FLORIDA LEGISLATIVE DEVELOPMENTS IN THE PROBATE, TRUST AND GUARDIANSHIP FIELDS – 2010

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Note: While all of the legislation described below has passed the Florida Legislature, as of the date of this presentation, none of it is law. In order to track its status, refer to www.leg.state.fl.us

The content of these materials reflects the editor's review of the bills referred to. In order to more fully review the text of a bill described, reference to the website referred to above is encouraged.

I. CS/CS/HB 1237—Ordered enrolled 4.29.10

A. Section 655.935 (dealing with the search of safe deposit boxes on the death of the lessee) is amended by adding a new subsection (2) to provide that the officer of the lessor is to make a complete copy of any document removed from the box and delivered pursuant to the statute and to place that copy, together with a memo of delivery identifying the name of the officer, the person to whom the document was delivered, the purported relationship of the person to whom the document was delivered and the date of delivery, in a safe deposit box leased or co-leased by the decedent.

B. F.S. Section 731.110, dealing with the filing of caveats, is amended to provide that the caveat of an interested person, other than a creditor, may be filed before or after the death of the 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. A caveat filed before the death of the person for whom the estate will be administered expires 2 years after filing.

C. F.S. Section 731.201(18), defining "formal notice", is amended to define the method of service by formal notice as a form of notice that is described in and served by a method of services provided under Rule 5.040(a) of the Florida Probate Rules (which describes the method for service of formal notice). F.S. Section 731.201(22), is amended to provide that informal notice is defined as a method of service of pleadings as provided under Rule 5.040(b) of the Florida Probate Rules (which describes the method for service of informal notice).

D. F.S. Section 731.301(2) is amended to provide that, in a probate proceeding, formal notice is sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the person's interest in the estate or in the decedent's protected homestead.

E. F.S. Section 731.301(3) is amended to provide that only persons give proper notice of a proceeding are bound by all orders entered in that proceeding.

F. F.S. Section 732.401, Descent of Homestead, contains a major revision, designed to address the issues that currently exist between a surviving spouse who has a life estate in homestead property and the Defendants who have a vested remainder interest. The issues have arisen over the often inequitable allocation of expenses as between the spouse and the remainder interests. Usually these situations arise when the spouse is not the parent of the children who are the remaindermen of the homestead. Currently, no legal means exist to sever the interests of the parties and much friction can exist between the surviving spouse. This is because both the life tenant and the remainderman are considered to have property rights as to the totality of the property, even if the right to occupy only rests with the surviving spouse. As a consequence, an action for severance cannot currently be brought.

The Real Property, Probate and Trust Law Section of the Florida Bar created an *ad hoc* committee to study the problem and make recommendations for legislation cures to this problem and another homestead issued.

The problem, of course, arises when there is a constitutionally invalid purported devise of homestead and there is a surviving spouse and at least one lineal descendant. Under those circumstances, any devise other than a fee simple to the surviving spouse is invalid. The Florida Constitution only describes what is invalid. It is left to the Legislature to determine the disposition of homestead when there is an invalid devise. Currently, F.S. Section 732.401(2) provides that, when there is an attempted but invalid devise of homestead, the surviving spouse receives a life estate, remainder to lineal descendants.

The *ad hoc* committee felt that it would be appropriate to recommend a change to F.S. Section 732.401(2), so that the surviving spouse could still receive a life estate, but, as an alternative, the spouse could make an election so that the spouse and descendants could effectively have separate interests in the property. Accordingly, F.S. Section 732.401(2) and (3) and are created to permit the surviving spouse to elect, instead of receiving a life estate in the homestead property, to take an undivided one-half interest in the homestead as a tenant-in-common with the remaining undivided one-half interest vesting in the decedent's descendants. As tenants in common, the spouse and descendants have separate, severable interests in the property.

The statute permits the election to be made by the surviving spouse or, subject to the approval of the Court having jurisdiction of the real property, by an attorney-in-fact or guardian of the property of the surviving spouse. A companion change is made to

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F.S. Section 744.444 (9), to authorize the election by a guardian. The election must be made within six months after the decedent's death and during the surviving spouse's lifetime. The time for making the election may not be extended. A suggested form for making the election is part of the legislation. Until the election is made, the allocation of expenses is to be made pursuant to Chapter 738.

Subsection (4) provides that, if a surviving spouse does not make the election, but retains a life estate, a disclaimer of the life estate results in the life estate passing in accordance with the Florida disclaimer statutes found in Chapter 739.

Subsection (5) modifies previous subsection (2), to provide that the statute does not apply to situations where the spouses owned the property not only as tenants by the entireties, but also as joint tenants with rights of survivorship.

New F.S. Section 732.4015 is created to make it clear that, if homestead is validly devised to the surviving spouse, but the spouse disclaims that interest, the disclaimed interest passes in accordance with the Florida disclaimer statutes found in Chapter 739.

G. F.S. Section 732.4017 is created to address a Florida Supreme Court decision, *Johns v. Bowden,* 68 Fla. 32, 66 So. 155 (1914) (deed containing terms of trust) and an a 4th DCA opinion, *In Re Estate of Johnson,* 398 So.2d 970 (Fla. 4th DCA 1981) (quitclaim deed to trustee of revocable trust). Although in each case the trust or deed terms provided for a specific disposition of the homestead property upon the settlor's death, the settlor retained the right during lifetime to direct a conveyance of the title and the entire beneficial interest to other persons (including the settlor). Because of the retention of the entire beneficial estate in the settlor during life, in each case the trust instrument was in effect an attempted, but invalid, testamentary disposition. As a result, it was felt that clarification was needed concerning permissible inter vivos transfers of homestead. One of the most obvious situations where this arises is where there is a single parent owning homestead, with one or more minor children. If the parent owns the homestead at death, a guardianship would have to be established for the minors, which terminates at age 18. Instead, the parent should be able to convey the homestead inter vivos to a trust for the benefit of the minor children, which would not require the creation of a guardianship and which could continue beyond age 18. The *Johns* case and the *Johnson* case, however, raise the possibility that such an inter vivos conveyance might be considered an invalid testamentary disposition.

Generally, subsection (1) sets forth two essential requirements: (a) there must be a valid inter vivos conveyance of an interest to one or more persons other than the homestead owner, and (b) the homestead owner cannot have the power, acting in any capacity, whether alone or in conjunction with another person, to revoke the interest that is conveyed, or to revest the interest in the owner. The idea is get around the retention of rights in the homestead, which the case law found objectionable.

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Subsection (3) provides that, if an inter vivos conveyance satisfies the requirements of subsection (1), the owner can retain separate interests in the homestead property, such as a life estate, in order to retain the ad valorem tax exemptions and Save Our Homes Cap.

Examples of qualifying inter vivos transfers include: transfers to a QPRT; and, a conveyance of a remainder interest in homestead following a life estate by the owner.

H. F.S. Section 732.608 is amended to provide that the laws used to determine paternity and relationships for the purposes of intestate succession apply when determining whether class gift terminology and terms of relationship include adopted persons and persons born out of wedlock. A companion change is made to Section 736.1102 of the Trust Code, dealing with construction of terms in trusts.

I. F.S. Section 732.805 is created to provide that a surviving spouse who is found to have procured a marriage to the decedent by fraud, duress, or undue influence is not entitled to any of the following rights or benefits that inure solely by virtue of the marriage or the person's status as surviving spouse of a decedent, unless the decedent and the surviving spouse voluntarily cohabitated as husband and wife with full knowledge of the facts constituting the fraud, duress, or undue influence or both spouses otherwise subsequently ratify the marriage: any rights or benefits under the Florida Probate Code; any rights or benefits under a bond, life insurance policy, or other contractual arrangement if the decedent is the principal obligee or the person upon whose life the policy is issued (unless the surviving spouse is provided for by name, whether or not designated as spouse); any rights or benefits under a will, trust or power of appointment (unless the surviving spouse is provided for by name, whether or not designated as spouse); and, any immunity from the presumption of undue influence of a surviving spouse may have under state law.

A challenge to a surviving spouse's rights may be maintained as a defense, objection, or a cause of action by any interested person after the death of the decedent in any proceeding in which the fact of marriage may be directly or indirectly material. The contestant has the burden of establishing, by a preponderance of the evidence that the marriage was procured by fraud, duress, or undue influence. If ratification of the marriage is raised as a defense, the surviving spouse has the burden of establishing, by a preponderance of the evidence, the subsequent ratification by both spouses.

An insurance company, financial institution or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this section of the statute unless, before payment, it received written notice of a claim pursuant to the section. The statute goes on to provide the requirements for such notice. Unless sooner barred by adjudication, estoppels, or a provision of the Florida Probate Code

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or Florida Probate Rules, an interested person must commence such an action within four years of the decedent's date of death.

J. In order to provide a forum to address the issues associated with the construction of wills with estate tax formula provisions for persons dying at a time when there is no federal estate tax in place, F.S. Section 733.1051 is created. As a result, a Personal Representative or interested person may bring an action to construe the terms of a will to define the respective shares or determine beneficiaries, in accordance with the intention of a testator, if a disposition occurs during the applicable period and the will contains such a provision. The applicable period is a period beginning January 1, 2010 and ending on the later of the end of December 31, 2010 or at the end of the day on which the estate taxes are reinstated during 2010.

This remedy does not apply to a will which contains dispositions that are specifically conditioned upon no federal estate or generation-skipping transfer tax being imposed.

Unless otherwise ordered by the Court, during the applicable period and without Court order, the Personal Representative administering a will containing one or more estate tax provisions described in the Statute, may delay or refrain from making any distribution and may incur and pay fees and costs reasonably necessary to determine its duties and obligations, including compliance with provisions of existing and reasonably anticipated future federal tax law. In addition, the Personal Representative may establish and maintain reserves for the payment of fees and costs and federal taxes. The Court, in determining the testator's probable intent, may consider evidence relevant to the Testator's intent <u>even though the evidence contradicts an apparent plain meaning of the will.</u>

<u>A parallel statute, pertaining to the construction of irrevocable trusts (including, revocable trusts which became irrevocable as a result of the death of the Grantor), is found in H.B. 361, described below</u>.

This section is declared to be remedial in nature and is intended to provide a new or modified legal remedy. It is effective retroactively to January 1, 2010.

K. F.S. Section 733.107(1) is amended to address an evidentiary issue that can arise during a will contest. The proponent of the will has the burden of proving the due execution of the will. When all of the witnesses to that will are deceased or not available, rules of evidence provide that an affidavit, such as a self-proving affidavit, is hearsay and therefore, not admissible. To address this problem, the new statutes provides that a self-proving affidavit executed in accordance with F.S. Section 732.503 or an oath of an attesting witness executed as required in F.S. Section 733.201(2) is admissible and establishes *prima facie* the formal execution and attestation of the will. This does not mean that the self-proving affidavit or oath is

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not subject to challenge. It simply provides that the affidavit or oath satisfy the proponent's burden of establishing the *prima facie* proper execution.

Effective date: October 1, 2010, unless there is a different effective date specified for a particular section.

II. CS/CS/ SB 998—Ordered enrolled 4.28.10

A. F.S. Section 736.04114 is created to permit limited judicial construction of irrevocable trusts to address deaths of Grantors occurring during 2010, when there is no federal estate tax imposed. A more detailed discussion of these approaches can be found in the discussion above, referring to House Bill 1237.

B. A new subsection (5) is added to F.S. Section 736.05053, which deals generally with the Trustee's obligation to pay expenses and obligations of the Settlor's estate from revocable trust assets. New subsection (5) provides that non-residuary trust dispositions are to abate pro rata with non-residuary devises in the will, pursuant to the priorities specified in F.S. 736.05053 and F.S. Section 733.805, and determined as if the beneficiaries of the will and trust, other than the estate and trust itself, were taking under a common instrument. The purpose of the amendment is to better assure that the pourover will and revocable trust provisions dovetail with respect to the allocation of these expenses.

Effective date: July 1, 2010

III. CS/SB 926—Ordered enrolled 4.28.10

A. F.S. Section 518.112, dealing, generally, with authority of fiduciaries to delegate investment functions pursuant to the Uniform Prudent Investment Act, is amended to permit the Trustee of an irrevocable insurance trust to delegate a determination of whether the insurance contract which is the asset of the trust was procured or affected in compliance with Florida Statute 627.404 (dealing with whether an insurable interest existed at the time of the acquisition of the policy) and to delegate an investigation of the financial strength of a life insurance company.

B. F.S. Section 736.0902 is created to provide that the prudent investor rule does not apply to the Trustee of a trust owning a contract of life insurance acquired or retained on the life of a qualified person. The Trustee would not have the duty to: determine whether the contract was procured or affected in compliance with the requirement that there be an insurable interest; to determine whether any contract of life insurance is or remains a proper investment; to investigate the financial strength of a life insurance company; to determine whether to exercise any policy

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option available under the contract of life insurance; to diversify any such contract of life insurance or diversify the assets of the trust with respect to the contract of life insurance; or, to inquire or investigate the health or financial condition of any insured or insureds. The statute goes on to provide that in all circumstances in which this section applies, the Trustee is not liable to the beneficiaries of the trust or any other person for any loss sustained with respect to such contract of life insurance.

The inapplicability of the prudent investor rule to the Trustee's obligation to determine whether the contract of life insurance complied with the insurable interest rule applies to any contract of life insurance on the life of a qualified person. However, the other provisions making the prudent investor rule inapplicable to life insurance policies owned by the Trustee on the life insurance trust only apply if: the trust instrument, by reference to the statute, makes the section applicable to contracts of life insurance held by the trust; or, the trustee has provided notice that the Section applies to a contract of life insurance held by the trust. The new Statute then goes on to describe the method for providing notice to qualified beneficiaries. It further provides that, if any person notified pursuant to the Statute objects to application of the Section in writing delivered to the Trustee within 30 days after the date the notice was received, the inapplicability of the prudent investor statute is suspended until the objection is withdrawn.

The opportunity to waive applicability of the prudent investor statute to a Trustee of an insurance trust does not apply to any contract of life insurance purchased from an affiliate of the Trustee or with respect to which the Trustee or any authority of the Trustee receives any commission, unless the Trustee's duties have been delegated to another person in accordance with F.S. Section 518.112.

Effective date: upon becoming law.

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