

ESTATE PLANNING COUNCIL OF GREATER MIAMI

LEGISLATIVE UPDATE

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Brian J. Felcoski is a shareholder of Goldman Felcoski & Stone P.A. He practices in the area of trust and estate litigation. He is admitted to practice before the U.S. District Court for the Southern and Middle Districts of Florida and all Florida state courts.

A native of Miami, Florida, Brian earned his undergraduate degree (B.A., high honors, 1985) from Florida International University and his law degree (J.D., Magna Cum Laude, 1988) from the University of Miami where he was a member of the Order of the Coif and the University of Miami Law Review.

Brian is rated AV Preeminent by Martindale. He is listed in Florida Superlawyers, in Best Lawyers in America and in Florida Trend's Florida Legal Elite.

Brian is a Fellow in the American College of Trust and Estate Counsel (ACTEC). He serves as a member of ACTEC's Fiduciary Litigation, State Laws and Bylaws and Manual committees. He chairs the eDiscovery subcommittee for the ACTEC Fiduciary Litigation Committee.

Brian is a Past Chair for the Real Property, Probate and Trust Law Section of The Florida Bar. He has served as a Probate Division Director for the Section, and as chair of the Section's Legislation and Trust Law Committees. He co-chaired the Section's Ad Hoc Trust Code Revision Committee which was responsible for the creation of a comprehensive Florida Trust Code adopted by the Florida Legislature in 2006. Brian continues to serve the Section including as a member of its Long Range Planning, Legislative, Trust Law, Probate and Trust Litigation, Probate Law and Procedure, and Homestead committees. Brian also serves as a member of various Section ad hoc committees including the Ad Hoc Conflicts of Interest Study Committee, the Jurisdiction and Service of Process Committee, and the Ad Hoc Committee on PR Issues.

Brian is a co-author of the chapter titled "Termination and Modification of Express Trusts" in the publication *Administration of Trusts in Florida*. He is also a co-author of the chapter titled "Homestead Litigation" in the publication *Litigation Under the Florida Probate Code*.

Brian has chaired the Probate Rules Committee of The Florida Bar. He is also a past President of the Estate Planning Council of Greater Miami. Brian is a frequent lecturer for The Florida Bar and other organizations on probate and trust topics.

LEGISLATION

The Governor has not taken final action on all the measures. The full text of each enrolled bill, as well as applicable legislative staff reports, are available on the web sites (www.flsenate.gov; www.myfloridahouse.com; and www.leg.state.fl.us). You must check the foregoing websites to confirm that the Governor has approved the legislation or allowed it to become law without his signature.

MOREY FIX

Background: This legislation was proposed in response to *Morey v. Everbank*, 93 So. 3d 482 (Fla. 1st DCA 2012).

Section 222.13(1), Florida Statutes, provides a general exemption from claims of creditors of the insured for the proceeds of life insurance. However, the exemption can be waived. For example, in section 222.13(1), Florida Statutes, provides, in pertinent part:

. . . whenever the insurance, by designation or otherwise, is payable to the insured or to the insured's estate or to his or her executors, administrators, or assigns, the insurance proceeds shall become a part of the insured's estate for all purposes and shall be administered by the personal representative of the estate of the insured in accordance with the probate laws of the state in like manner as other assets of the insured's estate.

(emphasis added)

So the exemption is waived if the proceeds are payable to the insured or the insured's estate.

The exemption from claims of creditors of the insured can be preserved if the proceeds are made payable to the trustee of an inter vivos trust created by the insured or to the trustee of a trust created under the will of the insured. *See* 733.808(1) and (2), Fla. Stat. Under those circumstances, the insurance proceeds are not subject to the claims of

creditors or expenses of administration of the decedent's estate. Section 733.808(4) provides:

Death benefits payable as provided in subsection (1), subsection (2), or subsection (3), unless paid to a personal representative under the provisions of subsection (3), shall not be deemed to be part of the decedent's estate, and shall not be subject to any obligation to pay the expenses of the administration and obligations of the decedent's estate or for contribution required from a trust under s. 733.607(2) to any greater extent than if the proceeds were payable directly to the beneficiaries named in the trust.

(emphasis added)

The *Morey* decision: The insured designated his revocable trust as the beneficiary of the proceeds of his life insurance. After the insured's death, the trustee of that revocable trust petitioned to confirm that the proceeds of the life insurance were exempt from claims of creditors of the insured's estate.

The appellate court found that the exemption contained in section 222.13 making insurance proceeds unavailable to satisfy estate obligations can be waived. One way to waive the exemption is by naming as beneficiary of the life insurance proceeds a trust whose terms direct distribution of the trust assets to the personal representative of the estate, if requested. The appellate court held:

The Trustee also argues that the "general direction for payment of 'death obligations' in Article V(A) of the Trust ... does not trump the express exemption provided in Section 222.13." But the Carlton W. Morey, Jr. Revocable Trust declaration contains more than a "general direction for payment of 'death obligations.'" The entire structure of the trust bespeaks payment of "death obligations" as a primary purpose. Only once the personal representative's demands have been met and only as to any residuum then remaining does the trust instrument give rise to the residuary subtrust of which the decedent's daughters are named beneficiaries.

The apparent intent and practical result of the decedent's estate plan is the same as if the life insurance policy named the estate itself beneficiary and the will established a residuary trust. *See generally Engelke v. Estate of Engelke*, 921 So.2d 693, 697 (Fla. 4th DCA 2006) (describing "revocable trusts [as] merely will substitute devices"). Only after the estate is settled would any remaining assets of the Carlton W. **Morey**, Jr. Revocable Trust have been available to establish the **Morey** Family Trust.

Id. at 487.

Because many believed the *Morey* holding was contrary to the generally accepted interpretations of sections 222.13(1) and 733.808(4), legislation was proposed to clarify when the exemption would be considered waived under the terms of a trust. The effect of the legislation is to clarify that a waiver of the statutory exemption from creditor's claims applicable to insurance proceeds paid to a trust established by the insured must be explicit. The waiver of the exemption cannot be inferred from general "pay all my debts" type language in a trust instrument.

The Legislation – Sections 5, 6, 9 and 10 of CS/CS/HB 757

Section 5. Subsection (4) of section 733.808, Florida Statutes, is amended to read:

733.808 Death benefits; disposition of proceeds.—

(4) Unless the trust agreement, declaration of trust, or will expressly refers to this subsection and directs that it does not apply, death benefits payable as provided in subsection (1), subsection (2), or subsection (3), unless paid to a personal representative under the provisions of subsection (3), shall not be deemed to be part of the decedent's estate, and shall not be subject to any obligation to pay the expenses of the administration and obligations of the decedent's estate or for contribution required from a trust under s. 733.607(2) to any greater extent than if the proceeds were payable directly to the beneficiaries named in the trust.

Section 6. The changes made by this act to s. 733.808, Florida Statutes, are intended to clarify existing law, are remedial in nature, and apply retroactively without regard to the date of the decedent's death.

Section 9. Subsection (1) of section 736.05053, Florida Statutes, is amended to read:

736.05053 Trustee's duty to pay expenses and obligations of settlor's estate.—

(1) A trustee of a trust described in s. 733.707(3) shall pay to the personal representative of a settlor's estate any amounts that the personal representative certifies in writing to the trustee are required to pay the expenses of the administration and obligations of the settlor's estate. Payments made by a trustee, unless otherwise provided in the trust instrument, must be charged as expenses of the trust without a contribution from anyone. The interests of all beneficiaries of such a trust are subject to the provisions of this subsection; however, the payments must be made from assets, property, or the proceeds of the assets or property that are included in the settlor's gross estate for federal estate tax purposes and may not be made from, other than assets proscribed in s. 733.707(3) or death benefits described in s. 733.808(4) unless the trust instrument expressly refers to s. 733.808(4) and directs that it does not apply, that are included in the settlor's gross estate for federal estate tax purposes.

Section 10. The changes made by this act to s. 736.05053, Florida Statutes, are intended to clarify existing law, are remedial in nature, and apply retroactively without regard to the date of the settlor's death.

Effective Date: July 1, 2014.

Antilapse changes

Background: The purpose of the amendment to section 736.1106, Florida Statutes, is to make the Trust Code's antilapse statute similar to the Probate Code's antilapse statute with respect to the treatment of outright devises to certain persons who do not survive the settlor of a revocable trust or the testator of a testamentary trust. Devises to persons who are not a grandparent or a descendant of a grandparent of the settlor or testator *and* who predecease the settlor or testator will fail (or lapse) unless a contrary intent appears in the trust instrument. Prior to the legislation, there was a different result under the Trust Code and the Probate Code. The consensus was that the result under the specific circumstances addressed by the legislation should be the same. This legislation makes the treatment of outright devises in wills and trusts consistent so there is no difference in how these devises will be treated when the beneficiary has pre-deceased the testator or settlor.

The Legislation: Section 11 of CS/CS/HB 757

Section 11. Subsection (5) of section 736.1106, Florida Statutes, is renumbered as subsection (6) and amended, and a new subsection (5) is added to that section, to read:

736.1106 Antilapse; survivorship with respect to future interests under terms of inter vivos and testamentary trusts; substitute takers.—

(5) Unless a contrary intent appears in the trust instrument, subsections (2)-(4) do not apply to an outright devise that vests upon the death of the settlor unless the beneficiary is a grandparent, or a lineal descendant of a grandparent, of the settlor or testator and the beneficiary:

(a) Is dead at the time of the execution of the revocable trust or will;

(b) Fails to survive the settlor or testator; or

(c) Is required by the inter vivos trust or by operation of law to be treated as having predeceased the settlor or testator.

A devise in a revocable trust or a testamentary trust that is to take effect at the death of the settlor or testator does not vest until the death of the settlor or testator.

(6) (5) Subsections (1) - (4) apply to all trusts other than trusts that were irrevocable before the effective date of this code. Sections 732.603, 732.604, and 737.6035, as they exist on June 30, 2007, continue to apply to other trusts executed on or after June 12, 2003. Subsection (5) applies to those trusts that become irrevocable after June 30, 2014.

Effective Date: July 1, 2014.

BURDEN OF PROOF IN TRUST CONTESTS

Background - Under section 733.107, the proponent of the will has the initial burden of proving due execution of the will. Thereafter, in a will contest, the burden shifts to the will contestant to prove the grounds for the will contest. Before this legislation, there was no statute designating who has the burden of proof of due execution in a trust contest. As a general proposition, under Florida law, the plaintiff or petitioner has the burden of proof. Accordingly, in the absence of a statute, the contestant in a trust contest as the plaintiff or petitioner should have the burden of proof. However, because trusts are often referred to as “will substitutes” and revocable trusts frequently have testamentary aspects, there is confusion among practitioners and courts as to whether the proponent of a trust, like a will proponent, has the burden of proving due execution of the trust before the burden shifts to the trust contestant to prove the grounds for the trust contest. The legislation amends Florida Statutes § 736.0207(1) to make it clear that the contestant in a trust contest has the burden of proof on all issues, including proving that the trust was not properly executed. The legislation does change Florida law, but rather codifies what practitioners believe is the current state of Florida case law. The legislation applies to all actions commenced on or after the effective date of the bill.

The Legislation: Sections 7 and 8 of CS/CS/HB 757

Section 7. Section 736.0207, Florida Statutes, is amended to read:

736.0207 Trust contests.—

(1) In an action to contest the validity or revocation of all or part of a trust, the contestant has the burden of establishing the grounds for invalidity.

(2) An action to contest the validity of all or part of a revocable trust, or the revocation of part of a revocable trust, may not be commenced until the trust becomes irrevocable by its terms or by the settlor's death. If all of a revocable trust has been revoked, an action to contest the revocation may not be commenced until after the settlor's death. This section does not prohibit such action by the guardian of the property of an incapacitated settlor.

Section 8. The changes made by this act to s. 736.0207, Florida Statutes, apply to all cases commenced on or after the effective date of this act.

Effective Date: July 1, 2014.

PRESUMPTION OF UNDUE INFLUENCE

Background: As it relates to undue influence cases, section 733.107(2), Florida Statutes, provides that the “presumption of undue influence implements public policy against abuse of fiduciary or confidential relationships and is therefore a presumption shifting the burden of proof under ss. 90.301-90.304.” The effect of this statute is to shift the burden of proof in an undue influence case to the proponent if the contestant establishes a presumption of undue influence. *Hack v. Janes*, 878 So.2d 440, 443 (Fla. 5th DCA 2004). The statute is intended to apply to all undue influence proceedings, including trust contests and challenges to the validity of inter vivos gifts. Because section 733.107(2), Florida Statutes, is located in the Florida Probate Code, it could be argued that it only applies in will contests. The legislation amends section 733.107(2) to clarify and confirm its applicability in all circumstances in which the presumption of undue influence is established, including trust contests and challenges to inter vivos gifts.

The Legislation: Sections 3 and 4 CS/CS/HB 757

Section 3. Section 733.107, Florida Statutes, is amended to read:

733.107 Burden of proof in contests; presumption of undue influence.—

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

Section 4. The changes made by this act to s. 733.107, Florida Statutes, are intended to clarify existing law, are remedial in nature, and apply retroactively to all proceedings pending on or before the effective date of this act and to all cases commenced on or after the effective date of this act.

Effective Date: July 1, 2014

GIFTS TO LAWYERS

Background: During the 2013 session, the legislature created section 732.806 rendering certain gifts to lawyers and other persons void. However, that legislation did not address the application of the new law to instruments executed prior to the effective date of the 2013 legislation. The 2014 legislation clarifies that section 732.806, Florida Statutes, only applies to instruments executed on or after October 1, 2013.

The Legislation: Sections 1 and 2 of CS/CS/HB 757

Section 1. Subsection (9) is added to section 732.806, Florida Statutes, to read:

732.806 Gifts to lawyers and other disqualified persons.—

(9) This section applies only to written instruments executed on or after October 1, 2013.

Section 2. The changes made by this act to s. 732.806, Florida Statutes, are intended to clarify existing law and are remedial in nature.

Effective Date: July 1, 2014.

CONFIDENTIALITY OF ESTATE INVENTORIES AND ACCOUNTINGS

Summary: CS/SB 650 – This bill amends section 733.604 to remove the scheduled repeal on October 2, 2014 of the public records exemption for estate inventories (including amended and supplemental inventories), elective share inventories, and estate accountings (including interim, final, amended and supplemental accountings). As a result, estate inventories and accountings will remain confidential and exempt from disclosure under the public records laws.

Effective Date: July 1, 2014.

DIRECTED TRUSTS

Summary: CS/CS/HB 405 seeks to clarify the responsibility and liability of a directed (“excluded”) trustee under section 736.0703(9). Unless the excluded trustee has engaged in willful misconduct, that excluded trustee is not liable for any consequence that results from the exercise of a power in accordance with the power to direct held by another trustee. The excluded trustee does not have any duty or obligation to review, inquire or investigate the exercise of the power to direct by the other trustee(s) who hold and exercise the power. The legislation also provides that section 736.0808(2), Florida Statutes, does not apply if the person holding the power to direct is also a co-trustee.

Section 736.0808(2) provides:

If the terms of a trust confer on a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

Effective Date: July 1, 2014.

GUARDIANSHIP OVERSIGHT

Summary: CS/HB 635 amends Chapter 744 to expand the authority of the court and the clerk of the court to oversee guardians. The bill (1) amends section 744.3135, Florida Statutes, to require a person seeking appointment as a guardian, other than as a corporate guardian, to submit to a credit history investigation and background screening; (2) amends section 744.368 to authorize the clerk of the court to request and review records and documents that reasonably relate to the guardianship assets; (3) amends 744.368 to authorize the clerk of the court, upon proper application to the court, to issue subpoenas to nonparties to compel the production of records and documents; (4) amends 744.368 to provide a procedure for the issuance of a subpoena by the clerk including advance notice to the guardian and the ward of the clerk's intent to issue a subpoena and to provide for a period of time for the guardian or ward to object prior to issuance of the subpoena; (5) amends section 744.3685 to authorize the court to compel the guardian to comply with a records request from the clerk of the court; (6) amends 744.474 to add, as a grounds for removal of a guardian, the guardian's failure in bad faith to submit a guardianship record during the audit pursuant to 744.368; and (7) requires a person seeking the appointment as a guardian to acknowledge arrests covered by an expunged or sealed record.

Effective Date: July 1, 2014.

NURSING HOME RECORDS

Summary: CS/CS/SB 670 – This is comprehensive legislation addressing nursing home litigation. One portion of the bill, that may affect our practice, addresses access to the resident’s records at a nursing home. The legislation amends section 400.145 to provide that upon a written request that complies with HIPAA and this section, the nursing home shall furnish to a “competent” resident, or the resident’s representative who is authorized to make a request under HIPAA or this section, copies of the resident’s paper and electronic records that are in the possession of the facility. The legislation provides a time period for compliance with a records request.

The legislation identifies to whom and under what circumstances medical records relating to a deceased resident may be released. The list is presented in the order of priority, as follows:

1. A court appointed personal representative, executor, administrator, curator, or temporary administrator of the deceased resident’s estate, upon submission of a copy of the court order.
2. If a judicial appointment has not been made, the personal representative designated in the resident’s self-proved will.
3. If a judicial appointment or person designated by will is not available, the following individuals may request the medical records upon submission of a letter from the person’s attorney verifying the relationship to the deceased resident:
 - a. A surviving spouse.
 - b. A surviving child of the resident if there is no spouse.
 - c. A parent of the resident if there is no spouse or child.

Effective Date: The Act takes effect upon becoming law.

FAMILY TRUST COMPANIES

Summary: CS/SB 1238 creates Chapter 662 which is to be cited as the Florida Family Trust Company Act. CS/SB 1320 is the public records exemption bill for the Family Trust legislation.

Trust companies are for-profit business organizations that are authorized to engage in trust business and to act as a fiduciary for the general public.

Some states allow families to form and operate private or family trust companies that provide trust services similar to those that can be provided by an individual trustee or a financial institution. However these family trust companies are owned exclusively by family members and may not provide fiduciary services to the public. These private, family trust companies are generally formed to manage the wealth of high net-worth families in lieu of traditional individual or institutional trustee arrangements for a variety of personal, investment, regulatory, and tax reasons.

The legislation authorizes families to form and operate family trust companies, licensed family trust companies, and foreign licensed family trust companies in Florida, subject to varying regulatory requirements, including a license or registration with the Office of Financial Regulation (OFR), maintenance of minimum capital accounts with a principal place of business in Florida, and certain reporting requirements.

This legislation specifies the powers of family trust companies such as serving as a trustee of trusts held for the benefit of family members and providing fiduciary, investment advisory, and wealth management services to a family. A family trust company cannot perform these services for the general public.

Effective Date: October 1, 2015 if SB 1320 (a public records bill) or similar legislation is adopted. CS/SB 1320 passed and has the same effective date as CS/SB 1238.

OTHER INITIATIVES OF INTEREST

Abuse of Vulnerable Persons: CS/CS/HB 409 provides new criteria for the abuse and exploitation of vulnerable persons. It defines the unauthorized appropriation of assets or identity theft by a trustee, guardian or an agent under a power of attorney; and it provides for enhanced penalties for abuse and exploitation. Effective Date: October 1, 2014.

Service of Process: HB 627 establishes a uniform \$40 fee for service of process by the sheriff; requires an employer to permit service on an employee and imposes a \$1,000 fine for failure to permit service on an employee; and permits the sheriff to rely on an affidavit given by levying creditor when disbursing proceeds from the sale of levied property. Effective Date: July 1, 2014.

Information Protection Act: CS/CS/SB 1524 imposes new requirements on business entities to protect customer records, including names, social security numbers, medical histories, computer passwords allowing access to online accounts, and other identification numbers. The legislation requires reporting of breaches in security that access electronically stored personal data to the Department of Legal Affairs; imposes obligations to rectify a security breach; and places new requirements on the disposal of personal information maintained in the records of the business. Effective Date: July 1, 2014.

INITIATIVES OF INTEREST THAT FAILED TO PASS

Notaries: CS/SB 172 and CS/CS/HB 407 sought to amend Chapter 117 and require notaries to maintain an electronic journal with a record of notarial acts completed.

Guardianships: SB 120 and HB 123 are companion bills and contain RPPTL Section guardianship initiatives dealing with the payment of examiners fees and attorneys' fees in guardianship proceedings.

Guardians and Wards: SB 412 and HB 1157 sought to revise the guardianship law including provisions authorizing fee for services when the actions benefit the ward; revise the membership of the examining committee; and authorize family members to observe and record the examinations.

Confidentiality of Guardianship Settlements: CS/SB 108 - This bill sought to amend section 744.3701 to create a public records exemption for any court record relating to the settlement of a ward's claim including a petition for court approval of a settlement, a report of a guardian ad litem relating to the settlement, and an order approving the settlement.