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Estates and Trusts: 2001 Survey of Florida Law

Eloisa C. Rodriguez-Dod*

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I. INTRODUCTION

The previous survey of Florida law on trusts and estates discussed statutes, cases, and rules through the middle of 1998.¹ This survey attempts to update the prior survey through the middle of 2001.

This article highlights and summarizes, in Part II, some aspects of the elective share provisions and other legislative changes to the *Florida Probate Code* and trust administration statutes.² Part III addresses amendments to the *Florida Probate Rules*. Lastly, Part IV discusses a few recent cases affecting this area of the law.

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1. Michael D. Simon & William T. Hennessey, *Estates, Trusts and Guardianships: 1998 Survey of Florida Law*, 23 NOVA. L. REV. 119, 120 (1998). The 1998 survey also included a discussion of guardianship law. *See generally id.* However, this survey will be limited to the laws affecting probate estates and trusts and will not include references to statutes or rules governing guardianships.

2. It is impractical to discuss all the changes to the probate estate and trust administration statutes or other related statutes. Therefore, I will focus on what I deem the more important or more interesting changes.

II. STATUTORY CHANGES

The Florida Legislature has been quite active in the past three years in amending the *Florida Probate Code* (“*Probate Code*”). Many of the changes have been minor in nature, enacted for clarification purposes,³ to eliminate redundancies with the *Florida Probate Rules* (“*Probate Rules*”),⁴ or to correlate a statute with another statute, such as the renumbering of statutes.⁵ However, the legislature did overhaul the elective share provisions of the *Florida Probate Code*, bringing it somewhat more in line with the *Uniform Probate Code*.⁶

A. Elective Share Provisions

The new elective share provisions took effect October 1, 1999.⁷ However, they only apply to estates of decedents dying after October 1, 2001.⁸ Most of the existing elective share provisions were repealed, rather than merely amended, and new statutes were added in their place.⁹

The spousal right to an elective share¹⁰ under section 732.201 has not changed, but the statute was amended to reflect the right to a thirty percent¹¹ share in the newly augmented “elective” estate.¹² A spouse’s right to this

3. See, e.g., FLA. STAT. § 732.302 (2001); FLA. STAT. § 733.805(1)(a) (2001) (changing language in abatement rule from a “[p]roperty not disposed of by will” to a “[p]roperty passing by intestacy”).

4. See, e.g., FLA. STAT. § 731.301 (2001).

5. See, e.g., Ch. 2001-226, §§ 60–61, 2001 Fla. Laws 2010 (renumbering FLA. STAT. § 732.910–911 (2001) as FLA. STAT. § 765.510–511 (2001)).

6. See, e.g., UNIF. PROBATE CODE § 2-203 (amended 1993) (outlining augmented estate).

7. § 732.2155(1) (2000).

8. *Id.*

9. See FLA. STAT. §§ 732.201–2155 (2001).

10. Of course, a spouse may have waived rights to an elective share pursuant to a prenuptial or post nuptial agreement. For the requirements of a valid waiver effective January 2, 2001, see *infra* Part II.B. Any valid waiver executed prior to October 1, 1999, is valid under the new provisions.

11. § 732.2065. An ad-hoc committee of the Florida bar had recommended increasing the percentage of the estate payable to the surviving spouse based on the length of the marriage but the legislature ultimately decided against that. See Florida’s Elective Share Revised Executive Summary 2, (revised Sept. 24, 2001), available at <http://www.dpowell.com> [hereinafter Executive Summary].

12. § 732.201. The statute previously stated that “[the] surviving spouse . . . [has] the right to a share of the estate of the [decedent].” FLA. STAT. § 732.201 (1999). The statute, as

elective share is still in addition to the spouse's rights to other statutory entitlements under Part IV of the *Florida Probate Code*,¹³ but the legislature clarified that the homestead rights were included as well.¹⁴

Previously, only a spouse or guardian of the surviving spouse's property could exercise the right to the elective share.¹⁵ The new statute also permits a surviving spouse's attorney-in-fact to exercise the right to elect against the estate.¹⁶ As always, if someone other than the surviving spouse exercises the right, then court approval is required;¹⁷ however, the court must now take into account the surviving spouse's lifetime needs when reviewing whether the election is in the spouse's best interest.¹⁸

In addition, the time period within which to make the election has been extended "from four months from the date of the first publication of [the] notice of administration"¹⁹ to the earlier of six months from the date the surviving spouse or "an attorney in fact or guardian of the property of the surviving spouse" are served with a copy of the notice of administration,²⁰ or two years after the decedent's death.²¹ Conceivably, a surviving spouse may not discover that the decedent has died until some time after the second anniversary of the decedent's death and thus, under the new statute, the surviving spouse may be precluded from electing against the estate. The

amended, now reads, "[the] surviving spouse . . . has the right to a share of the elective estate of the decedent." § 732.201.

13. § 732.2105.

14. Ch. 99-343, § 10, 1999 Fla. Laws 3568 (renumbered from FLA. STAT. § 732.208 (1999) and amended at FLA. STAT. § 732.2105 (2000)). Section 732.2105 also states that a spouse who takes against the estate is treated as having predeceased the decedent; this provision was previously codified under section 732.211, which has since been repealed (Ch. 99-343, § 16, 1999 Fla. Laws 3571).

15. FLA. STAT. § 732.210 (1999).

16. FLA. STAT. § 732.2125 (2001). The change finally codifies the court's holding in *In re Estate of Schriver*, wherein the court stated that a holder of a durable power of attorney could exercise the elective share right on behalf of a surviving spouse. 441 So. 2d 1105, 1108 (Fla. 5th Dist. Ct. App. 1983) *approved in part* by *Harmon v. Williams*, 615 So. 2d 681 (Fla. 1993).

17. FLA. STAT. § 732.2125(2). If a surviving spouse's attorney-in-fact or guardian of the property petitions the court for approval of the right to take the elective share, such petition tolls the time for exercising the election. § 732.2135(4).

18. § 732.2125(2).

19. § 732.212.

20. FLA. STAT. § 732.2135(1) (2001). As originally enacted in 1999, it was the earlier of six months from the first date of publication, rather than service of a copy, of notice of administration. *See id.* It was recently amended to its present language.

21. *Id.*

statute, though, provides that a court may grant an extension for good cause.²²

Nevertheless, this mechanism does not solve the problem, as the petition for an extension of time must be made within the time period provided for making the election itself.²³ In the above hypothetical then, it seems that the spouse, within two years after the other spouse is missing, would have to file for an extension of time in order to preserve the surviving spouse's right to later elect against the estate. But then the question remains as to whether a court would consider this to be good cause for granting any extension. Is this really what the legislature intended?

After a petition for the elective share has been filed, the petition may be withdrawn as long as it is done so within eight months after the decedent's death and the court has not yet ordered contribution.²⁴ However, upon withdrawal, the court, in its discretion, may assess attorneys' fees and costs against the surviving spouse.²⁵

The biggest change to the elective share provisions concerns the property that is included in computing the elective share amount. First, the new elective share provisions no longer exclude real property located outside of Florida from the probate assets included in the computation of the elective share.²⁶ Section 732.2035 of the *Florida Statutes* includes all of the decedent's "probate estate."²⁷ The "probate estate" is defined within the *Probate Code* as "all property wherever located that is subject to estate administration in any state of the United States or in the District of Columbia."²⁸ The *Probate Code* clarifies that the decedent's "protected homestead" is not included as an asset subject to administration, and thus, its value is excluded from the elective share computation.²⁹

22. § 732.2135(2). A petition for an extension of time tolls the time for exercising the election against the estate. § 732.2135(4).

23. § 732.2135(2).

24. § 732.2135(3).

25. *Id.* The surviving spouse's estate may also be assessed for such fees and costs should the surviving spouse die. *Id.*

26. § 732.2035(1).

27. *Id.*

28. § 732.2025(7).

29. FLA. STAT. § 732.2045(1)(i). The legislature recently added a provision to the *Probate Code* defining "protected homestead" as the property described under article X, section 4 of the Florida Constitution, except for property held as a tenancy by entireties. FLA. STAT. § 731.201(29).

The decedent's interest in jointly held property is also included in the elective estate.³⁰ This includes accounts or securities held by the decedent at the time of death in "pay on death," Totten trust, or other similar right of survivorship form, or as a tenancy by the entireties.³¹ For tenancies by the entireties, one-half of the value of the account or security is included in the computation.³² For all other jointly held survivorship accounts or securities, the amount included is the amount that could be withdrawn by the decedent without accounting to the others.³³

Likewise, the elective estate includes other property held by the decedent at the time of death as a joint tenant with right of survivorship or as a tenancy by the entireties.³⁴ As with jointly held accounts and securities,³⁵ one-half of such other property held as a tenancy by the entireties will be included.³⁶ Other property held as a tenancy with right of survivorship will be valued based on the decedent's "fractional interest."³⁷ Thus, if a decedent owned real property with three others as a tenancy with right of survivorship, one-third of the value of the property is included in the elective estate.

When a transferred interest in property is revocable, the value of the property at the time of the decedent's death is added into the computation of the elective estate;³⁸ revocable trusts fall into this category. However, only those transfers that are revocable by the decedent individually or with another person are taken into account;³⁹ those transfers that are revocable only upon the consent of all beneficiaries are excluded.⁴⁰

Irrevocable property transfers made by the decedent are also computed into the elective estate.⁴¹ The *Probate Code* addresses two categories of these irrevocable transfers. The first category consists of transfers by the decedent in which the decedent retained the right to, or actually enjoyed the possession or use of, income or principal at the time of the decedent's death.⁴² The second category are those transfers by the decedent in which, at

30. § 732.2035(2), (3).

31. § 732.2035(2).

32. *Id.*

33. *Id.*

34. § 732.2035(3).

35. *See supra* note 32 and accompanying text.

36. § 732.2035(4).

37. § 732.2035(3).

38. *Id.*

39. § 732.2035(4).

40. *Id.*

41. § 732.2035(5).

42. § 732.2035(5)(a)(1).

the time of decedent's death, another person had discretionary powers to distribute principal to the decedent,⁴³ such as in an irrevocable discretionary trust.

However, if the spouse possessed the discretionary power to distribute the principal to the decedent, then the transfer is excluded,⁴⁴ as the spouse presumptively would have consented to any such distribution to the decedent. Both of these types of irrevocable transfers are valued, for elective estate purposes, based on the interest that benefits any person other than the decedent's estate.⁴⁵ Notwithstanding the foregoing, there are some exclusionary rules applicable to these irrevocable transfers.⁴⁶ Excluded are those distributions to the decedent permitted only upon the consent of all beneficiaries,⁴⁷ as are those distributions made possible only through an exercisable general power of appointment.⁴⁸ In addition, those distributions that are made or would have been made to satisfy the decedent's obligations to support are not considered.⁴⁹ Lastly, the statute excludes the value of any contingent right of the decedent to receive principal when the contingency was beyond the decedent's control and, in fact, never occurred before the decedent's death.⁵⁰

The decedent's interest immediately prior to death, in the net cash surrender value of insurance on the decedent's life is also computed into the elective estate.⁵¹ The elective share provisions do not apply, though, to any excess life insurance proceeds⁵² or proceeds from court ordered insurance policies on the decedent's life.⁵³

The elective estate also consists of the value of amounts payable upon decedent's death under public or private pension, retirement, deferred compensation or other similar plans, except for those benefits payable under the Federal Railroad Retirement Act or Federal Social Security System.⁵⁴ Also excluded are proceeds in excess of the cash surrender value of life

43. § 732.2035(5)(a)(2).

44. *Id.*

45. § 732.2035(5)(b).

46. § 732.2035(5)(c).

47. § 732.2035(5)(c)(1).

48. § 732.2035(5)(c)(2).

49. § 732.2035(5)(c)(3). The statute does not limit these distributions to court ordered support obligations; however, it would seem to create a proof problem otherwise.

50. § 732.2035(5)(c)(4).

51. § 732.2035(6).

52. § 732.2045(1)(d).

53. § 732.2045(1)(e).

54. § 732.2035(7).

insurance policies related to certain contribution plans defined under the *Internal Revenue Code*.⁵⁵

The elective estate provisions also apply to property transferred by the decedent within one year prior to death due to the termination of the decedent's rights in a revocable trust under section 732.2035(4) or in an irrevocable trust under section 732.2035(5) that would otherwise have been included in the elective estate under those sections.⁵⁶ Also included is other property transferred by the decedent within one year prior to death, with certain exceptions.⁵⁷ Payment for medical or educational expenses and \$10,000 payments, which qualify under the *Internal Revenue Code* gift tax exclusions, are excepted from the elective estate computation.⁵⁸

Lastly, the elective estate includes "[p]roperty transferred in satisfaction of the elective share."⁵⁹ This transfer is further defined as an "irrevocable transfer by the decedent to an elective share trust."⁶⁰ An elective share trust is defined⁶¹ as one wherein: 1) the surviving spouse is entitled to lifetime use of the property or to all of the income of the trust payable at least annually;⁶² 2) the trust is subject to the Florida "underproductive property" provision for trust administration⁶³ or the surviving spouse has the right under the trust or state law to require the trustee to make the property productive;⁶⁴ and 3) the surviving spouse has sole lifetime power to distribute principal or income to anyone other than the spouse.⁶⁵

The property discussed above is subject to additional exclusions under the elective share provisions.⁶⁶ Property transferred before October 1, 1999,

55. *Id.*

56. § 732.2035(8)(a). A termination of rights occurs when the decedent ends or relinquishes such right. § 732.2035(8)(c)(1). Similarly, a termination of a power over property occurs upon the "exercise, release, lapse, [or] default" of the power or other similar to termination. *Id.* Termination under this section does not occur pursuant to the terms of the governing instrument unless such terms were purposefully included to avoid the elective share provisions. § 732.2035(8)(d)(1).

57. § 732.2035(8)(b).

58. *Id.*

59. § 732.2035(9).

60. § 732.2025(10).

61. § 732.2025(2). A trust created before October 1, 1999, the effective date of the new elective share provisions, which meets all the requirements of an "elective share trust" is treated as one for purposes of the new elective share provisions. § 732.2155(4).

62. § 732.2025(2)(a).

63. § 738.12 (2000).

64. § 732.2025(2)(b).

65. § 732.2025(2)(c).

66. § 732.2045.

the effective date of the new elective share provisions, is excluded.⁶⁷ Property transferred prior to the decedent's marriage to the surviving spouse is likewise excluded.⁶⁸ The elective estate also excludes transfers made by the decedent for adequate consideration⁶⁹ or with the surviving spouse's written consent.⁷⁰ The decedent's interest in any community property is not included in the computation of the elective estate.⁷¹ Property deemed part of the decedent's gross estate for federal tax purposes solely because the decedent held a general power of appointment over that property is also excluded.⁷²

In addition to the foregoing, property transferred by the decedent into a "qualifying special needs trust" remains as property separate from the elective estate.⁷³ The "qualifying special needs trust" is a court-approved trust created before or after the decedent's death for the benefit of an incapacitated spouse and, commencing on the decedent's death,⁷⁴ the income and principal are distributable to the surviving spouse for life "in the discretion of one or more trustees less than half of whom are ineligible family trustees,"⁷⁵ and the spouse has sole lifetime power to distribute income or principal to anyone else.⁷⁶

In computing the elective estate, most of the property is computed based on the fair market value on the date of the decedent's death, after deducting mortgages, claims and liens on that property and claims payable from the estate.⁷⁷ In the case of the net cash surrender value of life insurance policies, the computation takes into account the value immediately before

67. § 732.2045(1)(a).

68. *Id.* This includes property transferred to a revocable or irrevocable trust if the assets were in trust from at least October 1, 1999, through the date of decedent's death and were non-marital assets. § 732.2155(6) (2001).

69. § 732.2045(1)(b); *see also* § 732.2155(5).

70. § 732.2045(1)(c). However, "spousal consent to split-gift treatment under [federal] gift tax laws does not constitute written consent . . ." *Id.*

71. § 732.2045(1)(f).

72. § 732.2045(1)(h).

73. § 732.2045(1)(g).

74. § 732.2025(8).

75. § 732.2025(8)(a). Ineligible family trustees are the decedent's grandparents and their descendants who are not also descendants of the surviving spouse. *Id.*

76. § 732.2025(8)(b).

77. § 732.2055(5). As originally enacted, section 732.2055(5) excluded funeral expenses as a claim payable by the elective estate for these purposes. § 732.2055. For a discussion concerning funeral expense inclusion, see Executive Summary, *supra* note 11, cmt. at 6.

the decedent's death.⁷⁸ Any property transferred within one year prior to decedent's death and includable in the elective estate pursuant to section 732.2035(8) is computed based on the fair market value of the property as of the date of the termination or transfer of the property, after deducting mortgages, claims and liens on that property.⁷⁹ Pension plans and the like are included based on the tax transfer value of the date of the decedent's death.⁸⁰

Once the elective estate is computed, the elective share is satisfied by property in the following order of priority, unless the decedent's will or a trust referred to in the will, if any, provides otherwise.⁸¹ First, property benefiting the surviving spouse is applied to satisfy the elective share.⁸² Property benefiting the spouse includes: 1) proceeds from insurance policies, owned by another person, on the decedent's life to the extent paid to or benefiting the surviving spouse;⁸³ 2) amounts paid to or benefiting the surviving spouse under pension plans and similar arrangements described in section 732.3025(7);⁸⁴ 3) the decedent's one-half of community property to the extent paid to or benefiting the surviving spouse;⁸⁵ 4) property in a qualifying special needs trust;⁸⁶ 5) property in the elective estate that passes to the surviving spouse;⁸⁷ and 6) property that would have satisfied the elective share but for the surviving spouse's disclaimer.⁸⁸

Then, if that property is insufficient, the balance is satisfied from the recipients of the remaining property in the elective estate apportioned according to four classes, in that order of priority.⁸⁹ Class 1 consists of the decedent's probate estate, as defined in section 732.2025(7) and revocable trusts.⁹⁰ Class 2 includes accounts, securities, and other property held by the

78. § 732.2055(1). However, any right or interest in life insurance policies transferred within one year prior to the decedent's death and includable in the elective estate pursuant to section 732.2035(8) is valued as of the date of the termination or transfer of the right or interest. § 732.2055(2).

79. § 732.2055(4).

80. § 732.2055(3).

81. § 732.2075(1).

82. *Id.*

83. § 732.2075(1)(a).

84. § 732.2075(1)(b).

85. § 732.2075(1)(c).

86. § 732.2075(1)(d).

87. § 732.2075(1)(e).

88. § 732.2075(1)(f).

89. § 732.2075(2).

90. § 732.2075(2)(a).

decedent with another in a survivorship form, such as Totten trusts, joint tenants with right of survivorship, and tenancy by the entireties.⁹¹ It also includes the decedent's property interests in irrevocable transfers described in section 732.2035(5) and pension plans and similar arrangements described in section 732.2035(7) where the decedent died owning the power to designate the recipient of those property interests.⁹² Class 3 takes into account all other property interests, except protected charitable interests.⁹³ Class 4 consists of "protected charitable lead interests," as defined in the statute, to the extent allowable without disqualifying such interest from being deducted under the federal gift tax laws.⁹⁴ As in the computation of the elective estate, most of the property used to satisfy the elective estate is valued as of the date of the decedent's death.⁹⁵

Only direct recipients of the elective estate and beneficiaries, including trusts, are liable for contribution to the elective share.⁹⁶ The abatement rules under section 733.805 continue to apply for distribution of the Class 1 probate estate used to satisfy the elective estate.⁹⁷ Recipients of property designated as Class 2 and Class 3 pay according to their proportionate share within each class.⁹⁸ Trust beneficiaries contribute a percentage based on the amount of principal distributed to such beneficiaries after the decedent's death.⁹⁹ Contribution may be in cash or in kind.¹⁰⁰ Once payment has been made to the surviving spouse, as under the old provisions, the spouse is treated as having predeceased the decedent.¹⁰¹

These new provisions have yet to be challenged in court. However, before they applied to any estates, the legislature found itself tweaking its

91. § 732.2075(2)(b).

92. *Id.*

93. § 732.2075(2)(c).

94. § 732.2075(2)(d).

95. § 732.2095.

96. § 732.2085(1). Section 732.2115 protects certain payors and third parties acting in good faith in reliance on a governing instrument. *Id.* For the definitions of "payor," "governing instrument," and certain other terms included in the new elective share provisions, *see generally* § 732.2025.

97. § 732.2075(4).

98. § 732.2085(1)(a).

99. § 732.2085(1)(b).

100. § 732.2075(3). *See also* § 732.2085(2). Section 732.2145 describes the personal representative's duties in collecting the contribution.

101. § 732.2105(2) (2000). This provision was previously codified in section 732.211.

own drafted language.¹⁰² It will be interesting to see how the new provisions play out.

B. *Other Changes to Probate Code*

This year, the legislature passed the “Barry Grunow Act,” which provides benefits to public school teachers and administrators who are intentionally killed or injured in the line of duty.¹⁰³ As part of the Act, any paid benefits are included as exempt property under section 732.402.¹⁰⁴ The Act applies retroactively to incidents occurring on or after May 26, 2000.¹⁰⁵

The following changes become effective on January 1, 2002.¹⁰⁶ In order for a spouse residing in Florida to effectively waive rights to the elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as the personal representative of an intestate estate, that spouse must sign the waiver in the presence of two subscribing witnesses.¹⁰⁷ Removal of contents from safe deposit boxes is now governed by section 733.6065.¹⁰⁸ The biggest change to the previous provision is that, in addition to the safe deposit box inventory, the personal representative will have to file a copy of the safe deposit box entry record from the period of time commencing six months prior to the decedent’s death through and including the date of the inventory.¹⁰⁹ A personal representative will now be required to serve formal notice of a copy of the Notice of Administration on “[p]ersons who may be entitled to exempt property.”¹¹⁰

A much needed change was made to the intestacy statute governing spousal share. When the decedent’s lineal descendants are also the surviving spouse’s lineal descendants, the surviving spouse will receive the first \$60,000 of the intestate estate, an increase of \$40,000.¹¹¹ Property used to

102. *See generally* ch. 2001-226.

103. Ch. 2001-180, §§ 1–6, 2001 Fla. Laws 1–3 (codified in FLA. STAT. §§ 112.1915, 732.402). Barry Grunow was a Florida public school teacher shot and killed in the school by one of his students. Kellie Patrick, *Tolerance Dips to Zero as Schools’ End Nears*, SUN SENTINEL (Ft. Lauderdale), May 31, 2001, at 1A.

104. FLA. STAT. § 732.402(2)(d) (2001).

105. § 112.1915.

106. § 731.155.

107. § 732.702(1).

108. § 733.6065.

109. *Id.*

110. § 733.212(1)(d).

111. § 732.102.

effect such a payment will be valued as of the date of distribution, rather than as of the date of the decedent's death.¹¹²

The maximum amount of family allowance payable to dependents of the decedent has also been increased to \$18,000,¹¹³ three times the maximum previously permitted by law.¹¹⁴ Exempt property, under section 732.402 of the *Florida Statutes*, will now be deducted from the estate before computing any residuary, intestacy, pretermitted, or elective shares.¹¹⁵ The suggested form for the self-proving affidavit includes two separate declarations, one by the testator/testatrix and another by the witnesses.¹¹⁶ What is most interesting about this change is that the testator/testatrix will have to declare to the witnesses that the document is that person's will for the affidavit to be valid.¹¹⁷

The anti-lapse statutes will now apply to beneficiaries of testamentary trusts.¹¹⁸ Family administration is completely repealed;¹¹⁹ however, the threshold for estates subject to summary administration increases to estates valued at \$75,000¹²⁰ from \$25,000.¹²¹ Before the court enters an order granting summary administration, a petitioner for summary administration will have to conduct a diligent and reasonable search for ascertainable creditors, serve a copy of the petition on any such creditors, and provide for payment to those creditors.¹²²

The legislature has amended the language of section 732.515¹²³ to make it consistent with section 732.505 concerning revocation of a will or codicil by a subsequent writing.¹²⁴ The legislature added a sentence stating that, where there exists more than one separate writing disposing tangible

112. *Id.* My students in Wills and Trusts will be elated with this change.

113. § 732.403.

114. *Id.*

115. § 732.402. I would presume that for these purposes homestead would be treated in the same manner as exempt property, but this issue has not been addressed by either the legislature or the courts. Likewise, the statute does not address whether any family allowance is excluded before determination of those shares.

116. § 732.503.

117. *Id.*

118. § 732.603.

119. Ch. 2001-226, § 178, 2001 Fla. Laws 108-09.

120. § 735.201(2).

121. *See* FLA. STAT. § 735.201(2) (2000).

122. § 735.206(2) (2001).

123. § 732.515.

124. Section 732.505 of the *Florida Statutes* states: "[a] will or codicil, or any part of either, is revoked . . . by a subsequent inconsistent will or codicil . . . only so far as the inconsistency."

personal property, the more recent writing revokes any inconsistent provisions in any other prior writings.¹²⁵ A provision has been added to section 733.613 of the *Florida Statutes*, where, upon the issuance of a court order authorizing the personal representative to sell or mortgage real property, the purchaser or lender takes the property free of creditors' claims against the estate, except for existing mortgages and liens, and rights of estate beneficiaries.¹²⁶

C. Changes to Trust Administration and Related Statutes

As opposed to the Probate Code, the trust administration statutes have remained fairly unchanged.¹²⁷ However, the following are some points of interest. Effective July 1, 1999, any attorney rendering services to a trust as of that date may petition for a court order awarding attorneys' fees; the petition must be served on the trustee and beneficiaries.¹²⁸ Also, the legislature further limited the personal liability of a successor trustee beyond those succeeding only grantor trustees of revocable trusts.¹²⁹ Under this provision, a successor trustee is also not personally liable¹³⁰ to the trust beneficiaries for any prior trustee's actions or omissions where a super majority of the beneficiaries has released the successor trustee¹³¹ or to any particular beneficiary that has effectuated such a release.

The next legislative session rewrote the trust "slayer statute"¹³² and added a provision concerning evidence of death.¹³³ The language of both

125. § 732.515.

126. § 733.613. The legislature seems to have somewhat codified the result in *Anderson v. Johnson*; in that case, the court held that a bona fide buyer who took title to the estate owned real property, pursuant to a court order, free of an interested party's claim for partition. 732 So. 2d 423, 425 (Fla. 5th Dist. Ct. App. 1999).

127. That is not to say that the legislature did not perform some minor housekeeping in that area as well, such as omitting legalese and changing the word "settlor" to "grantor" in some provisions. See, e.g., Ch. 2001-226, §§ 187-88, 190, 2001 Fla. Laws 113-16, 116-17.

128. FLA. STAT. § 737.2035 (2000). Service on beneficiaries is required only on those beneficiaries entitled to an accounting. *Id.*

129. FLA. STAT. § 737.306 (2001). Former section 737.306 of the *Florida Statutes* applied only with respect to a trust "that was revocable during the time that the grantor served as trustee." FLA. STAT. § 737.306 (1999).

130. For a complete list of circumstances under which a successor trustee is not personally liable, see FLA. STAT. § 737.306 (2001).

131. § 737.306(3)(e)(1). "Super majority" is defined as "at least two-thirds in interest of the beneficiaries" where the interests are ascertainable or, otherwise, "two-thirds in number of the beneficiaries." § 737.306(3)(f).

132. § 737.625.

statutes conforms to the language found in the Probate Code counterparts.¹³⁴ In addition, the legislature extended the savings clause of the rule against perpetuities from 99 years to 360 years for nonvested property interests and powers of appointments in trusts created after December 31, 2000.¹³⁵

D. Other Related Statutory Changes

It has become a bit easier for the estate practitioner regarding estate tax filings with the Florida Department of Revenue. The Preliminary Notice and Report has been eliminated for those estates where the decedent died as of January 1, 2000.¹³⁶ If no estate tax is due, a practitioner may now simply file with the clerk of the court an affidavit to this effect.¹³⁷

The Medicaid Estate Recovery Act¹³⁸ was enacted effective July 1, 1999.¹³⁹ This Act establishes the right, pursuant to federal law, of the Agency for Health Care Administration to file a claim against an estate of a Medicaid recipient at least fifty-five years old.¹⁴⁰ However, there will be no recovery by the Agency where the decedent is survived by a spouse, minor children, or a blind or permanently disabled child.¹⁴¹ Other heirs may petition for a hardship waiver under certain circumstances.¹⁴² In addition, the claim is not enforceable against property exempt from creditors' claims pursuant to Florida law.¹⁴³ In order to ensure compliance, a personal representative must serve a copy of the Notice of Administration on the Agency when a decedent was at least fifty-five years old.¹⁴⁴

Lastly, the anatomical gifts provisions have been removed from the *Probate Code* and added to the chapter on "Health Care Advance

133. § 737.626.

134. See FLA. STAT. §§ 731.103, 732.802 (2000).

135. FLA. STAT. § 689.225(2)(f).

136. Ch. 99-208, § 3, 1999 Fla. Laws 1260, 1265 (repealing FLA. STAT. § 198.12).

137. FLA. STAT. § 198.32(2). For a copy of the "Affidavit of No Estate Tax Due," see Form DR-312, available at <http://sun6.dms.state.fl.us/dor/forms/1999/dr312.pdf>. If an estate tax return is in fact filed with the Department of Revenue and yet no estate tax is due, the Department will still issue a certificate of nonliability. § 198.13(2).

138. § 409.9101.

139. *Id.*

140. § 409.9101(3).

141. § 409.9101(6).

142. § 409.9101(8).

143. § 409.9101(7).

144. § 733.2121(3)(d).

Directives.”¹⁴⁵ Chapter 765 had also been amended earlier to, among other things, permit the termination of life prolonging procedures for persons with an end-stage condition¹⁴⁶ or in a persistent vegetative state.¹⁴⁷

III. PROBATE RULES

There have not been any significant substantive changes to the *Florida Probate Rules*. However, one particular rule should please most probate attorneys. Under rule 5.110, an attorney serving as resident agent for a personal representative need only state the attorney’s office address and mailing address rather than the attorney’s residence address as previously required.¹⁴⁸ This amendment became effective January 1, 2001.¹⁴⁹

IV. CASES

This Part highlights a few select Florida cases that may be of interest to a trust and estates practitioner.

The courts had an opportunity to address the distribution of wrongful death proceeds between the decedent’s survivors and estate. In *In re Estate of Wiggins*,¹⁵⁰ the appellate court upheld a lower court’s admission of expert witness testimony concerning the distribution of those proceeds.¹⁵¹ In that case, an estate recovered, on behalf of the decedent’s survivors and estate, \$100,000 in proceeds from the insurer of the driver that killed the decedent.¹⁵² The hospital where the decedent was taken when the accident occurred filed a claim against the estate for services rendered in the amount of \$19,030.90.¹⁵³ The trial court permitted the personal representative to introduce the testimony of an attorney specializing in wrongful death cases.¹⁵⁴ Because a jury never heard the case, the attorney, as an expert,

145. §§ 765.510–.522.

146. “End-stage condition” is defined as a severe and permanent irreversible deterioration. § 765.101(4).

147. § 765.302(1). A “persistent vegetative state” is one where there is permanent and irreversible unconsciousness. § 765.101(12).

148. Amendments to Florida Probate Rules, 778 So. 2d 272, 280 (Fla. 2001) (amending, among others, 5 FLA. PROBATE R. 120).

149. *Id.* at 273.

150. 729 So. 2d 523 (Fla. 4th Dist. Ct. App. 1999).

151. *Id.* at 526.

152. *Id.* at 524.

153. *Id.*

154. *Id.*

testified as to the probable jury verdict on damages, and the apportionment of these damages had the case gone to trial.¹⁵⁵ The expert estimated that the jury would probably have awarded \$775,000 in damages, 3.3% of which (or \$26,000) would have been distributed to the estate.¹⁵⁶ Since the actual recovery totaled only \$100,000 (the policy's limit), rather than distributing 3.3% of the actual recovery (\$3300), the personal representative recommended that the court distribute a greater amount, ten percent of the total recovery (\$10,000), to the estate.¹⁵⁷ Due to the order of priority for paying claims and expenses under the *Probate Code*, there were barely any funds remaining to pay the hospital.¹⁵⁸ The hospital appealed the trial court's use of the expert testimony as to the value of the wrongful death claim and apportionment of the estimated value.¹⁵⁹ The appellate court held that as long as the trial court fairly apportions the value of a wrongful death claim among the decedent's survivors and estate, based on substantial and competent evidence, then the trial court's ruling stands.¹⁶⁰

Another case also involved the distribution of proceeds recovered in a settlement before a wrongful death action was instituted.¹⁶¹ In that case, a minor child was killed in a car accident caused by her mother.¹⁶² The father, who was appointed personal representative of the child's estate, asked the court to award him the full amount of the settlement; the father argued that the mother was at fault in the accident and thus should be awarded nothing.¹⁶³ The trial court disagreed and apportioned damages among the two parents based on the intestacy statute.¹⁶⁴ The appellate court reversed.¹⁶⁵ The court applied the Florida Wrongful Death Act in reaching its decision.¹⁶⁶ The court noted that, in wrongful death claims, a court must consider the comparative negligence of a survivor in reducing or denying an apportionment of damages to that survivor.¹⁶⁷ Thus, even though the issue of apportionment was before the probate court because the claim was settled

155. *Wiggins*, 729 So. 2d at 524.

156. *Id.* at 525.

157. *Id.*

158. *Id.* (citing FLA. STAT. § 733.707).

159. *Id.* at 526.

160. *Wiggins*, 729 So. 2d at 526.

161. *Hess v. Hess*, 758 So. 2d 1203 (Fla. 4th Dist. Ct. App. 2000).

162. *Id.* at 1204.

163. *Id.*

164. *Id.*

165. *Id.* at 1206.

166. *Hess*, 758 So. 2d at 1204–05 (citing FLA. STAT. §§ 768.16–.27).

167. *Id.* at 1205 (citing FLA. STAT. § 768.20).

before suit, the probate judge could not avoid the application of the wrongful death statutes.¹⁶⁸ Accordingly, the appellate court remanded the case for an entry of an order awarding all the proceeds to the father.¹⁶⁹

In a case that will surely disturb creditors, the Fourth District Court of Appeal held that, under the facts, a brother-in-law and a niece related by marriage were heirs for homestead protection purposes.¹⁷⁰ In *Moss v. Moss*,¹⁷¹ a decedent devised a share of her homestead property to the brother and niece of her predeceased spouse.¹⁷² The lower court afforded homestead protection to blood relatives of the decedent, but not to her deceased husband's relatives; therefore, the court awarded the property only to the decedent's relatives.¹⁷³ The appellate court noted that in *Snyder v. Davis*, the Supreme Court of Florida held that, where a homestead is properly devised, the homestead provision extends homestead protection to any person categorized within the intestacy statute.¹⁷⁴ Because the intestacy statute includes familial heirs of the last deceased spouse as heirs of an intestate estate, the decedent's brother-in-law and niece by marriage were her heirs for homestead purposes and thus entitled to the devise of the decedent's homestead property protected from creditors' claims.¹⁷⁵

In *In re Estate of DeLuca*,¹⁷⁶ the Fourth District Court of Appeal addressed the issue of whether service of a copy of the Notice of Administration is required when there are later discovered codicils.¹⁷⁷ In that case, Josephine Hyland, a beneficiary of the decedent's will, received a copy of the Notice of Administration.¹⁷⁸ Hyland desired to challenge the validity of the will; however, she did not file a claim within the limitations period pursuant to section 733.212.¹⁷⁹ After the time period for objections had expired, the co-personal representatives of the estate filed two newly discovered codicils, which were promptly admitted to probate.¹⁸⁰ The personal representatives did not send Hyland a Notice of Administration

168. *Id.* at 1205–06.

169. *Id.* at 1206.

170. *Moss v. Moss*, 777 So. 2d 1110, 1113 (Fla. 4th Dist. Ct. App. 2001).

171. *Id.* at 1110.

172. *Id.* at 1111.

173. *Id.*

174. *Id.* at 1112 (citing *Snyder v. Davis*, 699 So. 2d 999 (Fla. 1997)).

175. *Moss*, 777 So. 2d at 1112–13.

176. 748 So. 2d 1086 (Fla. 4th Dist. Ct. App. 2000).

177. *Id.* at 1086–87.

178. *Id.* at 1087.

179. *Id.*

180. *Id.*

regarding these codicils.¹⁸¹ Hyland then filed a petition to revoke the will and codicil.¹⁸²

The personal representatives argued that her petition was untimely because the three-month objection period had expired from the time they had served the Notice of Administration.¹⁸³ Hyland's argument was that the original time period did not apply because a new Notice of Administration was necessitated with regard to the codicils.¹⁸⁴ The appellate court agreed with Hyland.¹⁸⁵ The court first noted that a codicil is included in the definition of a will.¹⁸⁶ It then reviewed section 733.212 that limits the time for an interested person to challenge a will, and thus a codicil, only when a Notice of Administration has been served.¹⁸⁷ Because no notice as to the codicils was served on Hyland, she was not time barred and could object to the validity of the will and codicils under section 733.109.¹⁸⁸

In *May v. Illinois National Insurance Co.*, the Supreme Court of Florida addressed another limitations issue.¹⁸⁹ In that case, the court reviewed section 733.702, entitled "Limitations on presentation of claims,"¹⁹⁰ and section 733.710, entitled "Limitations on claims against estate."¹⁹¹ The question certified to the court was:

WHETHER SECTION 733.702 AND SECTION 733.710 OF THE FLORIDA STATUTES CONSIDERED SEPARATELY AND/OR TOGETHER OPERATE AS STATUTES OF NONCLAIM SO THAT IF NO STATUTORY EXCEPTION EXISTS, CLAIMS NOT FORMALLY PRESENTED WITHIN THE DESIGNATED TIME PERIOD ARE NOT BINDING ON THE ESTATE, OR DO THEY ACT AS STATUTES OF LIMITATIONS WHICH MUST BE PLEADED AND PROVED

181. *DeLuca*, 748 So. 2d at 1088.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *DeLuca*, 748 So. 2d at 1088.

187. *Id.*

188. *Id.* at 1089.

189. *May v. Ill. Nat'l Ins. Co.*, 771 So. 2d 1143 (Fla. 2000).

190. *Id.* at 1145; FLA. STAT. § 733.702 (2000).

191. *May*, 771 So. 2d at 1145; FLA. STAT. § 733.710.

AS AFFIRMATIVE DEFENSES IN ORDER TO AVOID
WAIVER.¹⁹²

After analyzing the language in the statutes, the court decided that section 733.710 is a self-executing statute of repose that absolutely bars any claims filed on an untimely basis.¹⁹³ On the other hand, the court held that section 733.702 is a statute of limitations.¹⁹⁴ The court based its decision on the language found in section 733.702. That statute permits an enlargement of time to file a claim upon a showing of fraud, estoppel or insufficiency of notice of the claims period.¹⁹⁵ However, section 733.702(5) explicitly states that “nothing in this section shall extend the limitations period set forth in [section] 733.710.”¹⁹⁶ In reading the two statutes together, the court stated that holding otherwise would result in both statutes being “all but indistinguishable.”¹⁹⁷ Thus, since there is no provision for extending section 733.710, that statute is a statute of repose which absolutely prohibits untimely claims.¹⁹⁸

There are four other cases also worthy of mention. In *Williams v. Estate of Pender*,¹⁹⁹ the First District Court of Appeal held that the elements of a virtual adoption must be proven by clear and convincing evidence.²⁰⁰ The court noted that, to date, no other court had affirmatively ruled on the issue, but it was guided in making its decision by the courts’ reasoning in prior virtual adoption cases.²⁰¹

192. *May*, 771 So. 2d at 1145. The question was certified by the United States Court of Appeals for the Eleventh Circuit. *May v. Ill. Nat’l. Ins. Co.*, 190 F.3d 1200, 1208 (11th Cir. 1999). Prior to that, two Florida district courts of appeal had certified a conflict to the Supreme Court on the same issue. See *Comerica Bank & Trust, F.S.B. v. SDI Operating Partners, L.P.*, 673 So. 2d 163, 168 (Fla. 4th Dist. Ct. App. 1996) (certifying conflict with *Baptist Hosp. of Miami v. Carter*, 658 So. 2d 560 (Fla. 3d Dist. Ct. App. 1995)); *Lutheran Bhd. Legal Reserve Fraternal Benefit Soc’y v. Estate of Petz*, 744 So. 2d 596, 598 (Fla. 2d Dist. Ct. App. 1999) (aligning itself with *Comerica* and certifying conflict with *Baptist Hospital*).

193. *May*, 771 So. 2d at 1145.

194. *Id.*

195. *Id.*

196. *Id.* at 1156.

197. *Id.*

198. *May*, 771 So. 2d at 1145.

199. 738 So. 2d 453 (Fla. 1st Dist. Ct. App. 1999).

200. *Id.* at 456.

201. *Id.* at 454–56.

*Snyder v. Bell*²⁰² concerned the award of attorneys' fees in a claim of breach of a trustee's fiduciary duties.²⁰³ At trial, the jury found in favor of the trustee; however, the court denied the trustee an award of attorneys' fees under section 737.627.²⁰⁴ On appeal, the court reversed and addressed the issue of the amount that could be awarded.²⁰⁵ The court noted that section 737.627 is similar to section 733.106, which provides for the award of attorneys' fees in defending a probate action.²⁰⁶ The court then relied on the opinion in *Dayton v. Conger* where the Third District Court of Appeal held that there is no personal liability for attorneys' fees under section 733.106.²⁰⁷ Accordingly, the court held that the trustee's award of attorney's fees could be no greater than the beneficiary's share in the trust.²⁰⁸

In the third case, also concerning attorneys' fees, the Third District Court of Appeal issued a warning regarding duplication of such fees.²⁰⁹ The *Brake* court stated, in dicta, that needless legal work should not be rewarded.²¹⁰ In a strongly worded opinion, it stated that the public has become repulsed by a probate process which "they perceive to be a sharing of the estate with an attorney."²¹¹ It suggested that courts "seize control" as they are the "ultimate guardian[s] of the public's . . . property."²¹²

Finally, in *Persan v. Life Concepts, Inc.*,²¹³ the court stated that "[m]aking a gift to a charity for a specific project or purpose does not create a charitable trust."²¹⁴ There, some donors had given twenty-four acres of real property to Central Florida Sheltered Workshop, Inc. ("CFSW") to construct homes for disadvantaged adults.²¹⁵ CFSW built the homes but sold the property fifteen years later.²¹⁶

202. 746 So. 2d 1100 (Fla. 2d Dist. Ct. App. 1999).

203. *Id.* at 1100.

204. *Id.* at 1101. Section 737.627 provides for the award of attorneys' fees in challenges to trustees' exercise of powers. FLA. STAT. § 737.627 (2000).

205. *Snyder*, 746 So. 2d at 1103-04.

206. *Id.* at 1104 (citing FLA. STAT. § 733.106).

207. *Id.* at 1104 (citing *Dayton v. Conger*, 448 So. 2d 609, 611 (Fla. 3d Dist. Ct. App. 1984)).

208. *Id.*

209. *Brake v. Murphy*, 736 So. 2d 745, 748 (Fla. 3d Dist. Ct. App. 1999).

210. *Id.*

211. *Id.* at 749.

212. *Id.*

213. 738 So. 2d 1008 (Fla. 5th Dist. Ct. App. 1999).

214. *Id.* at 1010.

215. *Id.* at 1009.

216. *Id.*

A lawsuit was filed against Life Concepts, Inc., the successor charity to CFSW, for breach of a charitable trust or, in the alternative, an imposition of a resulting trust.²¹⁷ The court held that neither type of trust existed.²¹⁸ In order to create a charitable trust in land, the trust must be in writing, signed by the party creating the trust and evincing the intent to create a trust.²¹⁹ In this case, the real property was given by deed with no restrictions, right of reverter or other conditions creating an express charitable trust.²²⁰ Again, because the court found that the property was transferred directly by the owner to CFSW as a gift, the court found that a resulting trust did not exist.²²¹

V. CONCLUSION

It is evident from this survey that the law of trusts and estates is not well settled in this state. In some instances, the Florida Legislature was motivated by a need to implement clarifications to the language in the law. Other changes reflect the need to fulfill the legislature's role in responding to public policy needs. Similarly, the courts' decisions in recent cases attempt to meet these goals. Clearly, it is imperative that the practitioner in this dynamic field closely monitor changes in the law of trusts and estates.

217. *Id.* at 1009–10.

218. *Persan*, 738 So. 2d. at 1012.

219. *Id.* at 1012 (citing FLA. STAT. § 689.05).

220. *Id.* at 1011.

221. *Id.* at 1012.

