

# Florida Trust Considerations for the New York Practitioner

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## Introduction

- 10 unique features of Florida trust law that differ from New York law
- Drafting tips and ways to anticipate and deal with associated issues

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## 10 Notable Features of Florida Trust Law

1. Who can serve as Trustee?
2. Trustee Compensation
3. In Terrorem Clauses
4. Rule Against Perpetuities
5. Modification and Decanting
6. Annual Accountings
7. Limitation Notice Procedures
8. Incorporation By Reference
9. Fee Shifting in Trust Cases
10. Homestead in Trusts

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### 1. Who Can Serve As Trustee?

- Much less stringent requirements than those for a personal representative
  - Anyone capable of taking legal title or beneficial interest
  - Trust companies, state banking and savings institutions, and national banking associations and federal savings and loan associations

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## 2. Trustee Compensation

- Fixed fee versus “reasonable compensation”
  - In New York, entitled to a fixed fee based on value of assets
  - In Florida, entitled to “compensation that is reasonable under the circumstances”
- What if the terms of the Trust specify compensation?
  - Court can allow more or less if the duties differ significantly than those initially contemplated or if the specified compensation is “unreasonably low or high”

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## 2. Trustee Compensation (Continued)

- What is “reasonable?”
  - *West Coast* established factors, including:
    - Amount of capital and income received/disbursed
    - Salary customarily paid to others in the community for similar services
    - How successful the Trustee was
    - Whether usual skill or experience was utilized
    - Nature of work done in connection with the administration
    - Level of risk/responsibility
    - Time spent administering the Trust
  - Florida courts reject lodestar method (*Rauschenberg*)

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### 3. In Terrorem Clauses

- What is an in terrorem clause?
  - Provision that purports to penalize an interested person for contesting a will or other proceedings relating to an estate
  - Generally enforceable in New York, depending on nature of claim
  - Unenforceable in Florida

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### 3. In Terrorem Clauses (Continued)

- Potentially Enforceable Alternatives
  - Execute trust prior to moving to Florida
  - Use of conditional bequests

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## 4. Rule Against Perpetuities

- New York's rule is codified in EPTL § 9-1.1
  - Lives in being plus 21 years
- Florida's rule is codified in Fla. Stat. § 689.225
  - 360 years

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## 5. Modification and Decanting

- Modification
  - Trust instrument modification
  - Statutory modification: judicial
    - Trust reformation
    - Modification of charitable trusts
    - Modification not inconsistent with settlor's purpose
    - Modification in the best interests of the beneficiaries
    - Modification to achieve settlor's tax objectives
    - Modification or termination of uneconomic trust

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## 5. Modification and Decanting (Continued)

- Ways to amend an otherwise irrevocable Trust
- Modification
  - Can be in the trust instrument itself
  - Judicial Reformation
  - Statutory modification: non-judicial
    - Settlement agreements
    - Consent agreements
    - Termination of uneconomic trusts
    - Division of trusts
    - Merger of trusts

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## 5. Modification and Decanting (Continued)

- Decanting
  - Common law authority
    - Florida: *Phipps v. Palm Beach Trust Co.*
    - New York: *In re Hoppenstein*
  - State Statute
    - Florida: Revised decanting statute enacted in 2018
    - New York: 2011 amendments share much in common with Florida's revised statute

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## 6. Annual Accountings

- NY: no annual accounting requirement
- FL: Trustee of an irrevocable trust must account at least annually.
  - Accounting to “qualified beneficiaries”
  - Cannot be drafted around
  - May be waived
  - Does not apply to revocable trusts

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## 7. Limitation Notice Procedures

- Method to shorten statute of limitations for breach of trust from 4 years to 6 months
- Applies to information “adequately disclosed” in a “trust disclosure document”
  - can be anything from a bank statement to a formal accounting
  - what is adequately disclosed is a gray area
- Requires notice of limitation language

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## 8. Incorporation By Reference

- A writing in existence when a will is executed may be incorporated by reference
  - Frequently used to incorporate the terms of a trust into a pour-over will
  - Trust must be executed first
- Beware the Pasquale issue
- Separate writing for tangible personal property

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## 9. Fee Shifting in Trust Cases

- Florida has statutory fee shifting in breach of trust and other trust cases
- There is also a statutory procedure to prevent a trustee from paying fees to defend breach of trust claims

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## 10. Homestead in Trusts

- Florida Constitution creates homestead rights
  - Ad valorem property tax benefits
  - Creditor protection
  - Restrictions on devise

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## 10. Homestead in Trusts (Continued)

- If decedent is survived by a spouse or minor child, homestead may not be devised other than fee simple to spouse
- Devise in trust for spouse is not fee simple
- If invalid devise, then life estate to spouse, remainder to lineal descendants or spouse may elect 50/50 tenant-in-common ownership

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## 10. Homestead in Trusts (Continued)

- Homestead in a revocable trust retains homestead character
- Homestead rights can be waived

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## 11. Other Differences?

- Of course, this is not an exhaustive list
- For example, taxation of trusts is very different in New York versus Florida
- New York and Florida trust law differ in many significant ways
- Careful research required
- Consultation with Florida counsel recommended

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