of a plan of reinvestement.

C. Nonademption of specific devises in certain cases; sale by guardian of the property; unpaid proceeds of sale, condemnation, or insurance. – F.S. § 732.606

1. General Rule. Under common law a specific devise will adeem if the property it is not in existence at the time of the testator's death.

2. Exception. If specifically devised property is sold by a guardian for the ward's care or proceeds of a condemnation or insurance are paid to the guardian then the devisee has a right to a general pecuniary devise equal to the net sales price or the proceeds (less any monies the devisee is entitled to as described in (3) below) unless the testator's disability is judicially removed and the testator survives the restoration by at least one year. F.S. § 732.606(1)

3. Additional sums a specific devisee may be entitled to receive.

a. If all or part of specifically devised property is sold by the guardian or testator, the specific devisee is entitled to the balance of the purchase price owing from the purchaser plus any security interest.

b. Any amount of a condemnation award for the taking of the specifically devised property that is unpaid at the time of death.

c. Any proceeds unpaid at the time of death on fire or casualty insurance on the property.

d. Property owned by the testator at death as a result of foreclosure, or obtained instead of foreclosure, of the security for the specifically devised obligation. F.S. § 732.606(2)

4. F.S. § 732.606(1) only applies to property that is specifically devised and sold by the guardian or to certain events that occur with respect to specifically devised property while there is a guardian. F.S. § 732.606(2) is not limited to situations where there is a guardian, it applies to all testators.

D. Reformation to Correct Mistakes & Modification to Achieve Tax Objectives – F.S. §§ 732.615 and 732.616

Up until July 1, 2011, it was the law of Florida that no court of law or equity could reform or rewrite a will. See, *e.g.*, *Owens v. Estate of Davis ex rel. Holzauser*, 930 So.2d 873 (Fla. 2d DCA 2006); *In re Estate of Budny*, 815 So.2d 781 (Fla. 2d DCA 2002); *In re Estate of Robinson*, 720 So.2d 540 (Fla. 4th DCA 1998); *In re Estate of Barker*, 448 So.2d 28 (Fla. 1st DCA 1984). But see *In re Estate of Reese*, 622 So.2d 157 (Fla. 4th DCA 1993) (court recognized general rule prohibiting reformation, but granted petition to construe will that divided testamentary trust into several new trusts, including certain tax-exempt trusts, to minimize

federal tax liability); and *In re Estate of Wood*, 226 So.2d 46, 50 (Fla. 2d DCA 1969) (courts can construe will to include additional words that were omitted "by inadvertence or oversight," but that "are essential to the expression of the testator's manifest intention").

In a significant departure from prior law, the Code was amended, effective July 1, 2011, to permit a court to reform a will, even if its terms are unambiguous, to correct the terms of a will if it is shown by clear and convincing evidence that the terms of the will were affected by a mistake. F.S. § 732.615. "In determining the testator's original intent, the court may consider evidence relevant to the testator's intent even though the evidence contradicts an apparent plain meaning of the will." *Id.* Under this statute, interested persons can now petition the court to fix a mistake in a will to conform the document to the testator's true intent. See also F.S. § 736.0415 (reformation of trusts to correct mistakes).

Similarly, the 2011 Florida Legislature also added F.S. § 732.616, which permits any interested person to petition the court to modify a will to achieve the testator's tax objectives in a manner that is not contrary to the testator's probable intent. While this procedure had been available for trusts since 2007, it only became applicable to wills in 2011. See F.S. § 736.0416, the corresponding statute in the Florida Trust Code.

Actions to reform a will and to modify a will are both specific adversary proceedings under Rule 5.025(a). Accordingly, the proceedings, as nearly as practicable, are conducted similar to civil suits and are governed by the Florida Rules of Civil Procedure. Rule 5.025(d)(2).

VIII. Part VII -- Contractual Arrangements Relating to Death

A. Agreement concerning succession – F.S. § 732.701

1. Agreements. An agreement: (i) to make a will, (ii) to give a devise, (iii) not to revoke a will, (iv) not to revoke a devise, (v) not to make a will, or (vi) not to make a devise is enforceable only if:

a. General Rule. It is in writing, signed by the agreeing party in the presence of two attesting witnesses.

b. Exception. If an agreement is executed by a nonresident of Florida at the time of execution, the agreement is valid if it was validly executed under the laws of the state or country where the agreement was executed.

c. Remedy for breach.

i. If the decedent breaches the agreement, the will is not invalid. The injured party has a claim for breach of contract. See *Johnson v. Girtman*, 542 So.2d 1033 (Fla. 3d DCA 1989), *disapproved on other grounds* 656 So.2d 460. Note that the injured party must file a timely claim under F.S. § 733.702. See *Spohr v. Berryman*, 589 So.2d 225 (Fla. 1991).

ii. If the contract to make a will has been defeated through an inter vivos transfer by the decedent, the claimant may pursue an action against the donee to set aside

the transfer, based on fraudulent intent to avoid a contract. *Boyle v. Schmitt,* 578 So.2d 367 (Fla. 3d DCA 1991).

2. Joint or Mutual Will: The execution of a joint will or mutual will does not create a presumption of a contract either: (i) to make a will: or (ii) not to revoke the will or wills.

3. Agreement vs. elective share and pretermitted spousal rights. An agreement with a party other than the surviving spouse cannot be used to defeat a surviving spouse's right to elective share or pretermitted spouse. *Via v. Putnam,* 656 So. 2d 460, 464 (Fla. 1995). Example: A married couple execute mutual contractual wills agreeing that their estates will pass to each other and, upon the survivor's death, to their children. Wife then dies. Husband remarries and then dies without having executed a new will. The surviving spouse's right to elective share or pretermitted spouse share takes priority over the claim of the husband's children.

B. Waiver of spousal rights – F.S. § 732.702.

1. Key Distinction. There are different standards for the validity of a prenuptial agreement in a probate proceeding and a dissolution proceeding. The Code supersedes cases that have evolved in the marital law context (i.e. *Del Vecchio v Del Vecchio*, 143 So.2d 17 (Fla. 1962).

2. Rights that can be waived. A surviving spouse (before or after marriage) by written contract, agreement, or waiver may waive wholly or partly the following rights:

a. Elective share;

b. Intestate share;

c. Pertermitted spouse share;

d. Homestead rights;

e. Exempt property rights;

f. Family allowance rights; and

g. Preference in appointment as personal representative of an intestate estate.

3. Waiver of all rights. Unless the waiver provides otherwise, a waiver of "all right," or equivalent language, in the property or estate of a present or prospective spouse is a waiver of all rights listed above. In addition, a waiver of "all rights" also waives any rights under a will executed before the written agreement, contract, or waiver.

4. Execution. The contract, agreement, or waiver must be signed by the surviving spouse in the presence of two subscribing witnesses. If an agreement is executed by a nonresident of Florida at the time of execution, the agreement is valid even if it does not meet

met the execution requirements, if it was validity executed under the laws of the state or country where the agreement was executed.

5. Disclosure/consideration. Neither disclosure nor consideration is necessary to the validity of a waiver unless executed during marriage, in which case there must be fair disclosure. This statute was upheld by the Florida Supreme Court in *Estate of Roberts*, 388 So.2d 216 (Fla. 1980).

C. Effect of divorce, dissolution, or invalidity of marriage on disposition of certain assets at death – F.S. § 732.703. This statute makes it clear that a designation made by or on behalf of the decedent providing for the payment or transfer at death of an interest in an asset to or for the benefit of the decedent's former spouse is void as of the time the decedent's marriage was judicially dissolved or declared invalid by court order prior to the decedent's death, if the designation was made prior to the dissolution or court order. The decedent's interest in the asset shall pass as if the decedent's former spouse predeceased the decedent. This statute applies to a myriad of assets, including assets that may pass outside of probate, including:

1. A life insurance policy, qualified annuity, or other similar tax-deferred contract held within an employee benefit plan.

2. An employee benefit plan.

3. An individual retirement account described in s. 408 or s. 408A of the Internal Revenue Code of 1986, including an individual retirement annuity described in s. 408(b) of the Internal Revenue Code of 1986.

4. A payable-on-death account.

5. A security or other account registered in a transfer-on-death form.

6. A life insurance policy, annuity, or other similar contract that is not held within an employee benefit plan or a tax-qualified retirement account.

The statute also identifies a list of assets to which is does not apply.

IX. Part VIII - General Provisions

A. Slayer Statute – F.S. § 732.802. A surviving person who unlawfully and intentionally kills or participates in procuring the death of the decedent is not entitled to any benefits under the will or under the Code, and the estate of the decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent. This rule also applies to joint tenancies, named beneficiaries of a bond, life insurance policy, other contractual arrangement, and life estate in homestead.

B. Provisions relating to disposition of the body – F.S. § 732.804. Before the issuance of letters of administration, any person may carry out written instructions of the decedent relating to the decedent's body and funeral and burial arrangements.

C. Spousal rights procured by fraud, duress, or undue influence – F.S. § 732.805. commun

D. Gifts to lawyers and other disqualified persons – F.S. §732.806. This relatively new section of the Code renders void any part of a written instrument that makes a gift to a lawyer or a person related to a lawyer if the lawyer prepared or supervised the execution of the written instrument, or solicited the gift. The statute does not apply if the lawyer or other recipient of the gift is related to the person making the gift. F.S. § 732.806 was recently amended to clarify that this statute only applies to written instruments executed on or after October 1, 2013, the effective date of the statute.

X. Production of Wills -- F.S. § 732.901

A. The custodian of a will must deposit the will with the clerk of the court having venue of the estate of the decedent within ten (10) days after receiving information that the testator died. F.S. § 732.901(1).

B. If the custodian fails to deposit the will a petition to compel the custodian to deposit the will can be filed. F.S. § 732.901(2).

C. Costs, damages, and reasonable attorney's fees can be assessed against the custodian if the court finds there was no just or reasonable cause for the custodian failing to deposit the will. F.S. § 732.901(2).

D. New Retention Rule. Over the last few years, the Florida Supreme Court has significantly revised the Rules of Judicial Administration to facilitate the implementation of electronic filing in the State of Florida. When the idea of electronic service first arose, concerns were raised regarding the impact of the proposed amendments on the retention of original wills and codicils. F.S. § 732.901 provides that original wills are "deposited", not filed, with the clerk. In practice, however, once a probate proceeding is underway, a will is often added to the court file. Historically this was not a problem. Under the new electronic filing rules, however, it appears that a clerk is permitted to scan original documents, store a scanned copy in their electronic record keeping system, and then destroy the original.

In light of the unique evidentiary importance of preserving original wills and codicils, as part of the implementation of the electronic filing rule, the Florida Probate Rules Committee requested that the Florida Supreme Court enact a new rule aimed at protecting and preserving original wills and codicils. In particular, Florida Probate Rule 5.043, which became effective on October 1, 2012, states:

> Notwithstanding any rule to the contrary, and unless the court orders otherwise, any original executed will or codicil deposited with the court must be retained by the clerk in its original form and must not be destroyed or disposed of by the clerk for 20 years after submission regardless of whether the will or codicil has been permanently recorded as defined by Florida Rule of Judicial Administration 2.430.

Effective October 1, 2013, F.S. § 732.901 was updated to conform to Rule 5.043. It also provides that separate writings must be maintained in their original form for the 20-year period.

E. A will under this statute includes a "separate writing." F.S. § 732.515.

Chapter 733 – Probate Code: Administration of Estates

I. Part I – *Select* General Provisions

A. Venue. – F.S. § 733.101. The venue for probate of wills and granting letters shall be: (a) in the Florida county where the decedent was domiciled; (b) if the decedent had no domicile Florida, then in any county where the decedent's property is located; (c) if the decedent had no domicile Florida and possessed no property in this Florida, then in the county where any debtor of the decedent resides. A married woman whose husband is an alien or a nonresident of Florida may establish or designate a separate domicile Florida. Additionally, whenever a proceeding is filed laying venue in an improper county, the court may transfer the action in the same manner as provided in the Florida Rules of Civil Procedure. Any action taken by the court or the parties before the transfer is not affected by the improper venue.

B. Effect of Probate. – F.S. § 733.10. A will is not effective to prove title to, or the right of possession of the property of the testator, until a will is admitted to probate (either in Florida or the state where the decedent was domiciled). In any collateral action or proceeding relating to devised property, the probate of a will in Florida is conclusive of its due execution; that it was executed by a competent testator, free of fraud, duress, mistake, and undue influence; and that the will was unrevoked on the testator's death.

C. Suspension of statutes of limitation in favor of the personal representative. – F.S. § 733.104.

If a person entitled to bring an action dies before the expiration of the time limited for the commencement of the action and the cause of action survives, the action may be commenced by that person's personal representative before the later of the expiration of the time limited for the commencement of the action or 12 months after the decedent's death.

If a person against whom a cause of action exists dies before the expiration of the time limited for commencement of the action and the cause of action survives, if a claim is timely filed, the expiration of the time limited for commencement of the action shall not apply.

D. Determination of beneficiaries. – F.S. § 733.105. Any interested person may petition the court to determine beneficiaries when property passes by intestate succession or the will is unclear and there is doubt about: (a) who is entitled to receive any part of the property; (b) the shares and amounts that any person is entitled to receive. Any personal representative who makes distribution or takes any other action pursuant to an order determining beneficiaries shall be fully protected. A separate civil action to determine beneficiaries may be brought when an estate has not been administered.

E. Costs and attorney fees – F.S. § 733.106

1. Effective date. This fee and cost statute was overhauled effective July 1, 2015. The law in effect before July 1, 2015, applies to proceedings commenced before that date.

2. In all probate proceedings, costs may be awarded as in chancery actions.

3. A person nominated as personal representative, or any proponent of a will if the person so nominated does not act within a reasonable time, if in good faith justified in offering the will in due form for probate, shall receive costs and attorney fees from the estate even though probate is denied or revoked.

4. Any attorney who has rendered services to an estate may be awarded reasonable compensation from the estate.

5. If costs and attorney fees are to be paid from the estate under the relevant Code sections the court, in its discretion, may direct from what part of the estate they shall be paid.

6. If the court directs an assessment against a person's part of the estate and such part is insufficient to fully pay the assessment, the court may direct payment from the person's part of a trust, if any, if a pour-over will is involved and the matter is interrelated with the trust.

7. All or any part of the costs and attorney fees to be paid from the estate may be assessed against one or more persons' part of the estate in such proportions as the court finds to be just and proper. In the exercise of its discretion, the court may consider the following factors: (a) the relative impact of an assessment on the estimated value of each person's part of the estate; (b) the amount of costs and attorney fees to be assessed against a person's part of the estate; (c) the extent to which a person whose part of the estate is to be assessed, individually or through counsel, actively participated in the proceeding; (d) the potential benefit or detriment to a person's part of the estate expected from the outcome of the proceeding; (e) the relative strength or weakness of the merits of the claims, defenses, or objections, if any, asserted by a person whose part of the estate is to be assessed; (f) whether a person whose part of the estate is to be assessed was a prevailing party with respect to one or more claims, defenses, or objections; (g) whether a person whose part of the estate is to be assessed unjustly caused an increase in the amount of costs and attorney fees incurred by the personal representative or another interested person in connection with the proceeding; and (h) any other relevant fact, circumstance, or equity.

8. The court may assess a person's part of the estate without finding that the person engaged in bad faith, wrongdoing, or frivolousness.

F. Fees and costs; will reformation and modification – F.S. § 733.1061. In a proceeding to reform or modify a will the court shall award taxable costs as in chancery actions, including attorney's fees and guardian ad litem fees. When awarding taxable costs, including attorney's fees and guardian ad litem fees, under this section, the court in its discretion may direct payment from a party's interest, if any, in the estate or enter a judgment which may be satisfied from other property of the party, or both.

G. Burden of proof in contests; presumption of undue influence – F.S. § 733.107. In all proceedings contesting the validity of a will, the burden shall be upon the proponent of the

will to establish prima facie its formal execution and attestation. A properly executed self-proving affidavit or an oath of an attesting witness is admissible and establishes prima facie the formal execution and attestation of the will. Thereafter, the contestant has the burden of establishing the grounds on which the probate of the will is opposed or revocation is sought.

In any transaction or event to which the presumption of undue influence applies, the presumption implements public policy against abuse of fiduciary or confidential relationships and is therefore a presumption shifting the burden of proof under F.S. §§ 90.301-90.304.

H. Revocation of Probate – F.S. § 733.109.

A proceeding to revoke the probate of a will must be brought in the court having jurisdiction over the administration. Any interested person, including a beneficiary under a prior will, unless otherwise barred by a waiver or statute of limitations, may commence the proceeding before final discharge of the personal representative. Pending a final determination, the personal representative is to proceed with the administration of the estate as if no revocation proceeding had been commenced, except that no distribution may be made to beneficiaries in contravention of the rights of those who, but for the will, would be entitled to the property disposed of.

Revocation of probate of a will shall not affect or impair the title to property purchased in good faith for value from the personal representative prior to an order of revocation.

II. Part II – Commencing Administration

A. Proof of Wills – F.S. § 733.201. Self-proved wills executed in accordance with the Code may be admitted to probate without further proof. A will may be admitted to probate upon the oath of any attesting witness taken before any circuit judge, commissioner appointed by the court, or clerk.

If it appears to the court that the attesting witnesses cannot be found or that they have become incapacitated after the execution of the will or their testimony cannot be obtained within a reasonable time, a will may be admitted to probate upon the oath of the personal representative nominated by the will, whether or not the nominated personal representative is interested in the estate, or upon the oath of any person having no interest in the estate under the will stating that the person believes the writing exhibited to be the true last will of the decedent.

B. Petition for Administration – F.S. § 733.202. Any interested person may petition for administration.

C. Probate of a will written in a foreign language – F.S. § 733.204. A will written in a foreign language must be accompanied by a true and complete English translation before it can be admitted to probate in Florida. No personal representative who complies in good faith with the English translation of the will as established by the court shall be liable for doing so.

D. Probate of notarial will – F.S. § 733.205. When a copy of a notarial will in the possession of a notary entitled to its custody in a foreign state or country, the laws of which state or country require that the will remain in the custody of the notary, duly authenticated by the notary, whose official position, signature, and seal of office are further authenticated by an

American consul, vice consul, or other American consular officer within whose jurisdiction the notary is a resident, or whose official position, signature, and seal of office have been authenticated according to the requirements of the Hague Convention of 1961, is presented to the court, it may be admitted to probate if the original could have been admitted to probate in Florida.

The duly authenticated copy is prima facie evidence of its purported execution and of the facts stated in the certificate. Any interested person may oppose the probate of such a notarial will or may petition for revocation of probate of such a notarial will, as in the original probate of a will in this state.

E. Probate of will of resident after foreign probate. – F.S. § 733.206. If a will of any person who dies a resident of Florida is admitted to probate in any other state or country through inadvertence, error, or omission before probate in Florida, the will may be admitted to probate in Florida if the original could have been admitted to probate in this state.

An authenticated copy of the will, foreign proof of the will, the foreign order of probate, and any letters issued shall be filed instead of the original will and shall be prima facie evidence of its execution and admission to foreign probate. Any interested person may oppose the probate of the will or may petition for revocation of the probate of the will, as in the original probate of a will in this state.

F. Establishment and probate of lost or destroyed will. – F.S. § 733.207. 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.

G. Discovery of later will. – F.S. § 733.208. 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.

H. Estates of missing persons. – F.S. § 733.209. Any interested person may petition to administer the estate of a missing person; however, no personal representative shall be appointed until the court determines the missing person is dead.

I. Notice of administration; filing of objections. – F.S. § 733.212.

1. The personal representative must promptly serve a copy of the notice of administration in the manner provided for service of formal notice, unless served under F.S. § 733.2123 on the following persons who are known to the personal representative:

a. The decedent's surviving spouse;

b. Beneficiaries;

c. The trustee of any trust described in F.S. § 733.707(3) and each qualified beneficiary of the trust as defined in F.S. § 736.0103, if each trustee is also a personal representative of the estate; and

d. Persons who may be entitled to exempt property

The personal representative may similarly serve a copy of the notice on any devisees under a known prior will or heirs or others who claim or may claim an interest in the estate.

2. The notice of administration must state:

a. The name of the decedent, the file number of the estate, the designation and address of the court in which the proceedings are pending, whether the estate is testate or intestate, and, if testate, the date of the will and any codicils.

b. The name and address of the personal representative and the name and address of the personal representative's attorney, and that the fiduciary lawyer-client privilege in F.S. § 90.5021 applies with respect to the personal representative and any attorney employed by the personal representative.

c. That any interested person on whom a copy of the notice of administration is served must file on or before the date that is 3 months after the date of service of a copy of the notice of administration on that person any objection that challenges the validity of the will, the venue, or the jurisdiction of the court. The 3-month time period may only be extended for estoppel based upon a misstatement by the personal representative regarding the time period within which an objection must be filed. The time period may not be extended for any other reason, including affirmative representation, failure to disclose information, or misconduct by the personal representative or any other person. Unless sooner barred, all objections to the validity of a will, venue, or the jurisdiction of the court must be filed no later than the earlier of the entry of an order of final discharge of the personal representative or 1 year after service of the notice of administration.

d. That persons who may be entitled to exempt property under F.S. § 732.402 will be deemed to have waived their rights to claim that property as exempt property unless a petition for determination of exempt property is filed by such persons or on their behalf on or before the later of the date that is 4 months after the date of service of a copy of the notice of administration on such persons or the date that is 40 days after the date of termination of any proceeding involving the construction, admission to probate, or validity of the will or involving any other matter affecting any part of the exempt property.

e. That an election to take an elective share must be filed on or before the earlier of the date that is 6 months after the date of service of a copy of the notice of administration on the surviving spouse, or an attorney in fact or a guardian of the property of the surviving spouse, or the date that is 2 years after the date of the decedent's death.

3. Any interested person on whom a copy of the notice of administration is served must object to the validity of the will, the venue, or the jurisdiction of the court by filing a petition or other pleading requesting relief in accordance with the Rules on or before the date that

is 3 months after the date of service of a copy of the notice of administration on the objecting person, or those objections are forever barred. The 3-month time period may only be extended for estoppel based upon a misstatement by the personal representative regarding the time period within which an objection must be filed. The time period may not be extended for any other reason, including affirmative representation, failure to disclose information, or misconduct by the personal representative or any other person. Unless sooner barred, all objections to the validity of a will, venue, or the jurisdiction of the court must be filed no later than the earlier of the entry of an order of final discharge of the personal representative or 1 year after service of the notice of administration.

4. The appointment of a personal representative or a successor personal representative shall not extend or renew the period for filing objections under this section, unless a new will or codicil is admitted.

5. The personal representative is not individually liable to any person for giving notice under this statute, regardless of whether it is later determined that notice was not required by this section. The service of notice in accordance with this section is not be construed as conferring any right.

6. 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.

7. If a will or codicil is subsequently admitted to probate, the personal representative must promptly serve a copy of a new notice of administration as required for an initial will admission.

8. For the purpose of determining deadlines established by reference to the date of service of a copy of the notice of administration in cases in which such service has been waived, service are deemed to occur on the date the waiver is filed.

J. Notice to creditors and filing of claims. – F.S. § 733.2121.

1. Unless creditors' claims are otherwise barred by F.S. § 733.710, the personal representative must publish a notice to creditors. The notice shall contain the 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 F.S. § 733.702, or be forever barred.

2. 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.

3. The personal representative must 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. The personal representative is not individually liable to any person for giving notice under this statute, even if it is later determined that notice was not required. The service of notice to creditors is not be construed as admitting the validity or enforceability of a claim.

4. 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.

5. If a decedent at the time of death was 55 years of age or older, the personal representative shall promptly serve a copy of the notice to creditors and provide a copy of the death certificate on the Agency for Health Care Administration within 3 months after the first publication of the notice to creditors, unless the agency has already filed a statement of claim in the estate proceedings.

6. If the Department of Revenue has not previously been served with a copy of the notice to creditors, then service of the inventory on the Department of Revenue shall be the equivalent of service of a copy of the notice to creditors.

K. Adjudication before issuance of letters. – F.S. § 733.2123. A petitioner may serve formal notice of the petition for administration on interested persons. A person who is served with such notice before the issuance of letters or who has waived notice may not challenge the validity of the will, testacy of the decedent, venue, or jurisdiction of the court, except in the proceedings before issuance of letters.

L. Probate as prerequisite to judicial construction of will. – F.S. § 733.213. A will may not be construed until it has been admitted to probate.

III. Part III – Preference in Appointment and Qualifications of Personal Representative

A. Preference in appointment of personal representative. – F.S. § 733.301.

1. Preference in Testate Estates. In granting letters of administration, the following order of preference applies in testate estates: (a) the personal representative, or his or her successor, nominated by the will or pursuant to a power conferred in the will; (b) the person selected by a majority in interest of the persons entitled to the estate; and (c) a devisee under the will. If more than one devisee applies, the court may select the one best qualified.

2. Preference in Intestate Estates. In granting letters of administration, the following order of preference applies in intestate estates: (a) the surviving spouse; (b) the person selected by a majority in interest of the heirs; and (c) the heir nearest in degree. If more than one applies, the court may select the one best qualified.

3. A guardian of the property of a ward who if competent would be entitled to appointment as, or to select, the personal representative may exercise the right to select the personal representative.

4. In either a testate or an intestate estate, if no application is made by any of the persons described above, the court will appoint a capable person, except that the following persons may not be appointed: (a) one who works for, or holds public office under, the court; or (b) one who is employed by, or holds office under, any judge exercising probate jurisdiction.

5. After letters have been granted in either a testate or an intestate estate, if a person who was entitled to, and has not waived, preference over the person appointed at the time of the appointment and on whom formal notice was not served seeks the appointment, the letters granted may be revoked and the person entitled to preference may have letters granted after formal notice and hearing.

6. After letters have been granted in either a testate or an intestate estate, if any will is subsequently admitted to probate, the letters shall be revoked and new letters granted.

B. Who may be appointed personal representative. – F.S. § 733.302. Subject to the limitations set forth in the Code, 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.

C. Persons not qualified to serve a Personal Representative. – F.S. § 733.303. A person is not qualified to act as a personal representative if the person: (a) has been convicted of a felony; (b) is mentally or physically unable to perform the duties; or (c) is under the age of 18 years.

D. Nonresidents. – F.S. § 733.304. A person who is not domiciled in Florida cannot qualify as personal representative unless the person is: (a) a legally adopted child or adoptive parent of the decedent; (b) related by lineal consanguinity to the decedent; (c) a spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent, or someone related by lineal consanguinity to any such person; or (d) he spouse of a person otherwise qualified under this section.

E. Trust companies and other corporations and associations. – F.S. § 733.305. 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 exercise fiduciary powers in Florida are entitled to act as personal representatives and curators of estates.

F. Effect of appointment of debtor. – F.S. § 733.306. The appointment of a debtor as personal representative does not extinguish the debt due the decedent.

G. Succession of administration. – F.S. § 733.307. The personal representative of the estate of a deceased personal representative is not authorized to administer the estate of the first decedent. On the death of a sole or surviving personal representative, the court must appoint a successor personal representative to complete the administration of the estate.

H. Administrator ad litem. – F.S. § 733.308. When an estate must be represented and the personal representative is unable to do so, the court must appoint an administrator ad

litem without bond to represent the estate in that proceeding. The fact that the personal representative is seeking reimbursement for claims against the decedent does not require appointment of an administrator ad litem.

I. Executor de son tort. – F.S. § 733.309. No person is liable to a creditor of a decedent as executor de son tort, but any person taking, converting, or intermeddling with the property of a decedent is liable to the personal representative or curator, when appointed, for the value of all the property so taken or converted and for all damages to the estate caused by the wrongful action. This statute is not to be construed to prevent a creditor of a decedent from suing anyone in possession of property fraudulently conveyed by the decedent to set aside the fraudulent conveyance.

J. Personal representative not qualified. – F.S. § 733.3101. This statute was substantially revised effective July 1, 2015. The law in effect before July 1, 2015 applies to proceedings commenced before that date.

1. A personal representative must resign immediately if the personal representative knows that he or she was not qualified to act at the time of appointment.

2. Any time a personal representative, who was qualified to act at the time of appointment, knows that he or she would not be qualified for appointment if application for appointment were then made, the personal representative must promptly file and serve a notice setting forth the reasons. The personal representative's notice must state that any interested person may petition to remove the personal representative. An interested person on whom a copy of the personal representative's notice is served may file a petition requesting the personal representative's removal within 30 days after the date on which such notice is served.

3. A personal representative who fails to comply with this section is *personally liable* for costs, including attorney fees, incurred in any removal proceeding if the personal representative is removed. This liability extends to a personal representative who does not know, but should have known, of the facts that would have required him or her to resign or to file and serve a notice.

IV. Part IV – Fiduciary Bonds

A. Bond of fiduciary; when required; form. – F.S. § 733.402.

Unless the bond requirement has been waived by the will or by the court, every fiduciary to whom letters are granted must execute and file a bond with surety, as defined in F.S. § 45.011, to be approved by the clerk without a service fee. The bond is payable to the Governor and the Governor's successors in office, conditioned on the performance of all duties as personal representative according to law. The bond must be joint and several.

The court may waive the requirement of filing a bond, require a bond, increase or decrease the bond, or require additional surety.

B. Amount of bond. – F.S. § 733.403. All bonds required are to be in the penal sum that the court deems sufficient after consideration of the gross value of the estate, the relationship

of the personal representative to the beneficiaries, exempt property and any family allowance, the type and nature of assets, known creditors, and liens and encumbrances on the assets.

C. Liability of surety. – F.S. § 733.404. No surety for any personal representative or curator may be charged beyond the value of the assets of an estate because of any omission or mistake in pleading or of false pleading of the personal representative or curator.

D. Release of surety. – F.S. § 733.405.

On the petition of any interested person, the surety is entitled to be released from liability for the future acts and omissions of the fiduciary. Pending hearing on the petition, the court may restrain the fiduciary from acting, except to preserve the estate.

On hearing, the court is to enter an order prescribing the amount of the new bond for the fiduciary and the date when the bond is to be filed. If the fiduciary fails to give the new bond, the fiduciary shall be removed at once, and further proceedings shall be had as in cases of removal.

The original surety remains liable in accordance with the terms of its original bond for all acts and omissions of the fiduciary that occur prior to the approval of the new surety and filing and approval of the bond. The new surety is be liable on its bond only after the filing and approval of the new bond.

E. Bond premium allowable as expense of administration. – F.S. § 733.406. A personal representative or other fiduciary required to give bond shall pay the reasonable premium as an expense of administration.

V. Part V – Curators, Resignation and Removal of Personal Representatives

A. Curators. – F.S. § 733.501.

1. When it is necessary, the court may appoint a curator after formal notice to the person apparently entitled to letters of administration. The curator may be authorized to perform any duty or function of a personal representative. If there is great danger that any of the decedent's property is likely to be wasted, destroyed, or removed beyond the jurisdiction of the court and if the appointment of a curator would be delayed by giving notice, the court may appoint a curator without giving notice.

2. Bond shall be required of the curator as the court deems necessary. No bond shall be required of banks and trust companies as curators.

3. Curators shall be allowed reasonable compensation for their services, and the court may consider the provisions of F.S. § 733.617.

4. Curators are subject to removal and surcharge.

B. Resignation of personal representative. – F.S. § 733.502. 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 does not exonerate the personal representative or the surety from liability.

C. Appointment of successor upon resignation. – F.S. § 733.503. 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.

D. Surrender of assets after resignation. – F.S. § 733.5035. When the resignation has been accepted by the court, all estate assets, records, documents, papers, and other property of or concerning the estate in the resigning personal representative's possession or control shall immediately be surrendered to the successor fiduciary. The court may establish the conditions and specify the assets and records, if any, that the resigning personal representative may retain until the final accounting of the resigning personal representative has been approved.

E. Accounting and discharge following resignation. – F.S. § 733.5036. A resigning personal representative shall file and serve a final accounting of the personal representative's administration. After determination and satisfaction of the liability, if any, of the resigning personal representative, after compensation of the personal representative and the attorney and other persons employed by the personal representative, and upon receipt of evidence that undistributed estate assets have been delivered to the successor fiduciary, the personal representative shall be discharged, the bond released, and the surety discharged.

F. Removal of personal representative; causes for removal. – F.S. § 733.504. 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. Adjudication that the personal representative is incapacitated.

2. Physical or mental incapacity rendering the personal representative incapable of the discharge of his or her duties.

3. Failure to comply with any order of the court, unless the order has been superseded on appeal.

4. Failure to account for the sale of property or to produce and exhibit the assets of the estate when so required.

5. Wasting or maladministration of the estate.

6. Failure to give bond or security for any purpose.

7. Conviction of a felony.

8. Insolvency of, or the appointment of a receiver or liquidator for, any corporate personal representative.

9. 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 the Code.

10. Revocation of the probate of the decedent's will that authorized or designated the appointment of the personal representative.

11. Removal of domicile from Florida, if domicile was a requirement of initial appointment.

12. The personal representative was qualified to act at the time of appointment but is not now entitled to appointment.

G. Jurisdiction in removal proceedings. – F.S. § 733.505. A petition for removal is to be filed in the court having jurisdiction of the administration.

H. Proceedings for removal. – F.S. § 733.506. 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.

I. Appointment of successor upon removal. – F.S. § 733.5061. 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.

J. Accounting and discharge of removed personal representatives upon removal. – F.S. § 733.508. A removed personal representative shall file and serve a final accounting of that personal representative's administration. After determination and satisfaction of the liability, if any, of the removed personal representative, after compensation of that personal representative and the attorney and other persons employed by that personal representative, and upon receipt of evidence that the estate assets have been delivered to the successor fiduciary, the removed personal representative shall be discharged, the bond released, and the surety discharged.

K. Surrender of assets upon removal. – F.S. § 733.509. Upon entry of an order removing a personal representative, the removed personal representative is required to immediately deliver all estate assets, records, documents, papers, and other property of or concerning the estate in the removed personal representative's possession or control to the remaining personal representative or successor fiduciary.

VI. Part VI – Duties and Powers of Personal Representative

A. Time of accrual of duties and powers. – F.S. § 733.601. The duties and powers of a personal representative commence upon appointment. The powers of a personal representative relate back in time to give acts by the person appointed, occurring before appointment and beneficial to the estate, the same effect as those occurring after appointment. A personal

representative may ratify and accept acts on behalf of the estate done by others when the acts would have been proper for a personal representative.

B. General duties. – F.S. § 733.602.

1. A personal representative is a fiduciary who must 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 the Code as expeditiously and efficiently as is consistent with the best interests of the estate.

2. A personal representative is not be liable for any act of administration or distribution if the act was authorized at the time. Subject to other obligations of administration, a probated will is authority to administer and distribute the estate according to its terms. An order of appointment of a personal representative is authority to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative is not aware of a proceeding challenging intestacy or a proceeding questioning the appointment or fitness to continue.

C. Personal representative to proceed without court order. – F.S. § 733.603. A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and, except as otherwise specified by the Code or ordered by the court, shall do so without adjudication, order, or direction of the court. A personal representative may invoke the jurisdiction of the court to resolve questions concerning the estate or its administration.

D. Inventories and accountings. – F.S. § 733.604.

1. A personal representative must 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. All inventories and accountings are confidential and exempt from public access, except that they are to be disclosed: (a) to the personal representative; (b) to the personal representative's attorney; (c) to an interested person as defined in F.S. § 731.201; or (d) by court order upon a showing of good cause.

2. 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.

3. 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.

4. The personal representative must notify each beneficiary of that beneficiary's rights under this statute. 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.

C. Opening safe-deposit box. – F.S. § 733.6065.

The initial opening of a safe-deposit box that is leased or co-leased by the decedent must be conducted in the presence of any two of the following persons: an employee of the institution where the box is located, the personal representative, or the personal representative's attorney of record. Each person who is present must verify the contents of the box by signing a copy of the inventory under penalties of perjury. The personal representative shall file the safe-deposit box inventory, together with a copy of the box entry record from a date which is 6 months prior to the date of death to the date of inventory, with the court within 10 days after the box is opened. Unless otherwise ordered by the court, this inventory and the attached box entry record is subject to inspection only by persons entitled to inspect an inventory under s. 733.604(1). The personal representative may remove the contents of the box.

D. Possession of estate. – F.S. § 733.607.

1. 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.

2. If, after providing for statutory entitlements and all devises other than residuary devises, the assets of the decedent's estate are insufficient to pay the expenses of the administration and obligations of the decedent's estate, the personal representative is entitled to payment from the trustee of a trust described in F.S. § 733.707(3), in the amount the personal representative certifies in writing to be required to satisfy the insufficiency, subject to the exclusions and preferences under F.S. § 736.05053.

E. General power of the personal representative – F.S. § 733.608

1. Power over Property. All real and personal property of the decedent located in Florida (except the protected homestead) including rents, income, issues, and profits from it is under the authority of the personal representative: (a) for the payment of devises, family allowance, elective share, estate and inheritance taxes, claims, charges, and expenses of the administration and obligations of the decedent's estate; (b) to enforce contribution and equalize advancement; and (c) for distribution.

2. Possession of Homestead. If property that reasonably appears to the personal representative to be protected homestead is not occupied by a person who appears to have an

interest in the property, the personal representative is authorized, but not required, to take possession of that property for the limited purpose of preserving, insuring, and protecting it for the person having an interest in the property, pending a determination of its homestead status. If the personal representative takes possession of that property, any rents and revenues may be collected by the personal representative for the account of the heir or devisee, but the personal representative has no duty to rent or otherwise make the property productive.

3. Lien on Homestead. If the personal representative expends funds or incurs obligations to preserve, maintain, insure, or protect the homestead, the personal representative is entitled to a lien on that property and its revenues to secure repayment of those expenditures and obligations incurred. These expenditures and obligations incurred, including, but not limited to, fees and costs, will constitute a debt owed to the personal representative that is charged against and which may be secured by a lien on the protected homestead, as provided in this section. The debt includes any amounts paid for these purposes after the decedent's death and prior to the personal representative's appointment to the extent later ratified by the personal representative in the court proceeding. The statute goes on to discuss the procedure and requirements for the imposition of such a lien.

4. Personal Representative Note Liable for Not Taking Possession of Homestead. The personal representative shall not be liable for failure to take possession of the protected homestead or to expend funds on its behalf.

F. Improper exercise of power; breach of fiduciary duty – F.S. § 733.609.

1. 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.

2. 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. When awarding taxable costs, including attorney's fees, the court in its discretion may direct payment from a party's interest, if any, in the estate or enter a judgment which may be satisfied from other property of the party, or both.

G. Sale, encumbrance, or transaction involving conflict of interest – F.S. § 733.610. Any sale or encumbrance to the personal representative or the personal representative's spouse, agent, or attorney, or any corporation or trust in which the personal representative has a substantial beneficial interest, or any transaction that is affected by a conflict of interest on the part of the personal representative, is voidable by any interested person except one who has consented after fair disclosure, unless: (a) the will or a contract entered into by the decedent expressly authorized the transaction; or (b) the transaction is approved by the court after notice to interested persons.

F. Persons dealing with the personal representative; protection – F.S. § 733.611. Except as provided in F.S. § 733.613(1), a person who in good faith either assists or deals for value with a personal representative is protected as if the personal representative acted properly. The fact that a person knowingly deals with the personal representative does not require the

person to inquire into the authority of the personal representative. A person is not bound to see to the proper application of estate assets paid or delivered to the personal representative. This protection extends to instances in which a procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters, including a case in which the alleged decedent is alive.

H. Transactions authorized for the personal representative – F.S. § 733.612. Unless the will or a court order states otherwise, and subject to the order in which assets abate, a personal representative may:

1. Retain assets owned by the decedent, pending distribution or liquidation, including those in which the personal representative is personally interested or that are otherwise improper for fiduciary investments.

2. Perform or compromise, or, when proper, refuse to perform, the decedent's contracts. In performing the decedent's enforceable contracts to convey or lease real property, among other possible courses of action, the personal representative may:

a. Convey the real property for cash payment of all sums remaining due or for the purchaser's note for the sum remaining due, secured by a mortgage on the property.

b. Deliver a deed in escrow, with directions that the proceeds, when paid in accordance with the escrow agreement, be paid as provided in the escrow agreement.

3. Receive assets from fiduciaries or other sources.

4. Invest funds as provided in F.S. §518.10-518.14, considering the amount to be invested, liquidity needs of the estate, and the time until distribution will be made

5. 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.

6. Make ordinary or extraordinary repairs or alterations in buildings or other structures; demolish improvements; or erect new party walls or buildings.

7. Enter into a lease, as lessor or lessee, for a term within, or extending beyond, the period of administration, with or without an option to renew.

8. Enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement.

9. Abandon property when it is valueless or so encumbered, or in a condition, that it is of no benefit to the estate.

10. Vote, or refrain from voting, stocks or other securities in person or by general or limited proxy.

11. Pay calls, assessments, and other sums chargeable or accruing against, or on account of, securities, unless barred by the provisions relating to claims.

12. Hold property in the name of a nominee or in other form without disclosure of the interest of the estate, but the personal representative is liable for any act of the nominee in connection with the property so held.

13. Insure the assets of the estate against damage or loss and insure against personal and fiduciary liability to third persons.

14. Borrow money, with or without security, to be repaid from the estate assets or otherwise, other than real property, and advance money for the protection of the estate.

15. Extend, renew, or in any manner modify any obligation owing to the estate. If the personal representative holds a mortgage, security interest, or other lien upon property of another person, he or she may accept a conveyance or transfer of encumbered assets from the owner in satisfaction of the indebtedness secured by its lien instead of foreclosure.

16. Pay taxes, assessments, and other expenses incident to the administration of the estate.

17. Sell or exercise stock subscription or conversion rights or consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

18. Allocate items of income or expense to either estate income or principal, as permitted or provided by law.

19. Employ persons, including, but not limited to, attorneys, accountants, auditors, appraisers, investment advisers, and others, even if they are one and the same as the personal representative or are associated with the personal representative, to advise or assist the personal representative in the performance of administrative duties; act upon the recommendations of those employed persons without independent investigation; and, instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary. Any fees and compensation paid to a person who is the same as, associated with, or employed by, the personal representative shall be taken into consideration in determining the personal representative's compensation.

20. Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the personal representative.

21. Sell, mortgage, or lease any personal property of the estate or any interest in it for cash, credit, or for part cash or part credit, and with or without security for the unpaid balance.

22. Continue any unincorporated business or venture in which the decedent was engaged at the time of death:

a. In the same business form for a period of not more than 4 months from the date of appointment, if continuation is a reasonable means of preserving the value of the business, including good will.

b. In the same business form for any additional period of time that may be approved by court order.

23. Provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate.

24. Satisfy and settle claims and distribute the estate as provided in the Code.

25. Enter into agreements with the proper officer or department head, commissioner, or agent of any department of the government of the United States, waiving the statute of limitations concerning the assessment and collection of any federal tax or any deficiency in a federal tax.

26. 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.

27. Execute any instruments necessary in the exercise of the personal representative's powers.

I. Personal representative; powers as to environmental issues relating to property subject to administration; liability – F.S. § 733.6121. This statute articulates special rules regarding the personal representative's power and liability in dealing with property that has environmental issues.

J. Personal representative's right to sell real property – F.S. § 733.613.

1. When a personal representative of an intestate estate, or whose testator has not conferred a power of sale or whose testator has granted a power of sale but the power is so limited by the will or by operation of law that it cannot be conveniently exercised, shall consider that it is for the best interest of the estate and of those interested in it that real property be sold, the personal representative may sell it at public or private sale. No title shall pass until the court authorizes or confirms the sale. No bona fide purchaser shall be required to examine any proceedings before the order of sale.

2. When a decedent's will confers specific power to sell or mortgage real property or a general power to sell any asset of the estate, the personal representative may sell, mortgage, or lease, without authorization or confirmation of court, any real property of the estate or any interest therein for cash or credit, or for part cash and part credit, and with or without security for unpaid balances. The sale, mortgage, or lease need not be justified by a showing of necessity, and the sale pursuant to power of sale shall be valid.

3. In a sale or mortgage which occurs under a specific power to sell or mortgage real property, or under a court order authorizing or confirming that act, the purchaser or lender takes title free of claims of creditors of the estate and entitlements of estate beneficiaries, except existing mortgages or other liens against real property are not affected.

K. Powers and duties of successor personal representative – F.S. § 733.614. A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate as expeditiously as possible, but shall not exercise any power made personal to the personal representative named in the will without court approval.

L. Joint personal representatives; when joint action required – F.S. § 733.615.

1. If two or more persons are appointed joint personal representatives, and unless the will provides otherwise, the concurrence of all joint personal representatives appointed pursuant to a will or codicil executed prior to October 1, 1987, or appointed to administer an intestate estate of a decedent who died prior to October 1, 1987, or of a majority of joint personal representatives appointed pursuant to a will or codicil executed on or after October 1, 1987, or appointed to administer an intestate estate of a decedent dying on or after October 1, 1987, is required on all acts connected with the administration and distribution of the estate.

2. This restriction does not apply when any joint personal representative receives and receipts for property due the estate, when the concurrence required under this subsection cannot readily be obtained in the time reasonably available for emergency action necessary to preserve the estate, or when a joint personal representative has been delegated to act for the others.

3. Where action by a majority of the joint personal representatives appointed is authorized, a joint personal representative who has not joined in exercising a power is not liable to the beneficiaries or to others for the consequences of the exercise, and a dissenting joint personal representative is not liable for the consequences of an action in which the dissenting personal representative joins at the direction of the majority of the joint personal representatives, if the dissent is expressed in writing to the other joint personal representatives at or before the time of the action.

4. A person dealing with a joint personal representative without actual knowledge that joint personal representatives have been appointed, or if advised by a joint personal representative that the joint personal representative has authority to act alone for any of the reasons mentioned above, is as fully protected in dealing with that joint personal representative as if that joint personal representative possessed and properly exercised the power.

M. Powers of surviving personal representatives – F.S. § 733.616. Unless otherwise provided by the terms of the will or a court order, every power exercisable by joint personal representatives may be exercised by the one or more remaining after the appointment of one or more is terminated. If one or more, but not all, nominated as joint personal representatives are not appointed, those appointed may exercise all powers granted to those nominated.

N. Compensation of personal representative – F.S. § 733.617.

1. A personal representative is entitled to a commission payable from the estate assets without court order as compensation for ordinary services. The commission is 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.

2. The presumed reasonable compensation for a personal representative in formal administration as follows: (a) 3% for the first $1 million; (b) 2.5% for all above $1 million and not exceeding $5 million; (c) 2% for all above $5 million and not exceeding $10 million; (d) 1.5% for all above $10 million.

3. A personal representative is also entitled to additional compensation 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; (d) the carrying on of the decedent's business; (e) dealing with protected homestead; and (f) any other special services which may be necessary for the personal representative to perform.

4. If the will provides that a personal representative's compensation shall be based upon specific criteria, other than a general reference to commissions allowed by law or words of similar import, including, but not limited to, rates, amounts, commissions, or reference to the personal representative's regularly published schedule of fees in effect at the decedent's date of death, or words of similar import, then a personal representative shall be entitled to compensation in accordance with that provision. However, except for references in the will to the personal representative's regularly published schedule of fees in effect at the decedent's date of death, or words of similar import, if there is no written contract with the decedent regarding compensation, a personal representative may renounce the provisions contained in the will and be entitled to compensation under statute. A personal representative may also renounce the right to all or any part of the compensation.

5. Joint Commissions. 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.

6. 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.

7. 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. The statute lists the factors the court must consider.

O. Compensation of attorney for the personal representative – F.S. § 733.6171.

1. Attorneys for personal representatives are entitled to reasonable compensation payable from the estate assets without court order.

2. The attorney, the personal representative, and persons bearing the impact of the compensation may agree to compensation determined in a different manner than provided in this section. Compensation may also be determined in a different manner than provided in this section if the manner is disclosed to the parties bearing the impact of the compensation and if no objection is made as provided for in the Rules.

3. Compensation for ordinary services of attorneys in formal estate administration is presumed to be reasonable if 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 the administration as provided in the following schedule:

a. One thousand five hundred dollars for estates having a value of $40,000 or less.

b. An additional $750 for estates having a value of more than $40,000 and not exceeding $70,000.

c. An additional $750 for estates having a value of more than $70,000 and not exceeding $100,000.

d. For estates having a value in excess of $100,000, at the rate of 3 percent on the next $900,000.

e. At the rate of 2.5 percent for all above $1 million and not exceeding $3 million.

f. At the rate of 2 percent for all above $3 million and not exceeding $5 million.

g. At the rate of 1.5 percent for all above $5 million and not exceeding $10 million.

h. At the rate of 1 percent for all above $10 million.

4. In addition to fees for ordinary services, the attorney for the personal representative shall be allowed further reasonable compensation for any extraordinary service. What is an extraordinary service may vary depending on many factors, including the size of the estate. The statute lists examples of extraordinary service, including things like involvement in a

will contest, will construction, a proceeding for determination of beneficiaries, a contested claim, elective share proceeding, apportionment of estate taxes, or any adversarial proceeding or litigation by or against the estate.

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 if the facts and circumstances of the particular administration warrant. The statute lists facts for consideration by the court.

6. If a separate written agreement regarding compensation exists between the attorney and the decedent, the attorney shall furnish a copy to the personal representative prior to commencement of employment, and, if employed, shall promptly file and serve a copy on all interested persons. Neither a separate agreement nor a provision in the will suggesting or directing that the personal representative retain a specific attorney will obligate the personal representative to employ the attorney or obligate the attorney to accept the representation, but if the attorney who is a party to the agreement or who drafted the will is employed, the compensation paid shall not exceed the compensation provided in the agreement or in the will.

P. Proceedings for review of employment of agents and compensation of personal representatives and employees of estate – F.S. § 733.6175

1. The court may review the propriety of the employment of any person employed by the personal representative and the reasonableness of any compensation paid to that person or to the personal representative.

2. Court proceedings to determine reasonable compensation of the personal representative or any person employed by the personal representative, if required, are a part of the estate administration process, and the costs, including attorneys' fees, of the person assuming the burden of proof of propriety of the employment and reasonableness of the compensation shall be determined by the court and paid from the assets of the estate unless the court finds the requested compensation to be substantially unreasonable. The court shall direct from which part of the estate the compensation shall be paid.

3. The burden of proof of propriety of the employment and the reasonableness of the compensation shall be upon the personal representative and the person employed. Any person who is determined to have received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

4. The court may determine reasonable compensation for the personal representative or any person employed by the personal representative without receiving expert testimony. Any party may offer expert testimony after notice to interested persons. If expert testimony is offered, a reasonable expert witness fee shall be awarded by the court and paid from the assets of the estate. The court shall direct from what part of the estate the fee shall be paid.

Q. Individual liability of personal representative – F.S. § 733.619

1. Unless otherwise provided in the contract, a personal representative is not individually liable on a contract, except a contract for attorney's fee, properly entered into as

fiduciary unless the personal representative fails to reveal that representative capacity and identify the estate in the contract.

2. A personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if personally at fault.

3. Claims based on contracts, except a contract for attorney's fee, entered into by a personal representative as a fiduciary, on obligations arising from ownership or control of the estate, or on torts committed in the course of estate administration, may be asserted against the estate by proceeding against the personal representative in that capacity, whether or not the personal representative is individually liable.

4. Issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge, or indemnification, or other appropriate proceeding.

R. Exculpation of personal representative – F.S. § 733.620

1. A term of a will relieving a personal representative of liability to a beneficiary for breach of fiduciary duty is unenforceable to the extent that the term:

a. Relieves the personal representative of liability for breach of fiduciary duty committed in bad faith or with reckless indifference to the purposes of the will or the interests of interested persons; or

b. Was inserted into the will as the result of an abuse by the personal representative of a fiduciary or confidential relationship with the testator.

2. An exculpatory term drafted or caused to be drafted by the personal representative is invalid as an abuse of a fiduciary or confidential relationship unless:

a. The personal representative proves that the exculpatory term is fair under the circumstances.

b. The term's existence and contents were adequately communicated directly to the testator or to the independent attorney of the testator. This provision applies only to wills created on or after July 1, 2007.

VII. Part VII – Creditor Claims

This topic is being covered separately by Tami Conetta, but the basics are set forth for your review and enjoyment.

A. Duties to Creditors

The personal representative handles the decedent's possessions so that creditors, legatees, distributees, and other lawful claimants receive their rightful shares under the law. *Whitfield v.*

Whitfield, 172 So. 711 (Fla. 1937); *Campbell v. Owen*, 132 So. 2d 212 (Fla. 2d DCA 1961). It has been said that it is the personal representative's paramount duty to protect the interests of creditors because they have the first claim against the estate, and in a broad sense, the personal representative holds the estate as a trust fund for the payment of the decedent's debts. *State v. Beardsley*, 82 So. 794 (Fla. 1919); *In re Wilson's Estate*, 116 So. 2d 440 (Fla. 2d DCA 1959).

Once the personal representative is appointed, Florida law provides a period of 3 months during which creditors of the decedent must notify the personal representative of their claims. F.S. § 733.702. The personal representative must publish a notice to that effect in the local newspaper, and send proof of publication to the court. In addition, the personal representative is required to send a copy of the notice to all "known or reasonably ascertainable" creditors, and advise them of the decedent's death and the time period within which they must present their claims. F.S. §§ 733.701, 733.2121.

If probate is not opened, then creditors have up to 2 years from decedent's date of death to seek payment from the decedent's revocable trust and/or the recipients of property received as a result of the decedent's death. F.S. § 733.710.

If a creditor does not timely file written notice of his claim with the court, in most cases he or she will be barred from making a claim against the estate. If any claim is considered questionable, the personal representative may refuse to pay it and should promptly follow the procedure for timely filing a written objection to or compromise of the claim.

Prior to the end of the claim period, the personal representative should also file with the court a form listing all claims and funeral expenses which he either has paid or intends to pay. Fla. Prob. R. 5.498, 5.499.

The personal representative is required to pay all valid claims within 1 year from the date of first publication of notice to creditors, provided that the time shall be extended for claims in litigation, unmatured claims, and contingent claims. F.S. § 733.705(1). The court may extend the time for payment of a valid claim upon a showing of good cause. *Id.* The personal representative cannot be compelled to pay a debt of the decedent until 5 months after the first publication of notice to creditors. *Id.*

B. Procedure for Filing Claims

1. Form and Manner of Presenting Claims

Florida Probate Rule 5.490 and F.S. § 733.703 set forth the form and manner of presenting a claim. A creditor's statement of claim must be verified, filed with the clerk in duplicate, and state (a) the basis for the claim; (b) the amount claimed; (c) the name and address of the creditor; (d) the security for the claim, if any; and (e) whether the claim is due or involves uncertainty and, if not due, then the due date, and if contingent or unliquidated, the nature of the uncertainty. The form requirements under F.S. § 733.703 have been very liberally construed. For example, in *May v. Illinois Nat. Ins. Co.*, 771 So. 2d 1143 (Fla. 2000), a petition for appointment of an administrator ad litem filed in the actual probate proceeding contained enough about a claim against the estate that the court deemed it sufficient to fulfill the filing requirements. When an error, omission or other defect is made in a statement of claim, it may be

corrected by amendment at any time. *Id.*; F.S. § 733.704. However, an amendment to the nature or amount of the claim must be made before the expiration of the non-claim period. *See Estate of Shearer v. Agency for Health Care Admin.*, 737 So. 2d 1229 (Fla. 5th DCA 1999).

2. Time for Filing

Florida Statute § 733.702 provides that claims must be filed within the later of 3 months after the first publication of notice to creditors, or as to any creditor who was required to be served with notice to creditors (i.e., "reasonably ascertainable"), 30 days after the date of service of a copy of the notice to creditors. If a creditor fails to file their claim within the time period prescribed by F.S. § 733.702, their claim will be time barred unless the time for filing is extended by the court. An extension may be granted only upon the grounds of fraud, estoppel, or insufficient notice of the claims period.

In *May v. Illinois Nat. Ins. Co*., 771 So. 2d 1143 (Fla. 2000), the Florida Supreme Court held that F.S. § 733.702 is a statute of limitations as opposed to a jurisdictional statute of nonclaim. *See also Scott v. Reyes*, 913 So. 2d 13 (Fla. 2d DCA 2005). The difference between the two types of statutes is that a jurisdictional statute of nonclaim operates as an automatic bar to untimely claims, while a statute of limitations bars untimely claims only when a party asserts its operation as an affirmative defense. As a practical matter, this means that a creditor who fails to file their claim within the time set forth in F.S. § 733.702 must be given an opportunity to justify their failure to file a claim in a timely manner.

As noted above, in order to preserve a claim against a decedent's estate in Florida, a creditor must file a written statement of the claim within the statutorily prescribed time periods. *See* F.S. § 733.702 and § 733.710. Section 733.702 is a statute of limitations tied to the later of 30 days after the date of service of a notice to creditors or 3 months after the first publication of notice to creditors. On the other hand, section 733.710 is a jurisdictional statute of nonclaim that is not subject to waiver or extension in a probate proceeding.

Specifically, F.S. § 733.702 states in relevant part:

> (1) If not barred by s. 733.710, no claim or demand against the decedent's estate that arose before the death of the decedent . . . is binding on the estate, on the personal representative, or on any beneficiary *unless filed in the probate proceeding on or before the later of the date that is 3 months after the time of the first publication of the notice to creditors or, as to any creditor required to be served with a copy of the notice to creditors, 30 days after the date of service on the creditor*, even though the personal representative has recognized the claim or demand by paying a part of it or interest on it or otherwise . . . .
>
> ***
>
> (3) Any claim not timely filed as provided in this section is barred even though no objection to the claim is filed unless the court

> extends the time in which the claim may be filed. An extension may be granted only upon grounds of fraud, estoppel, or insufficient notice of the claims period. No independent action or declaratory action may be brought upon a claim which was not timely filed unless an extension has been granted by the court. If the personal representative or any other interested person serves on the creditor a notice to file a petition for an extension, the creditor shall be limited to a period of 30 days from the date of service of the notice in which to file a petition for extension.

Section 733.710, states in relevant part:

> (1) 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.
>
> (2) This section shall not apply to a creditor who has filed a claim pursuant to s. 733.702 within 2 years after the person's death, and whose claim has not been paid or otherwise disposed of pursuant to s. 733.705.

The First, Second, and Fifth Districts in Florida have ruled that a reasonably ascertainable creditor who was not served with a notice to creditors is required to file a claim within the 3-month publication period, unless the creditor files a motion for extension of time under F.S. § 733.702(3) within the 2-year statute of repose set out in F.S. § 733.710. *See Morgenthau v. Estate of Andzel*, 26 So. 3d 628, 632-33 (Fla. 1st DCA 2009); *Lubee v. Adams*, 77 So. 3d 882, 884 (Fla. 2d DCA 2012); *Souder v. Malone*, 143 So. 3d 486 (Fla. 5th DCA).

The Fourth DCA reached a contrary result in *Golden v. Jones*, 126 So. 3d 390 (Fla. 4th DCA 2013). *Golden* dealt with the timeliness of a claim filed in a probate estate by a known or reasonably ascertainable creditor who was not served with a notice to creditors. The Fourth DCA held that the statute of limitations for filing a claim under F.S. § 733.702 does not begin to run against a known or reasonably ascertainable creditor unless that creditor is served with a notice to creditors. Hence, such a creditor has until 2 years following the decedent's date of death, as provided in F.S. §733.710, to file a timely claim. Citing its opinion in *In re Estate of Puzzo*, 637 So. 2d 26 (Fla. 4th DCA 1994), the Fourth DCA stated that "a claim of a reasonably ascertainable creditor, who was never served with notice to creditors, is timely if it is filed within two years of the decedent's death." The court concluded that "[b]ecause such a claim is timely under section 733.702(1), it would be unnecessary for a reasonably ascertainable creditor to file a motion for extension of time under section 733.702(3)." This is an important distinction between *Golden* and the *Lubee* and *Morgenthau* cases. Ultimately, the Fourth DCA reversed and remanded the case to the trial court to determine whether the creditor was a known or reasonably ascertainable creditor. In light of the conflict with the First and Second Districts, the Fourth

DCA certified the question to the Florida Supreme Court. The Florida Supreme Court accepted jurisdiction and, in late 2015, finally brought some clarity to this issue.

The Florida Supreme Court resolved the conflict and issued an opinion on October 1, 2015 approving the decision of the Fourth DCA in *Jones v. Golden*, 176 So. 3d 242 (Fla. 2015). The Court concluded that "claims of known or reasonably ascertainable creditors of an estate who were not served with a copy of the notice to creditors are timely if filed within two years of the decedent's death."

3. Two Year Statute of Nonclaim

It is worth repeating that F.S. § 733.710 provides that "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 for claims of creditors which have been timely filed pursuant to F.S. § 733.702 within 2 years of death.

Florida Statute 733.710 is a true jurisdictional statute of nonclaim and serves as an absolute bar to creditors' claims after the two-year period. *May v. Illinois Nat. Ins. Co.*, 771 So. 2d 1143 (Fla. 2000). The *May* decision resolved a split among the District Courts of Appeal on this issue. *See Baptist Hospital of Miami, Inc. v. Carter*, 658 So. 2d 560 (Fla. 3d DCA 1995) and *Comerica Bank v. SDI Operating Partners, L.P.*, 673 So. 2d 163 (Fla. 4th DCA 1996).

C. Necessity of Filing Claim

Florida Statute 733.702(1) requires that "claims or demands" against the decedent's estate that arose before the death of the decedent, and funeral or burial expenses incurred after death, be filed with the court. The terms "claims and demands" are extremely broad and cover almost all causes of action in tort and contract.

A claim must be filed regardless of whether the action has already been commenced by the creditor, the action is already pending, or a judgment has already been obtained. *See Spohr v. Berryman*, 589 So. 2d 225 (Fla. 1991); *In re Estate of Danese*, 601 So. 2d 570 (Fla. 1st DCA 1992); *Hogan v. Howard*, 716 So. 2d 286 (Fla. 2d DCA 1998).

D. Procedure for Objecting to Claims

1. Standing to Object

Pursuant to Florida Statute 733.705(2), the personal representative or any other "interested person" may file an objection to a claim. The objection may be signed and filed by the attorney of record for the interested person. *Johnson v. Estate of Fraedrich*, 472 So. 2d 1266 (Fla. 1st DCA 1985).

2. Time for Objecting

Florida Statute 733.705(2) provides that an objection must be filed within the later of 4 months from the first publication of notice to creditors or within 30 days from the timely filing of a claim or amendment to a claim. The time for objecting can be extended by the court for "good cause" under F.S. § 733.705(2). The court can grant the extension even if the petition for extension is filed after the time for making the objection has run. *In re Estate of Keerl*, 451 So. 2d 872 (Fla. 2d DCA 1984). Courts have held that "good cause" requires the showing of a substantial reason that constitutes a legal excuse (similar to the excusable neglect concept for setting aside defaults). *See e.g., Cohen v. Majestic Distilling Co., Inc.*, 765 So. 2d 276 (Fla. 4th DCA 2000). The burden of showing good cause is on the movant. *In re Estate of Maze*, 431 So. 2d 747 (Fla. 5th DCA 1983). Mere ignorance of law, hardship, or reliance on the advice of another is not considered to be good cause. *In re Estate of Dudley*, 374 So. 2d 1111 (Fla. 4th DCA 1979). Settlement negotiations alone are not good cause. *Id.; Maze*, 431 So. 2d 747.

Failure to object to an improper claim will require its payment. However, if that is the case, the beneficiaries of the estate may seek to surcharge the personal representative. *See Goggin v. Shanley*, 81 So. 2d 728 (Fla. 1955).

E. The Independent Action

If an interested person files an objection, the creditor has 30 days to file an "independent action" against the personal representative to enforce the claim or establish its validity. F.S. § 733.705. Initiating an independent action requires the filing of a separate action upon the claim rather than the filing of a petition for payment of the claim in the probate proceedings. *In re Estate of Pridgeon*, 349 So. 2d 741 (Fla. 1st DCA 1977). Under certain circumstances, a pending lawsuit against the decedent will fulfill the independent action requirement. *In re Estate of Brown*, 421 So. 2d 752 (Fla. 4th DCA 1982). If a creditor fails to bring an action, the claim is barred without further court order. F.S. § 733.705(5). The time for filing an independent action can be extended by the court for good cause. *Id.*

VIII. Part VIII – *Select* Special Provisions for Distribution

A. Delivery of devises and distributive shares – F.S. § 733.801. The personal representative is not required to pay or deliver any devise or distributive share or to surrender possession of any land to any beneficiary until the expiration of 5 months from the granting of letters of administration. Additionally, unless the will provides otherwise, the personal representative shall pay as an expense of administration the reasonable expenses of storage, insurance, packing, and delivery of tangible personal property to a beneficiary.

B. Proceedings for compulsory payment of devises or distributive interest – F.S. § 733.802.

1. Before final distribution, no personal representative shall be compelled: (a) to pay a devise in money before the final settlement of the personal representative's accounts; (b) to deliver specific personal property devised, unless the personal property is exempt personal property; (c) to pay all or any part of a distributive share in the personal estate of a decedent, or (d) to surrender land to any beneficiary, *unless* the beneficiary establishes that the property will

not be required for the payment of debts, family allowance, estate and inheritance taxes, claims, elective share of the surviving spouse, charges, or expenses of administration or to provide funds for contribution or to enforce equalization in case of advancements.

2. An order directing the surrender of real property or the delivery of personal property by the personal representative to the beneficiary shall be conclusive in favor of bona fide purchasers for value from the beneficiary or distributee as against the personal representative and all other persons claiming by, through, under, or against the decedent or the decedent's estate.

3. If the administration of the estate has not been completed before the entry of an order of partial distribution, the court may require the person entitled to distribution to give a bond, conditioned on the making of due contribution for the payment of devises, family allowance, estate and inheritance taxes, claims, elective share of the spouse, charges, expenses of administration, and equalization in case of advancements, plus any interest on them.

C. Encumbered property; liability for payment – F.S. § 733.803. The specific devisee of any encumbered property shall be entitled to have the encumbrance on devised property paid at the expense of the residue of the estate only when the will shows that intent. A general direction in the will to pay debts does not show that intent.

D. Order in which assets abate – F.S. § 733.805

1. Funds or property designated by the will shall be used to pay debts, family allowance, exempt property, elective share charges, expenses of administration, and devises, to the extent the funds or property is sufficient. If no provision is made or the designated fund or property is insufficient, the funds and property of the estate shall be used for these purposes, and to raise the shares of a pretermitted spouse and children, except as otherwise provided in subsections (3) and (4) of the statute, in the following order: (a) property passing by intestacy; (b) property devised to the residuary devisee or devisees; (c) property not specifically or demonstratively devised; (d) property specifically or demonstratively devised.

2. Demonstrative devises shall be classed as general devises upon the failure or insufficiency of funds or property out of which payment should be made, to the extent of the insufficiency. Devises to the decedent's surviving spouse, given in satisfaction of, or instead of, the surviving spouse's statutory rights in the estate, shall not abate until other devises of the same class are exhausted. Devises given for a valuable consideration shall abate with other devises of the same class only to the extent of the excess over the amount of value of the consideration until all others of the same class are exhausted. Except as herein provided, devises shall abate equally and ratably and without preference or priority as between real and personal property. When property that has been specifically devised or charged with a devise is sold or used by the personal representative, other devisees shall contribute according to their respective interests to the devisee whose devise has been sold or used. The amounts of the respective contributions shall be determined by the court and shall be paid or withheld before distribution is made.

3. F.S. § 733.817 (the Code's estate tax apportionment statute) applies before this section is applied.

E. Advancement – F.S. § 733.806. If a person dies intestate, property that the decedent gave during lifetime to an heir is treated as an advancement against the heir's share of the estate only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir. The property advanced shall be valued at the time the heir came into possession or enjoyment of the property or at the time of the death of the decedent, whichever first occurs. If the recipient of the property does not survive the decedent, the property shall not be taken into account in computing the intestate share to be received by the recipient's descendants unless the declaration or acknowledgment provides otherwise.

F. Right of retainer – F.S. § 733.809. The amount of a noncontingent indebtedness due from a beneficiary to the estate or its present value, if not due, may be offset against that beneficiary's interest. However, that beneficiary shall have the benefit of any defense that would be available in a direct proceeding for recovery of the debt.

G. Distribution in kind; valuation – F.S. § 733.810

1. Assets shall be distributed in kind unless (a) a general power of sale is conferred; (b) a contrary intention is indicated by the will or trust; or (c) disposition is made otherwise under the provisions of the Code.

2. Any pecuniary devise, family allowance, or other pecuniary share of the estate or trust may be satisfied in kind if: (a) the person entitled to payment has not demanded cash; (b) the property is distributed at fair market value as of its distribution date; and (c) no residuary devisee has requested that the asset remain a part of the residuary estate.

3. When not practicable to distribute undivided interests in a residuary asset, the asset may be sold.

4. When the fiduciary under a will or trust is required, or has an option, to satisfy a pecuniary devise or transfer in trust, to or for the benefit of the surviving spouse, with an in-kind distribution, at values as finally determined for federal estate tax purposes, the fiduciary shall, unless the governing instrument otherwise provides, satisfy the devise or transfer in trust by distribution of assets, including cash, fairly representative of the appreciated or depreciated value of all property available for that distribution, taking into consideration any gains and losses realized from a prior sale of any property not devised specifically, generally, or demonstratively.

5. A personal representative or a trustee is authorized to distribute any distributable assets, non-pro rata among the beneficiaries subject to the fiduciary's duty of impartiality.

H. Improper distribution or payment; liability of distributee or payee – F.S. § 733.812. A distributee or a claimant who was paid improperly must return the assets or funds received, and the income from those assets or interest on the funds since distribution or payment, unless the distribution or payment cannot be questioned because of adjudication, estoppel, or limitations. If the distributee or claimant does not have the property, its value at the date of disposition, income thereon, and gain received by the distributee or claimant must be returned.

I. Purchasers from distributees protected – F.S. § 733.813. If property distributed in kind, or a security interest in that property, is acquired by a purchaser or lender for value from a distributee, the purchaser or lender takes title free of any claims of the estate and incurs no personal liability to the estate, whether or not the distribution was proper. The purchaser or lender need not inquire whether a personal representative acted properly in making the distribution in kind.

J. Partition for purpose of distribution – F.S. § 733.814. When two or more beneficiaries are entitled to distribution of undivided interests in any property, the personal representative or any beneficiary may petition the court before the estate is closed to partition the property in the same manner as provided by law for civil actions of partition. The court may direct the personal representative to sell any property that cannot be partitioned without prejudice to the owners and that cannot be allotted equitably and conveniently.

K. Private contracts among interested persons – F.S. § 733.815. Subject to the rights of creditors and taxing authorities, interested persons may agree among themselves to alter the interests, shares, or amounts to which they are entitled in a written contract executed by them. The personal representative shall abide by the terms of the contract, subject to the personal representative's obligation to administer the estate for the benefit of interested persons who are not parties to the contract, and to pay costs of administration. Trustees of a testamentary trust are interested persons for the purposes of this statute.

L. Disposition of unclaimed property held by personal representatives – F.S. § 733.816. This statute lays out the procedure whereby a personal representative may dispose of unclaimed property.

M. Apportionment of estate taxes – F.S. § 733.817. This statute, which could be the subject of a full day seminar itself, establishes the default procedure for the apportionment of estate tax.

IX Part IX – Closing Estates

A. Final discharge – F.S. § 733.901. 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.

B. Subsequent administration – F.S. § 733.903. The final settlement of an estate and the discharge of the personal representative shall not prevent further administration. The order of discharge may not be revoked based upon the discovery of a will or later will.

Chapter 734 – Probate Code:
Foreign Personal Representatives; Ancillary Administration

I. Part I – General Provisions

A. Foreign personal representative – F.S. § 734.101

1. 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 Florida.

2. Personal representatives appointed in any state or country may be sued in Florida concerning property in Florida and may defend actions or proceedings brought in Florida.

3. Debtors who have not received a written demand for payment from a personal representative or curator appointed in this state within 90 days after appointment of a personal representative in any other state or country, and whose property in Florida is subject to a mortgage or other lien securing the debt held by the foreign personal representative, may pay the foreign personal representative after the expiration of 90 days from the date of appointment of the foreign personal representative. Thereafter, a satisfaction of the mortgage or lien executed by the foreign personal representative, with an authenticated copy of the letters or other evidence of authority attached, may be recorded in the public records. The satisfaction shall be an effective discharge of the mortgage or lien, irrespective of whether the debtor making payment had received a written demand before paying the debt.

4. Except as provided in F.S. § 655.936, all persons indebted to the estate of a decedent, or having possession of personal property belonging to the estate, who have received no written demand from a personal representative or curator appointed in this state for payment of the debt or the delivery of the property are authorized to pay the debt or to deliver the personal property to the foreign personal representative after the expiration of 90 days from the date of appointment of the foreign personal representative.

B. Ancillary administration – F.S. § 734.102.

When domiciliary probate is proceeding in a foreign state, ancillary proceedings are necessary for the disposition of real property located in Florida. Ancillary administration is governed by Chapter 734 of the Florida Statutes. Its primary function is to effectuate the sale or transfer of Florida real estate owned by a nonresident decedent. Ancillary administration proceedings may also be used to transfer personal property held in Florida if done within 90 days from the date of appointment of a foreign personal representative. F.S. § 734.101(4).

Ancillary administration gives an ancillary personal representative, once appointed, the power to sell Florida property. F.S. § 734.102(7). If the foreign personal representative is qualified to act in Florida, he may petition the court to be named as ancillary personal representative. F.S. § 734.102(1). If the foreign personal representative is not qualified, a successor who is qualified may petition or alternatively a majority in interest of the estate beneficiaries are entitled to select an ancillary personal representative. F.S. § 734.102(1). Venue is proper in the county where the property is located. F.S. § 733.101(b).

The petition for ancillary administration must include an authenticated copy of the domiciliary proceedings showing the will, petition for probate, order admitting the will to probate, and authority of the personal representative. Notice must be given to all known persons qualified to act as ancillary personal representative with superior or equal entitlement to petitioner and to the domiciliary personal representatives. Fla. Prob. R. 5.201. Upon filing, the court must determine that the will was properly executed in accordance with Florida law, and, if so, the court will admit it to probate in Florida. Fla. Prob. R. 5.470(c).

The ancillary personal representative has identical powers to that of a Florida domiciliary personal representative. Additionally, an ancillary personal representative may sell Florida property to pay Florida debts, regardless of the existence of sufficient assets in the domicile state. *In re Wilson's Estate*, 197 So. 557 (Fla. 1940). After the payment of all administration expenses and claims against the estate, the court may order the remaining property transferred to the foreign personal representative or have it distributed to the beneficiaries. F.S. § 734.102(6).

C. Nonresident decedent's testate estate with property not exceeding $50,000 in this state; determination of claims – F.S. § 734.1025.

1. When a nonresident decedent dies testate and leaves property subject to administration in this state the gross value of which does not exceed $50,000 at the date of death, the foreign personal representative of the estate before the expiration of 2 years after the decedent's death may file in the circuit court of the county where any property is located an authenticated transcript of so much of the foreign proceedings as will show the will and beneficiaries of the estate, as provided in the Rules. The court must admit the will and any codicils to probate if they comply with F.S. § 732.502(1), (2), or (3).

2. The foreign personal representative may cause a notice to creditors to be served and published according to the relevant requirements of chapter 733. Claims not filed in accordance with chapter 733 will be barred as provided in F.S. § 733.702. If any claim is filed, a personal representative shall be appointed as provided in the Rules.

D. Foreign wills; admission to record; effect on title – F.S. § 734.104.

1. 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: (a) the will was executed as required by chapter 732; and (b) the will has been admitted to probate in the proper court of any other state, territory, or country.

2. A petition to admit a foreign will to record may be filed by any person and shall be accompanied by authenticated copies of the foreign will, the petition for probate, and the order admitting the will to probate. If no petition is required as a prerequisite to the probate of a will in the jurisdiction where the will of the nonresident was probated, upon proof by affidavit or certificate that no petition is required, an authenticated copy of the will may be admitted to record without an authenticated copy of a petition for probate, and the order admitting the will to record in this state shall recite that no petition was required in the jurisdiction of original probate.

3. If the court finds that the requirements of this section have been met, it shall enter an order admitting the foreign will to record.

4. When admitted to record, the foreign will shall be as valid and effectual to pass title to real property and any right, title, or interest therein as if the will had been admitted to probate in this state.

II. Part II – Jurisdiction over Foreign Personal Representatives

A. Jurisdiction by act of foreign personal representative – F.S. § 734.201. A foreign personal representative submits personally to the jurisdiction of the courts of this state in any proceeding concerning the estate by: (a) filing authenticated copies of the domiciliary proceedings under F.S. § 734.104; (b) receiving payment of money or taking delivery of personal property, under F.S. § 734.101; or (c) doing any act as a personal representative in this state that would have given the state jurisdiction over that person as an individual.

B. Jurisdiction by act of decedent – F.S. § 734.202. In addition to jurisdiction conferred by F.S. § 734.201, a foreign personal representative is subject to the jurisdiction of the courts of Florida to the same extent that the decedent was subject to jurisdiction immediately before death.

Chapter 735 – Probate Code: Small Estates

I. Part I - Summary Administration

Summary administration is available for the administration of estates not exceeding $75,000 or when the decedent has been dead for more than two years. F.S. § 735.201(2). Summary administration may not be used if the decedent expressly directed in his will that a principal administration must be performed. F.S. § 735.201(1). The provision allowing for any estate to use summary administration after two years is included because, at that point, claims by creditors have passed the two year non-claim bar under F.S. § 733.710.

In preparation for summary administration, the petitioner should first perform a diligent search for assets to determine the value and whether it is under $75,000. The $75,000 "value" is gross, rather than "net" value of the estate. This includes all "probate" assets of an estate. *See* Jennifer L. Griffin and Deborah P. Goodall, *Important Preliminary Administration Issues, in* Practice Under Florida Probate Code §§ 1.27-1.46 (Fla. Bar CLE 7th ed. 2012) (giving a good explanation of what is included in "probate" assets). Additionally, the petitioner must identify "known or reasonably ascertainable creditors" and include them in the petition.

Florida Statute 735.203 and Fla. Prob. R. 5.530 detail the requirements of a petition for summary judgment. The petition may be filed by "any beneficiary or person nominated as personal representative in the decedent's will offered for probate." F.S. § 735.203(1). When filing a petition for Summary Administration, a practitioner should follow the requirements of Fla. Prob. R. 5.530 and F.S. § 735.203 closely. Notably in summary administration, unlike principal administration, the petition must contain a schedule of distribution detailing to whom each asset is to be distributed. Fla. Prob. R. 5.530(a)(12).

Upon filing of the petition for summary administration, the will, if any, must be proven in accordance with Chapter 733 prior to admission to probate. F.S. § 735.206(1). The court may enter an order of summary administration allowing immediate distribution and authorizing debtors of the decedent and anyone holding property of the decedent to comply with the order. F.S. § 735.206(4)(b). After the property has been transferred, each recipient becomes personally liable, pro rata, on the creditor's claims against the estate for 2 years after the date of decedent's death. F.S. § 735.206(4)(e).

II. Part II - Disposition of Personal Property without Administration

A. Disposition without administration – F.S. § 735.301.

No administration is required or formal proceedings are necessary for a decedent leaving only personal property exempt under the provisions of F.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.

Upon informal application by affidavit, letter, or otherwise by any interested party, the court, by letter or other writing under the seal of the court, may authorize the payment, transfer, or disposition of the personal property, tangible or intangible, belonging to the decedent to those persons entitled.

Any person, firm, or corporation paying, delivering, or transferring property under the authorization shall be forever discharged from liability thereon.

B. Income tax refunds in certain cases – F.S. § 735.302.

In any case when the United States Treasury Department determines that an overpayment of federal income tax exists and the person in whose favor the overpayment is determined is dead at the time the overpayment of tax is to be refunded, and irrespective of whether the decedent had filed a joint and several or separate income tax return, the amount of the overpayment, if not in excess of $2,500, may be refunded as follows: (a) directly to the surviving spouse on his or her verified application; or (b) if there is no surviving spouse, to one of the decedent's children who is designated in a verified application purporting to be executed by all of the decedent's children over the age of 14 years.

In either event, the application must show that the decedent was not indebted, that provision has been made for the payment of the decedent's debts, or that the entire estate is exempt from the claims of creditors under the constitution and statutes of the state, and that no administration of the estate, including summary administration, has been initiated and that none is planned, to the knowledge of the applicant.

If a refund is made to the surviving spouse or designated child pursuant to the application, the refund operates as a complete discharge to the United States from liability from any action, claim, or demand by any beneficiary of the decedent or other person.

Probate Versus the Use of Revocable Trusts

I. Benefits of the Florida Probate Process

A. Addressing Creditors.

1. In General. Estate administration offers the fiduciary a better method to flesh out potential creditors without simply having to wait the two-year statute of repose set out in F.S. §733.710. By availing oneself of the estate administration process, in addition to being able to publish a Notice to Creditors, which will serve to bar creditors that would otherwise not be ascertainable by the personal representative through the performance of a diligent search, who fail to file a Statement of Claim within the three-month publication period, creditors who are provided a copy of the Notice to Creditors are also barred from recovering on their claim (I) as to a secured creditor, to the extent that the value of the property encumbered by a valid, perfected security interest is not sufficient to cover the amount of such claim, or (II) the creditor does not file a claim within the greater of three months after the date the Notice to Creditors was first published in a newspaper of general circulation in the county in which the estate is being administered or within 30 days of receiving a copy of the Notice to Creditors, whichever is longer in time.

2. Upside Down Asset. An estate administration process enables the personal representative to limit the remedy of a secured creditor to foreclosing on the encumbered asset, such as real estate, a vessel or a motor vehicle, by providing that secured creditor with a copy of the Notice to Creditors in instances in which the secured creditor does not timely file a Statement of Claim in the estate proceeding.

B. Handling Federal Tax Matters.

1. Only a court appointed personal representative has the authority to sign a United States Gift (and Generation-Skipping Transfer) Tax Return (IRS Form 709) on behalf of a decedent. CCA 201405016 (issued December 5, 2013).

2. Only a court appointed personal representative has the authority to bring an action in the United States Tax Court on behalf of a decedent or the decedent's estate (such as with respect to an IRS Form 706). Rule 60(c), Tax Court Rules and Procedures.

C. Homestead Real Estate Matters.

1. Creditor Issues. Allowing a Will (or even intestate succession) to convey ownership of the decedent's primary residence ("Homestead") to the decedent's surviving spouse or heirs (as that term was broadly defined in *McKean v. Warburton*, 919 So.2d 341 (Fla. 2006)), without the concern that creditor lacking a secured interest in the Homestead could reach the Homestead to satisfy, in whole or in part, the creditor's judgment or claim.

2. Note as well that homestead real property, if devised or other passing to the decedent's surviving spouse or one or more heirs of the decedent is not considered a part of the "probate" estate. *See* F.S. §§733.607 and 733.608.

D. Separate Writing Provision. Florida law specifically allows the use of a separate writing pursuant to the disposition of certain items of tangible personal property in conjunction with a Will. F.S. §732.515. There is no similar provision in the Florida Trust Code and the provisions of §736.0403(2)(b) appears to make the attempted use of a separate writing pursuant to the provisions of a trust agreement ineffective.

E. Less Confusing than Dealing with Two Separate Administrations (an Estate Administration and a Trust Administration)

F. Original Wills Must be Preserved by the Clerks of Court for 20 Years. Therefore, once filed, the original Will can be located later. An original document is the best source to determine forgery. Okay, where is the original trust agreement or even a copy when you need it?

II. Part II – Disadvantages of Revocable Trusts Pre-Mortem

This is an easy one. Many assets that could otherwise be structured in an asset protected fashion if owned by an individual (e.g., IRAs, which would need to be liquidated if the assets comprising the IRA were to be conveyed to the revocable trust) or by a married couple (e.g., tenancy by the entirety) are lost when owned by a revocable trust. In addition, designating a revocable trust as the beneficiary of a qualified retirement plan account or an IRA may preclude the stretch-out of the post-mortem payments from the qualified retirement plan account or IRA after the death of the plan participant/IRA owner Moreover, due to improvements made to Florida laws relating to durable powers of attorney, I would suggest that it is easier for the agent of an individual through the use of a durable power of attorney to obtain management of that individual's assets, than for a nominated successor trustee to obtain access to assets owned by a revocable trust.

III. Part III – Disadvantages of Revocable Trusts Post Mortem

A. Issues Involving Certain Special Florida Ad Valorem Tax Exemptions.

1. Ad Valorem Tax Exemption Passing to the Surviving Spouse of a Totally and Permanently Disabled Veteran – Service Connected Disability. F.S. §196.081. If the real estate was owned by the deceased veteran, there is a risk that the surviving spouse may not be deemed to own legal or beneficial title if the Homestead is owned by a trust established by the deceased veteran. F.S. §196.081(3).

2. Ad Valorem Tax Exemption Passing to the Surviving Spouse of a Totally and Permanently Disabled First Responder – In the Line of Duty Injury While Employed by the State of Florida or a Political Subdivision of the State of Florida. F.S. §§196.102 and 196.081(6).

B. Federal Income Tax Issues.

1. Must use a calendar year UNLESS an election is made pursuant to IRC §645 by the timely filing of an IRS Form 8855.

2. S corporation stock issues – QSSTs and ESBTs.

3. Minimum distribution rules with respect to qualified retirement plan accounts and IRAs payable after the death of the IRA owner to what was a revocable trust (now an irrevocable trust).

C. Professional Advice. Unlike the requirement that a personal representative administering an estate in Florida be represented by a member of The Florida Bar, there is not statutory provision or procedural rule that requires a trustee to be represented by attorney. *See*, Rule 5.030(a). The litigators are salivating over this!