The Probate Team 2018

Probate Power Hour

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[1] Appreciation goes to Brett C. Gold, Esq., for his diligent work in preparing these materials. Mr. Gold serves as the firm's Resident At Law. For more information, please see LairdALile.com.

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I. AND/OR.

A. Good drafting demands clarity and precision.

B. Few knew that better, and expressed himself more adamantly, than Wm. Glenn Terrell. Glenn Terrell was appointed to the Florida Supreme Court in 1923, at age 41. He served 41 years until his death in 1964, making him the longest serving member of the Court.[2]

C. One of Justice Terrell's more notable writings is found in a 1932 Florida Supreme Court decision that has been often cited, both in appellate decisions and in teachings on legal writing. I could describe his remarks, but if Justice Terrell were here, we'd let him tell it:[3]

> In the matter of the use of the alternative, conjunctive phrase 'and/or' it is sufficient to say that we do not hold this to be reversible error but we take our position with that distinguished company of lawyers who have condemned its use. It is one of those inexcusable barbarisms which was sired by indolence and dammed by indifference and has no more place in legal terminology than the vernacular of Uncle Remus has in Holy Writ. I am unable to divine how such senseless jargon becomes current. The coiner of it certainly had no appreciation for terse and concise law English. *Cochrane v. Fla. E. Coast Rwy. Co.*, 145 So. 217, 218-291 (Fla. 1932).

[2] Not all of Justice Terrell's judicial writings would today be considered well reasoned, i.e., his concurring opinion in *Hawkins v. Board of Control ,* 83 So.2d 20 (Fla. 1955).

[3] Paraphrasing lyrics from "Say No To This" from *Hamilton*, which is the lead in to a description of Alexander Hamilton's relationship with Maria Reynolds, eventually leading to publication of the Reynolds Pamphlet, the first person account of one of our young nation's earliest political sex scandals.

D. So, when we come across this term, know that you can write and/or speak better!

II. EMOJIS AND EMOTICONS

A. Speaking of avoiding ambiguity, stay clear of emojis and emoticons in your legal writings.

B. Emojis: those cute pictures that fit in our text.

C. Emoticons: those attempts at being cute with standard characters.

D. Great for text messaging and maybe emails, but not so much for legal documents.

1. At least not yet.

2. In 2017, emojis or emoticons were mentioned in over 30 court opinions throughout the U.S.[4]

E. When discerning intent, emojis will help, if we can figure out what they mean.[5]

F. For now, let's keep those out of our formal legal writings. But stay tuned!

1. Consider use of emojis and emoticons in e-wills.

G. Reversion to hieroglyphics?

1. Some say no.[6]

III. BENEFIT OF THE BENEFICIARIES

A. The age old rule is that the settlor's intent matters. It still matters.

B. Yet, a trust must be administered for the benefit of the beneficiaries.

C. So, which is it: "settlor's intent" or "for the benefit of the beneficiaries?"

1. Admittedly, the two principles are often at loggerheads.[7]

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[4] Mike Cherney, *Lawyers Faced with Emjois and Emoticons Are All ¯_(?)_/¯*, Wall Street Journal (Jan. 29, 2018), https://www.wsj.com/articles/lawyers-faced-with-emojis-and-emoticons-are-all-1517243950.

[5] Ronald H. Kauffman, *If it looks like a duck: Emojis, Emoticons and Ambiguity*, Commentator, Spring 2018.

[6] Una Titz, *Emoji vs. Hieroglyphs: A primitive form of language?*, Beluga (Apr. 28, 2018), https://medium.com/beluga-team/emoji-vs-hieroglyphs-a-primitive-form-of-language-a228f52e4bc2.

[7] A term that seems to have no reference to Testudines, the scientific order for turtles and tortoises. Instead the phrase finds it origins in the United Kingdom, where I am presently researching that and other important topics such as the optimal temperature for ale. In the U.K., a loggerhead means a 'stupid person' as did Shakespeare in *Love's Labour's Lost*.

D. Of course, the trust is to be administered with the settlor's intent as the polestar, and only for the benefit of the beneficiaries vis a vis the benefit of the trustee or others. This clarification was enacted in 2018. House Bill 413 (2018) which became Ch. 2018-35.

1. "'Interests of the beneficiaries' means the beneficial interests intended by the settlor as provided in the terms of a ~~the~~ trust." Florida Trust Code §736.0103(11), as modified in 2018.

2. The terms of a trust cannot override the principle that "the requirement that a trust ~~and its terms be for the benefit of the trust's beneficiaries, and that the trust~~ have a purpose that is lawful, not contrary to public policy, and possible to achieve." Florida Trust Code §736.0105(2), as modified in 2018.

3. A trust may be created only to the extent the purposes of the trust are lawful, not contrary to public policy, and possible to achieve. ~~A trust and its terms must be for the benefit of its beneficiaries.~~ Florida Trust Code §736.0404, as modified in 2018.

IV. DECANTING

A. Florida birthed the granddaddy of the law on decanting.

1. *Phipps v. Palm Beach Trust Co.,* 142 Fla. 782 (1940).

B. Next, our legislature gave us the "big daddy" of statutory law on decanting.

1. Florida Trust Code §736.04117 (2007).[8]

C. And now, we have a new law on decanting, in its infancy.

1. Florida Trust Code §736.04117 (2018). House Bill 413 (2018) which became Ch. 2018-35.

D. What is new?

1. Absolute power no longer required if an "authorized trustee" does the decanting.

[8] Laird A. Lile, *Trust Law Decanting: It's Nothing to Wine About*, Real Property, Probate and Trust Law Section Legislative Update Seminar (2007). See Appendix 1.

a. "'Authorized Trustee' means a trustee, other than the settlor or a beneficiary, who has the power to invade the principal of a trust." Florida Trust Code §736.04117(1)(b) (2018).

2. Each beneficiary of the first trust must have a substantially similar interest in the second trust.

a. "'Substantially similar'" means that "there is no material change in a beneficiary's beneficial interest or in the power to make distributions and that the power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to the power under the first trust to make a distribution directly to the beneficiary." Florida Trust Code §736.04117(1)(i) (2018).

3. No change in powers of appointments.

a. If no power exists in the first trust, then none in the second trust.

b. If a power exists in the first trust, then the power must be in the second trust with the same permissible appointees.

4. Decanting to supplemental needs trust.

a. A supplemental needs trust is a trust that the authorized trustee believes would not be considered a resource for purposes of determining whether the beneficiary who has a disability is eligible for government benefits.

b. The supplemental needs trust must benefit a beneficiary with a disability.

c. The beneficiaries of the second trust must include only beneficiaries of the first trust.

d. The authorized trustee must determine that the exercise will further the purposes of the first trust.

E. How to decant?

1. The new law includes additional definitions and should serve as a blueprint for decanting.

2. The exercise must be in writing, signed by the authorized trustee, and filed with the records of the first trust.

a. Certainly, a copy should also be in the records of the second trust.

3. Notice must be provided of the manner in which the authorized trustee intends to exercise the power to invade. The notice must be provided at least 60 days before the effective date of the exercise. Notice must be provided to: (i) all qualified beneficiaries of the first trust; (ii) under certain circumstances, the settlor; (iii) all trustees of the first trust; and (iv) any person who has the power to remove or replace the authorized trustee of the first trust. The notice may be waived by a person entitled to notice.

F. What is not new?

1. The new law expressly preserves common law rights to decant.

2. The new law maintains the substance of prior statutory rights to decant, when an absolute power exists.

V. LIMITATIONS RELATED TO TRUST ACCOUNTINGS

A. Not so fast, ye[9] in Black Robe.

1. The Fourth District held that trustees need not account for any administration that occurred before January 1, 2003. *Corya v. Sanders*, 155 So.3d 1279, 1287 (Fla. 4th DCA 2015).

a. The law on which the court relied only addressed the form of the accounting, not the requirement to account.

2. While the decision in *Corya* was terrific for that trustee (and the trustee's attorney), the limitation was not justified and should not be the law.

a. In fact, that was never the law, other than for the parties in that one proceeding.

3. "Subsections (1) and (2) govern the form and content of ~~This section applies to~~ all trust accountings rendered for any accounting period beginning on or after July 1, 2003, and all trust accountings rendered on or after July 1, 2018.

[9] Yes, I am still in London when writing this portion of these materials.

This subsection does not affect the beginning period from which a trustee is required to render a trust accounting." Florida Trust Code §736.08135(3), as modified in 2018.

a. The changes were made retroactive as a clarification of existing law. House Bill 413 (2018) which became Ch. 2018-35.

VI. MORE ON LIMITATIONS, OF THE STATUTE VARIETY

A. Not so fast, ye in Black Robe, Part Duex.

1. The Fourth District also held that when a person has actual knowledge that they are a beneficiary and actual knowledge that they have not received an accounting, they are barred from seeking an accounting for any period more than four years prior to the filing of the action. *Corya v. Sanders*, 155 So.3d 1279, 1288 (Fla. 4th DCA 2015).

B. A beneficiary's actual knowledge that he or she has not received a trust accounting does not cause a claim to accrue against the trustee for breach of trust based upon the failure to provide a trust accounting required by s. 736.0813 or former s. 737.303 and does not commence the running of any period of limitations or laches for such a claim, and paragraph (a) and chapter 95 do not bar any such claim. Florida Trust Code §736.1008, as modified in 2018.

a. The changes were made retroactive as a clarification of existing law. House Bill 413 (2018) which became Ch. 2018-35.

VII. POSTING OF TRUST ACCOUNTINGS

A. Since 2015, trust accountings and other trust related documents may be provided by posting on a secure electronic account or website. Florida Trust Code §736.0109 (2018).

B. Glitches happen. {Emoji for this?}

1. Compliance with the requirements set forth in the statute is required and the sender has the burden of proving compliance.

2. Authorization previously granted by a beneficiary may be terminated not only by giving the trustee written notice but also following procedures on the electronic account or website.

3. The requirements are made more specific and also relaxed, in the same sentence. The authorization must "[s]pecifically indicate whether a trust accounting, trust disclosure document, or limitation notice ... will be posted in this manner, and generally enumerate the other types of documents that may be posted in this manner." Florida Trust Code §736.0109(3), as modified in 2018. House Bill 413 (2018) which became Ch. 2018-35.

VIII. INJUNCTIONS FOR THE VULNERABLE

A. Chapter 825 of the Florida Statutes is titled "Abuse, Neglect, and Exploitation of Elderly Persons and Disabled Adults."

1. Expanded protections allow for injunctions.
2. Effective July 1, 2018.
3. House Bill 1059 (2018) which became Ch. 2018-100.

B. A petition for an injunction to protect against exploitation of a vulnerable adult:

1. May be filed by:
   a. The vulnerable adult.
   b. The guardian of the vulnerable adult.
   c. A do gooder with the consent of the vulnerable adult.
      (1) "A person or organization acting on behalf of the vulnerable adult."
   d. A petitioner for a determination of incapacity and appointment of a temporary guardian.
2. No attorney required.

C. Contents of petition

1. Sworn to by petitioner with specific facts and circumstances set forth.
2. Substantially in the form set forth in the statute.

a. Must allege that the vulnerable adult is either a victim of exploitation or that the petitioner has reasonable cause to believe the vulnerable adult is, or is in imminent danger of becoming, a victim of exploitation and then explain specific incidents or threats.

b. Must list known financial accounts of the vulnerable adult.

c. Must choose relief from among:

(1) Prohibiting respondent from direct or indirect contact with the vulnerable adult;
(2) Immediately restraining the respondent from committing acts of exploitation against the vulnerable adult;
(3) Freezing specific assets of the vulnerable adult, even if in joint names with the respondent or in the respondent's sole name;
(4) Freezing credit lines of the vulnerable adult; and/or
(5) Providing any terms the court deems necessary for protecting the vulnerable adult or his or her assets, including any injunctions or directives to law enforcement agencies.

d. Explain how the critical expenses of the vulnerable adult will be paid if assets are frozen, or include a request authorizing payment of critical expenses be paid notwithstanding the freeze.

3. The petition must include, directly above the signature line, a statement in all capital letters and bold face as follows:

a. I ACKNOWLEDGE THAT PURSUANT TO SECTION 415.1034, FLORIDA STATUTES, ANY PERSON WHO KNOWS, OR HAS REASONABLE CAUSE TO SUSPECT, THAT A VULNERABLE ADULT HAS BEEN OR IS BEING ABUSED, NEGLECTED, OR EXPLOITED HAS A DUTY TO IMMEDIATELY REPORT SUCH KNOWLEDGE OR SUSPICION TO THE CENTRAL ABUSE HOTLINE. I HAVE REPORTED THE ALLEGATIONS IN THIS PETITION TO THE CENTRAL ABUSE HOTLINE.

b. I HAVE READ EACH STATEMENT MADE IN THIS PETITION AND EACH SUCH STATEMENT IS TRUE AND CORRECT. I UNDERSTAND THAT THE STATEMENTS MADE IN THIS

PETITION ARE BEING MADE UNDER PENALTY OF PERJURY PUNISHABLE AS PROVIDED IN SECTION 837.02, FLORIDA STATUTES.

D. Upon filing a petition, the court is required to schedule a hearing on the petition at the earliest possible date.

E. The clerk also has duties to assist petitioners in filing petitions and is required to provide forms for that purpose. The clerk must also provide instructions to petitioners on how to serve the petition and how to enforce the injunction, if granted. The clerk must also provide an informational brochure. The clerk must also provide copies of petitions and orders to adult protective services. And, the clerk is to do all of this without fees.

F. Adult protective services must, within 72 hours, submit to the court any results of investigations relating to the vulnerable adult.

G. The court may:

1. Grant a temporary ex parte injunction and other relief the court finds proper if the court finds, based upon the petition, that:
    a. An immediate clear and present danger of exploitation exists;
    b. A likelihood of irreparable harm exists with no adequate remedy at law;
    c. There is a substantial likelihood of success on the merits;
    d. The (alleged) threatened injury outweighs harm to the respondent;
    e. The public interest will not be disserved by the injunction; AND
    f. The injunction provides for the vulnerable adult's physical or (NOT and) financial security.
2. Examples of relief the court may order when considering granting a temporary injunction (not necessarily on an ex parte basis) are:
    a. Restraining the respondent from committing acts of exploitation against the vulnerable adult;
    b. Awarding to the vulnerable adult the temporary and exclusive use and possession of the dwelling if shared with respondent, or barring

the respondent from the vulnerable adult's residence, but only if the court can confirm the availability of any required services or alternative caregivers to ensure the safety of the vulnerable adult;

c. Freezing financial assets of the vulnerable adult whether titled solely in the vulnerable adult's name, solely in the respondent's name, jointly with the respondent, in guardianship, in trust or in a Totten trust, provided that:

(1) Assets in a guardianship may only be frozen in the guardianship proceeding;
(2) Assets held by a trust may only be frozen if all of the trustees are served with process and given reasonable notice before any hearing on the petition;
(3) Assets in the sole name of the respondent may only be frozen ex parte if the petition and affidavit demonstrate to the court that the assets are traceable to the unlawful exploitation of the vulnerable adult, that such assets are likely to be returned to the vulnerable adult after a final evidentiary hearing, and that no other adequate remedy at law is reasonably available.

d. Freezing a credit line of the vulnerable adult whether listed solely in the vulnerable adult's name or jointly with the respondent.

(1) A credit line in a guardianship may only be frozen in the guardianship proceeding;
(2) A credit line held by a trust may only be frozen if all of the trustees are served with process and given reasonable notice before any hearing on the petition.

e. Prohibiting the respondent from having direct or indirect contact with the vulnerable person.

f. Providing directives to law enforcement agencies.

g. If a freeze (as described above) has been ordered, directing that specified living expenses continue to be paid;

h. Ordering payment of fees to clerks to assess as costs.

(1) $75 if the assets at a financial institution are between $1,500 and $5000; and
(2) $200 if the assets are more than $5,000.

3. Except for taking judicial notice as provided in the evidence code, only verified pleadings or affidavits may be utilized as evidence in an ex parte hearing.
    a. Unless the respondent appears or has received reasonable notice.
        (1) In which case the hearing should not be considered ex parte in the first place.

4. To deny a petition the court has to do more work.
    a. Must be by written order and must note the legal grounds for denial.
    b. If the only ground for denial is the lack of appearance of an immediate and present danger, the court must set a full hearing at the earliest possible date.
    c. Nothing affects a petitioner's right to amend a petition.
        (1) Ex parte, ore tenus motion to address judge's concern?

5. An injunction that is granted ex parte must be temporary and for a fixed period not to exceed 15 days.
    a. A full hearing must be set for a date prior to when the injunction will cease to be effective.
    b. A continuance may be granted for good cause shown by any party.
        (1) A continuance does not extend the injunction.

6. Reasonable cause merits its own definition for this new law. In determining whether reasonable cause exists, the court shall consider all relevant factors, including, but not limited to, any of the following:
    a. The existence of a verifiable order of protection issued previously or from another jurisdiction.
    b. Any history of exploitation by the respondent upon any vulnerable adult.
    c. Any history of the vulnerable adult being previously exploited or unduly influenced.

d. The capacity of the vulnerable adult to make decisions related to his or her finances and property.

e. Susceptibility of the vulnerable adult to undue influence.

f. Any criminal history of the respondent or previous probable cause findings by adult protective services, if known.

7. Notice.

a. The respondent shall be personally served before the final hearing with:

(1) Petition;
(2) Notice of Hearing; and
(3) Temporary Injunction, if any.

b. The vulnerable adult shall be served with the same items as the respondent if the petitioner is acting in a representative capacity, however:

(1) The vulnerable adult only needs to be "served," whereas the respondent must be "personally served."

c. If assets or lines of credit are sought to be frozen, then the depository or financial institution must be served.

8. At the final hearing, the court may grant the relief the court deems proper when, upon notice and hearing, it appears to the court that:

a. The vulnerable adult is the victim of exploitation or is in imminent danger of becoming a victim of exploitation;

b. A likelihood of irreparable harm exists with no adequate remedy at law;

c. The threatened injury outweighs possible harm to the respondent;

d. When involving freezing of assets of the respondent, probable cause that exploitation has occurred, the freeze only affects the proceeds of such exploitation, and there is a substantial likelihood that such assets will be returned to the vulnerable adult in further proceedings;

e. The injunction provides for the vulnerable adult's physical or (NOT and) financial security.

9. Examples of relief the court may order at the final hearing are:
   a. Continue the temporary injunction, in whole or in part;
   b. Restrain the respondent from committing acts of exploitation against the vulnerable adult;
   c. Award to the vulnerable adult the exclusive use and possession of the dwelling, if shared with respondent, or barring the respondent from the vulnerable adult's residence, but only if the court can confirm the availability of any required services or alternative caregivers to ensure the safety of the vulnerable adult;
   d. Order the respondent to participate in treatment, intervention, or counseling services to be paid for by the respondent;
   e. Direct assets under a temporary freeze be returned to the vulnerable adult; direct those assets remain frozen until ownership issues can be resolved; or direct the temporary freeze on a credit line be lifted;
   f. If finding the respondent has engaged in exploitation, then enter a final cost judgment against respondent, in favor of both the petitioner and the clerk of courts;
   g. Order such other relief as necessary for the protection of a victim of exploitation including injunctions and directives to law enforcement agencies.

10. An advocate from a state attorney's office , a law enforcement agency, or the adult protective service program must be allowed to attend any court proceeding with the petitioner or respondent if:
   a. The petitioner or respondent had made such a request; and
   b. The advocate is able to attend.

11. More details regarding required contents of temporary and final injunctions and details regarding transmittal to the sheriff, and for enforcement are contained in this new law.

12. The same law creates a new section that provides for processes when an injunction is violated.
    a. Imposes duties upon the court, the sheriff and the state attorney.
    b. Sanctions include criminal penalties up to a third degree felony.
    c. Economic recovery for the vulnerable adult.
        (1) Not for the petitioner.

13. "Nothing in this [law] may affect title to real property."

IX. ELIMINATION OF DOCUMENTARY STAMPS ON TRANSFERS OF HOMESTEAD REAL PROPERTY BETWEEN SPOUSES

A. A deed or other instrument that transfers or conveys homestead property or any interest in homestead property between spouses, if the only consideration for the transfer or conveyance is the amount of a mortgage or other lien encumbering the homestead property at the time of the transfer or conveyance and if the deed or other instrument is recorded within 1 year after the date of the marriage. This paragraph applies to transfers or conveyances from one spouse to another, from one spouse to both spouses, or from both spouses to one spouse. For the purpose of this paragraph, the term "homestead property" has the same meaning as the term "homestead" as defined in s.192.001.

B. HB 7087 (2018) which became Ch. 2018-118.

X. HOMESTEAD

A. Florida provides broad protection to homesteaders. Fla. Const. art. X, 4(c).

B. The protections include a restraint on devise if the owner is survived by a souse or minor child.
    1. Except that a devise to a spouse is permitted if no minor child.

C. Waiver of homestead rights by agreement.
    1. An example of a waiver agreement is provided with the understanding, just as with all of these materials, that no warranties, express or implied, are provided and that the author, the seminar sponsor, other speakers, and

everyone else disclaims this example, and all of these materials, as not being fit for any particular purpose. Those using anything from these materials, including the referenced form, do so as a member of The Florida Bar, accepting full responsibility for consequences, both foreseen and unforeseen, for any outcome. See Appendix 2.

D. Rather than an Agreement, how about a Deed?

1. The Third District held (but subsequently withdrew) that a warranty deed executed by a husband and wife conveying their marital homestead to the wife relinquished all homestead rights of the husband. *Habeeb v. Linder*, 36 Fla. L. Weekly D300c (Fla. 3rd DCA 2011), opinion withdrawn, 64 So.3d 1275 (Fla. 3rd DCA 2011). See Appendix - nevermind, Appendix withdrawn.

2. Other reported decisions added to the confusion. So, alas, what to do?

E. Wise men ne'er sit and wail their loss, but cheerily seek how to redress their harm.[10]

1. Enter the Florida Senate, preceded by the Real Property, Probate and Trust Law Section's Ad Hoc Homestead Committee.

2. Clarity is desired even by those who may prefer a different outcome.

3. A deed, regardless of type, executed by a spouse is a waiver of the constitutional devise restriction if the following or substantially similar language is included:

a. By executing or joining this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me. Senate Bill 512 (2018) which became Ch. 2018-22.

4. This wavier language "may not be considered" a waiver for creditor protection purposes. *Id*.

F. Tip: From another multigenerational estate planning family from South Florida, "Rubin on Homestead."

1. 240 pages of explanation and even a form or two.

[10] More Shakespeare, but still not *King Lear*. This one is from *Henry VI*.

2. Order on line and receive on line.

a. Personalized PDF. See Appendix 3.

XI. GUARDIANSHIP AUDIT

A. Clerks have increased audit authority.

1. Clerks must report to the court with findings of any audit.

B. New exceptions to confidentiality:

1. Clerks may disclose confidential information to the Department of Children and Families or law enforcement for other purposes as provided by court order.

2. A guardian may provide confidential information (i) to the clerk when related to an investigation by the clerk or (ii) to the Office of Public and Professional Guardians investigator when related to an investigation into a professional guardian.

C. House Bill 1187 (2018) which became Ch. 2018-68.

XII. E-WILLS

A. Not yet in Florida, but only because of an unexpected confluence of events.

1. Coming again, soon.

B. Electronic Wills Act in process at the Uniform Law Commission.

1. Discussion draft presented in July 2018.

XIII. NOT ALWAYS THE 15TH

A. Income tax returns are due to be filed with the IRS on the 15th of a month. Some month. But always the 15th.

1. Not any more.

2. Not since Congress enacted the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 ("The Act").

a. The Act also gave us basis consistency reporting requirements, leading to IRS Form 8971.

b. The Secretary of the Treasury is given authority to modify administratively the extended deadlines for income tax returns for trusts to be 5 1/2 months, which results in a September 30 deadline for calendar year taxpayers. Section 2006(b) of The Act.

3. And the Secretary did, beginning with the 2017 taxable year.

XIV. WARNING LABELS FOR INDIVIDUAL TRUSTEES

A. How are individual trustees supposed to know?

1. Duty to administer trust. Florida Trust Code §736.0801.
2. Duty of loyalty. Florida Trust Code §736.0802.
3. Duty of Impartiality. Florida Trust code §736.0803.
4. Duty to Act Prudently. Florida Trust Code §736.0804.
5. Ability to Delegate. Florida Trust Code §736.0807 and Florida Statutes §518.112.
6. Duty to keep records. Florida Trust Code §736.0810.
7. Duty to account and inform. Florida Trust Code §736.0813.
   a. Duty to give notice.
8. Limitation on distribution authority. Florida Trust Code §736.0814.

XV. QUALIFIED BENEFICIARIES

A. Family trust for wife for life.

B. Upon wife's death, Family Trust terminates in favor of new trusts for descendants of decedent.

C. Are the children of the decedent qualified beneficiaries of the Family Trust?

D. Trial court:

1. No.

E. Fourth DCA:

1. Yes.

F. *Rachins v. Minassian*, 43 Fla. L. Weekly D1572a (Fla. 4th DCA 2018).

G. This was round two for these parties. Both times the appellate opinions have been helpful. The first involved the authority of a trust protector. *Minassian v. Rachins*, 152 So.3d 719 (Fla. 4th DCA 2014).

XVI. WHO IS YOUR DADDY??

A. Common law rule provides that married mother's husband is the father of the child. The only father.

1. Common law presumption of legitimacy.
2. Typically, attempts to rebut were by the husband who did not want the financial responsibilities for the child.

B. In *Simmonds v. Perkins*, 247 So.3d 397 (Fla. 2018), the biological father wanted to rebut the presumption. He wanted to establish paternity. The biological father moved to dismiss the petition, asserting the common law presumption of legitimacy.

C. The trial court acknowledged that the biological father was very involved in the child's life, was at the hospital during birth, and was known to the child as "daddy." Yet, based upon precedent, the trial court ruled that the biological father did not have standing to rebut the common law presumption of legitimacy.

D. The supreme court held that the biological father had standing to assert paternity and may proceed with attempts to rebut the presumption of legitimacy.

XVII. DISCOVERY IN CONTESTS

A. Plaintiff was asserting rights as a beneficiary under a 1992 trust instrument.

B. Attorney for the decedent (who became a defendant as the successor trustee) refused to produce more recent trust instruments, asserting that the trust was initially created in 1992 and then amended or restated in 1996, 2000, 2002, 2005, 2007, 2013, and 2014, and that the plaintiff must first show that she would have been a beneficiary under an earlier trust before she is entitled to receive a copy of the later trust documents.

C. So, Plaintiff sought discovery of copies of trust documents.

D. Defendant/lawyer sought a protective order, which was eventually granted by the trial court, after an in camera inspection. However, the trial court failed to make the requisite findings when denying the petition.

E. The appellate court quashed the protective order, observing that without the sought trust documents, the plaintiff's claim would have been "eviscerated." *Boren v. Rogers*, 243 So.3d 448, 451 (Fla. 5th DCA 2018).

XVIII. FREELY DEVISEABLE HOMESTEAD

A. Homesteader passed away with neither spouse nor minor child.

B. Will left "[m]y entire estate to Judith D. Blue."

C. Ms. Blue was a friend.

D. Homesteader's relatives file a petition to determine homestead real property asking the court to find that where there is not specific intent in the will to dispose of the homestead, the homestead descends to the heirs.

E. The trial court denied the petition and found that the homestead was freely devisable and as such passed as part of the estate to Ms. Blue.

F. No only did an appeal follow, but the court decided to write an opinion instead of issuing a PCA. *Webb v. Blue*, 243 So.3d 1054 (Fla. 1st DCA 2018).

XIX. CONCLUSION

Appendices

1 Laird A. Lile, *Trust Law Decanting: It's Nothing to Wine About*, Real Property, Probate and Trust Law Section Legislative Update Seminar (2007)

2 Sample Post-Marital Agreement

3 Rubin on Homestead

Trust Law Decanting
It's Nothing to Wine About

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PROLOGUE

I sit to compose my thoughts for these materials in the desolate Crown Room at the Salt Lake City airport, after a long day of meetings and before an even longer journey home. I glance down at the clock. Is that really the time? Yes, yes, the witching hour has finally arrived.

The clock blinking in flourescent blue, a small font on the bottom corner of my screen, is now shouting the time at me: 12:14 AM, July 1, 2007. At least, that's the time in Florida. My trusty portable computer has not yet figured out that I have transported it two time zones to the west.

I stop and wonder. Are the stars sparkling over the Sunshine State? Are the waves lapping at the sandy beaches along our 1,197 miles of shorelines? Will trust beneficiaries wake quizzically, wondering what seems new and different about the dawn of the new day? Are individual trustees and trust officers rushing to the courthouse like drivers at the Daytona speedway to file actions that did not even exist the day before? Because, the time has come. The long awaited future is now.

Florida has a new Trust Code. And thus begins the story of Theodore Harson, small town Florida lawyer, and the Florida Trust Code.

CHAPTER 1
ANOTHER DAY, ANOTHER CHALLENGE

Theodore Harson just finished another client meeting. His assistant, Wanda, knows to hold his calls and not interrupt him. He is in one of those grooves. He needs time, she can tell. After all, she's been with him for nearly 20 years. The thoughtful look on his face, as he turns back from staring out at the live oak trees and the gathering clouds for the afternoon thunderstorm, says it all.

Theodore's client has a problem. And Theodore is well on his way to a solution.

John H. Phillips, Sr. left the office, no more than an hour ago. Senior, as he is known in the family, is the widower of Theodore's late client, Margaret. Margaret, a wealthy woman, at least by Ochopee standards, left a trust for the benefit of her son, John, Jr., with her husband and First National Bank as the co-trustees. The trust was drawn long before John, Jr. had married Sue. Sue has turned out to be such a great influence on John, Jr. Of course, John, Jr. hasn't accumulated much on his own. And Senior does not expect that to change. John, Jr. and Sue live a comfortable life off of the monthly distributions from Margaret's trust.

What, Senior has asked, will happen to Sue if John, Jr. dies before she does? How will she get by? Theodore reminded Senior that the trust provides liberally for John, Jr. and on John, Jr.'s death the remainder passes to John, Jr.'s brother and sister. Senior knows his other children to be well off in their own right (or at least as a result of their mother's largess). As Wanda knows from Theo's single spaced, three page file memo, that now sits on her worn, tired printer, Senior would like for John, Jr. to be able to provide for Sue to live on the trust's distributions if John, Jr. dies before Sue dies.

Senior has the power to direct the trustees to distribute the trust property to John, Jr. right now. In fact, the trust says that "the trustees shall pay over and transfer all or any part of the rest, residue and remainder of the trust estate, both principal and income, which may at such time remain and be in the hands of the Trustees to John, Jr. or any of his siblings, in such shares and proportions as the said Individual Trustee, in his or her sole and absolute discretion, shall determine and fix even to the extent of directing the payment of the entire trust estate to one of said parties."

So, Senior, as the Individual Trustee, could just direct First National and himself, as the Trustees, to distribute the trust property to John, Jr. Then John, Jr. could make whatever provision he wished for Sue if she survives him. But, Senior did not like *that* idea. Seems that John, Jr. may still have a bit of an imprudent streak. Something about those weekend trips to southeast Florida and the parking vouchers from the Gulfstream race track that makes Senior nervous about any distribution directly to John, Jr. And the trust property still includes some interests in Margaret's father's grove properties, so a distribution of those interests would be less than ideal.

CHAPTER 2
OLD LAW, STILL GOOD LAW

Theo dusts off his old research books. Soon, he found just what he was looking for. A 1940 Florida Supreme Court decision, *Phipps vs. Palm Beach Trust Company*, 196 So. 299 (Fla. 1940). Old Judge C.E. Chillingworth from Palm Beach County had gotten it right. That opinion predated the mysterious disappearance of Judge Chillingworth and his wife from their Manalapan residence by some 15 years. The Chillingworths were eventually declared dead, later determined to be victims of a hit ordered by Palm Beach Municipal Judge Peel.

In Florida, an individual trustee and a corporate trustee clothed with absolute power to administer a trust in the interest of designated beneficiaries may create a second trust, for the benefit of one or more of those beneficiaries, at such time and in the manner determined by the individual trustee. The particulars of the trust instrument and the breadth of the power granted the individual trustee would control. The general rule announced by the Supreme Court, in affirming Judge Chillingworth, is that the power vested in a trustee to create an estate in fee includes the power to create or appoint any estate less than a fee unless the settlor clearly indicates a contrary intent.

Theo was already drafting the new trust, the so-called second trust. The only current beneficiary would be John, Jr. But John, Jr. would be given a new power, a right that was missing from the first trust. John, Jr. would have the power to appoint the income from the trust to Sue's, or for her benefit, if she survives him. And in the second trust, Senior would continue to have the same distribution power he held in the original trust, thereby continuing *ad seriatim* the ability to transfer property to successive "second trusts" if other issues arose in the future. Wanda knew that Theo was on a roll when she saw him using Latin in the file memorandum.

If First National decided to be stubborn and not transfer the assets from the original trust to the second trust, Theo was ready. Ready to file a petition, based on the *Phipps* decision - the one from 1940! Cited few times, the precedent from *Phipps* seemed to stand. A court proceeding might give some added protection to all involved, Theo would admit to Wanda. Although others might consider laying the blame for the additional costs of a court proceeding on the corporate doorstep of First National, the though does not even cross Theo's mind, at least not for long. That is simply not the way Theodore Harson, small town Florida trust lawyer, operates. Theo will simply express his usual cautious viewpoint to Senior and recommend a court proceeding. And when Theo makes a recommendation, his clients listen. At least if they want to continue to be a client. Senior will grouse briefly, but his rapid acquiesce is based on the his trust of Theo's judgment. So, Theo now longs for statutory authority to ease his task of convincing the bank's trust counsel and the local judge that his solution is achievable under current Florida trust law.

CHAPTER 3
RPPTL TO THE RESCUE

Theo turns to his computer. The flat screens (yes, more than one) line the outside of his custom designed workspace. He toggles to the screen with his window to the world, his internet access. Quickly, Theo is at the bookmarked page for the Real Property, Probate and Trust Law Section of The Florida Bar, www.RPPTL.org. Unquestionably the best $50 his small office spends each year -- for membership in this Section. He looks around for new postings and seminar offerings. The on-line editions to the Section's newsletter, ACTION LINE, are prominently displayed from a link on the homepage. Theo scrolls through the table of contents of the recent edition, Summer 2007. Nothing about the *Phipps* case. But, what is this? An article about one of his

favorite subjects, decanting fine wine. Theo likes a good bottle of wine as much as the next trust lawyer. He does not often partake in libations of such a quality that deserve decanting, but he has heard stories of the process and hopes one day to be in *that* position.

No, wait - the article just has some clever title. The author is that Sarasota trust law scholar, Barry Spivey -- he would not be writing about wine. Theo's heart skips a beat, scanning down to page 14, as he looks more closely at the full title of the article "'Decanting' From One Trust to Another: Why a New Trust Code Section." His palms break into a sweat as he reads the first words...a reference to the *Phipps* case. Theo flies through the article, fearful that *Phipps* has been overturned or statutorily repealed. Instead of a repeal, Mr. Spivey writes that the new Florida Trust Code preserved the general holding of *Phipps*. So far, so good. But wait, it gets better. Mr. Spivey writes of a new statute that codifies the process of transferring assets from one trust to another, referring to this process as "decanting."

Theo charges to the massive green wall on the far side of his office, looking for materials from the 2007 Legislative Update seminar. The Legislative Update materials and other Section seminar materials from more than 25 years form a facade of green. Green in different hues. Some light, some dark, as The Florida Bar has changed specifications from time to time. Many bleached by the intense Florida sunshine. And all bound in soft covers. Why Theo keeps these years of materials, many outdated and useless (or, worse, dangerous), is beyond rationalization. But he does. And he knows he is not alone. The Legislative Update materials end with 2006. Where could the 2007 edition be? Theo *knows* he ordered the materials. He always does when he can't attend in person. Where? Where? Then he spots it. Not in the traditional format, the 2007 materials are looseleaf in an oversized binder. So much for Section tradition. Leadership must have given into new ideas. Good for them for taking the risk of being innovative.

As Theo thumbs through the table of contents, smiling to himself ever so faintly at the cute titles of the presentations, he found the one that he was looking for.

"Trust Law Decanting - It's Nothing to Wine About"

Theo flips to that chapter in the bulky, yet handsome, binder. He begins looking through the materials and, at first, is offended at the narrative style. Where is the substance? He wonders why the author has strayed from the time honored tradition of just copying the new legislation and submitting that new law as the course materials. Well, the new legislation is included in the materials as an appendix. In fact, the entire chapter 2007-153 of Florida Laws is included, which is not just the *Phipps* codification but other changes to the new Florida Trust Code. But this year, there is something more. An outline. Some analysis. Even, perhaps, a touch of humor.

CHAPTER 4
THE NEW LAW

Theo starts his usual practice of parsing through new legislation. The number for this new section, 736.04117, tells Theo the section is not derived from the Uniform Trust Code. The Uniform Trust Code-based provisions only have four digits to the right of the decimal. The sections with five digits nearly always are non-uniform trust code provisions and often from old Chapter 737. A glance at the correlation tables, providing cross-references between new Chapter 736 and old Chapter 737, which are available on the Section's website, confirms 737.04117 is new and has no counterpart in old Chapter 737.

The provisions of this new section, which Theo has mentally nicknamed "Decanter," are only applicable if the trust instrument does not expressly provide to the contrary. Makes sense - like most of the Florida Trust Code, the settlor can override. Not a problem with the Margaret Phillips' trust.

The "Decanter" statute requires the trustee to have:

1. absolute power
2. under the terms of the trust (the "first trust")
3. to invade principal of the first trust
4. to make distributions to or for the benefit of one or more persons.

Theo wonders aloud, "How absolute must this invasion power be?" The end of the first subsection provides that a power to invade principal which is not limited to specific or ascertainable purposes is an absolute power. That is so even without the modifier "absolute." And, a power to invade principal for the best interests, welfare, comfort or happiness is an absolute power not limited to specific or ascertainable purposes. So, "absolute" may be a bit watered down, like a vodka drink from a second rate hotel bar.

So far, so good. The necessary power exists in Margaret's trust. Continuing with the statutory parsing, Theo realizes that with this power Senior may exercise the power:

1. by appointing all or part of the principal of the trust subject to the power
2. in favor of a trustee of another trust (the "second trust")
3. for the current benefit of one or more persons who could have received the distributions directly from the first trust
4. under the same trust instrument or a different trust instrument.

"This just keeps getting better," Theo gleefully realizes. Just the solution Theo had constructed to deal with Senior's concerns and now allowed by a new Florida statute. Theo thinks

that perhaps the statute should end right there, but alas, not the case. This "decanting" is only allowed "provided:"

1. Only beneficiaries of the first trust are beneficiaries of the second trust. Not all of the beneficiaries of the first trust *need* to be beneficiaries of the second trust. A perfect use for a Venn diagram, Theo realizes, reflecting on his seventh grade son's recent math homework.
2. The second trust may not reduce any fixed income, annuity, or unitrust interest in the assets of the first trust. This requirement was not part of the *Phipps* holding but was determined to be an acceptable limitation.
3. If the first trust qualified for the marital or charitable deduction, the second trust shall not include any provision which, if included in the first trust, would have prevented the first trust from receiving the tax benefit.

Fla. Stat. §736.04117(1).

Other than these enumerated limitations, the second trust may have different terms than the first trust. For instance, the difference in terms may be reflected in administrative provisions, in the trustee's discretion to make distributions or in the timing of any right to receive distributions of principal.

Senior will be required to exercise the power with certain formalities. The exercise must be by an instrument in writing (as if there is any other kind), signed and acknowledged by the trustee, and filed with the records of the first trust. Fla. Stat. §736.04117(2).

The new law treats the power as a non-general power of appointment to ward off the bad tax karma that comes with unexpectedly having a general power of appointment. In addition, the new law also addresses possible rule against perpetuities issues. The rule against perpetuities period begins with reference to the first trust. Theo understands that allowing the second trust to begin the running of a new perpetuities period would essentially be a repeal of the rule. So far, as Theo well knows, Florida's public policy mandates a perpetuities period, even if it might be as long as 360 years. Fla. Stat. §736.04117(3).

Notice to all of the qualified beneficiaries of the first trust is required, at least 60 days prior to the proposed exercise of the power to distribute property from the first trust to the second trust. Theo recognizes the new term, "qualified beneficiary" and makes a note to consult the definitions, in Chapter 736, around subsection 14 of 736.0103, he thinks. The notice must include how the power is to be exercised; a copy of the second trust instrument will suffice. If all qualified beneficiaries waive the notice period, then the trustee's power to invade is immediately exercisable.

The waiver must be in writing and delivered to the trustee. Implicitly, the transfer may not occur until after the notice period has expired, without the waivers from all of the qualified beneficiaries of the first trust. This notification process does not allow beneficiaries to block the decanting. Nor does the notice let the trustee off the hook. A beneficiary may later object, such as to an accounting that reflects the distribution. Theo muses that perhaps the notice will flush out any concerns from John, Jr.'s brother and sister now. And certainly even they are bright enough to calculate the price of Senior's rath should one of them not sign a waiver. Fla. Stat. §736.04117(4).

Margaret's trust includes a spendthrift provision and it became irrevocable upon her death. Theo is pleased to see that a spendthrift provision won't impale this power nor does the irrevocable nature of Margaret's trust. Fla. Stat. §736.04117(5).

Now, Theo begins thinking about some other client situations. He wonders if this new law creates some duty on his trustee-clients to pursue decanting from one trust to another. Much to his relief, he learns the new statute includes a relief provision on this point. No duty is created in any trustee. Fla. Stat. §736.04117(6).

Well, Theo is liking the codification of *Phipps* but wonders if some limitations might be inadvertently created. Does this new statutory edition take away anything that Judge Chillingworth and the Florida Supreme court gave us in 1940? The final section of the decanting statute answers this question: any common law rights and any authority under a trust to decant co-exists with this new alternative. Fla. Stat. §736.04117(7).

Now that Senior's problem is most certainly resolved, Theo takes a few minutes of his own time to consider when else this decanting provision might be useful.

1. Dividing a trust with multiple beneficiaries into separate trusts to simplify administration and minimize conflicts among the beneficiaries.
2. Qualifying for tax benefits by adding necessary administrative language, such as the ability to hold stock of an S corporation or to receive retirement benefits.
3. Adding investment powers that are missing from the first trust and which are now useful in light of changes in assets or other circumstances.

Theo knows that many of these objectives can be accomplished using other tools in the Florida Trust Code. But he also knows that another way to "skin the cat" can sure come in handy.

CHAPTER 5
THE END, OR JUST THE BEGINNING

Early the next afternoon, Theo works to finish his letter to Senior. One, two, three versions printed in hard copy and marked up at the worn, oak library table in the center of the small conference room, away from the temptation of email and the annoyances of the telephone. The letter, describing Senior's good fortune with the recent enactment of Florida Statutes §736.04117, and plotting a course of action by which Senior can achieve his goals, ends with a summary of the costs that Theo believes are reasonable for his humble servitude. A post script to the letter suggests that Senior may want to contribute to the RPPTL-PAC, a political action committee on whose board Theo serves. Theo knows well the critical importance this PAC has played in the development of real property, probate and trust law in Florida, benefitting folks just like Senior and hopes Senior might become the RPPTL-PAC's first double platinum member.

Theo knocks off early for the day once the letter to Senior is in final form. Getting the letter out the door will be left in Wanda's able hands. Looks like Theo has time for a quiet walk home while he reflects on his future. Theo has not ventured out in the past with his musings and reflections. Should he recede back into the shadows? Or, should he get out more often, sharing his tribulations and discoveries? Perhaps he will ask his friends for their thoughts.

POST-MARITAL AGREEMENT

(Releasing Homestead Rights)

THIS AGREEMENT by and between **[SPOUSE1]** (hereinafter referred to as "Husband") and **[SPOUSE2]** (hereinafter referred to as "Wife"), both of [COUNTY] County, Florida.

WHEREAS, Husband and Wife each wish to relinquish the spousal homestead right of a deceased spouse as provided under Article X, Section 4 of the Florida Constitution, and instead Husband and Wife each wish to dispose of his or her respective homestead interests as provided under the provisions of his or her Will or other dispositive estate planning document.

NOW, THEREFORE, for and in consideration of the other party entering into this agreement, and for other good and valuable consideration, Husband and Wife each agrees as follows:

1. Husband hereby acknowledges that he has made complete financial disclosure of his assets to Wife, and Wife hereby acknowledges receipt of such disclosure, and acknowledges she has had an opportunity to inquire and investigate as to such financial disclosure and is fully satisfied that a full and complete disclosure has been made by Husband.

2. Wife hereby acknowledges that she has made complete financial disclosure of her assets to Husband, and Husband hereby acknowledges receipt of such disclosure, and acknowledges he has had an opportunity to inquire and investigate as to such financial disclosure and is fully satisfied that a full and complete disclosure has been made by Wife.

3. **As authorized by Section 732.702 of the Florida Statutes, each party hereby waives, renounces and relinquishes any and all rights, claims or demand in the homestead property, which, except for this Agreement, the marriage of Husband and Wife would confer upon the survivor of them.**

4. Husband and Wife each acknowledges that the release of the homestead rights described herein does not result in the release of any homestead rights that exist during the marriage, but only upon the death of a spouse. As a result of this release, Husband acknowledges that Wife, and Wife acknowledges that Husband, may transfer his or her respective interest in the homestead at death to such persons or entities as the deceased spouse so elects. While it is anticipated that each spouse will utilize his or her interest in the homestead property to accomplish certain mutual estate planning objectives of both parties, this intention is not binding on either party hereto.

5. Husband and Wife each acknowledge that by reason of the relinquishment of the

spousal homestead rights, his or her spouse can disinherit such party with respect to the homestead property and of being informed of this possibility.

6. Husband and Wife each acknowledge that they have been advised that they should seek independent counsel prior to entering into this Agreement. **[YOUR LAW FIRM]** hereby confirms to both parties that it is representing the two of them as joint clients, with respect to this planning and to the waiver of homestead rights and both have previously consented to this mutual representation. After having been advised to seek separate legal counsel, each hereby either waives such right, or has, in fact, discussed this situation with separate counsel, and after having done so, makes a knowing and voluntary waiver and release of such homestead rights.

EXECUTED this ____ day of September, 2018.

Signed and delivered as to both in our presence:

I HAVE READ THIS DOCUMENT AND UNDERSTAND I AM WAIVING IMPORTANT RIGHTS

_____ _____

[SPOUSE1]

_____

Type or print name of Witness No. 1

I HAVE READ THIS DOCUMENT AND UNDERSTAND I AM WAIVING IMPORTANT RIGHTS

_____ _____

[SPOUSE2]

_____

Type or print name of Witness No. 2

STATE OF FLORIDA
COUNTY OF COLLIER

The foregoing instrument was acknowledged before me this _____ day of September, 2018, by **[SPOUSE1] and [SPOUSE2]**, who ☐ are personally known to me or ☐ have produced driver's licenses as identification.

NOTARY PUBLIC:

Sign _____

Print _____

State of Florida at Large
My Commission Expires:

RUBIN ON FLORIDA HOMESTEAD

A COMPREHENSIVE TREATISE ON ALL ASPECTS OF FLORIDA HOMESTEAD LAW

CHARLES (CHUCK) RUBIN

RESTRICTIONS ON TRANSFER • PROBATE ADMINISTRATION AND OTHER DEATH OF OWNER ISSUES • PROTECTION AGAINST FORCED SALE • AD VALOREM TAX EXEMPTION AND VALUATION LIMITATIONS • OTHER ISSUES AND PLANNING

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