Florida Trust Considerations for the New York Practitioner

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Introduction

With no state income or estate tax, and with warmer temperatures during the cold winter months, Florida has always been an attractive place for many New Yorkers. So it is quite common for a New York practitioner to encounter an existing Florida trust or a client who wants to establish a trust in Florida.

This presentation will flag ten unique features of Florida trust law that differ from New York law - from annual accounting requirements to the impact of homestead laws on trusts, and beyond. The seminar will then suggest drafting tips and ways of anticipating and dealing with any associated issues.

I. Who Can Serve As Trustee?

While Florida law imposes numerous restrictions on who may act as personal representative of an estate (i.e., the executor of the estate), such as requiring the personal representative to be either a Florida resident[1] or, regardless of residence, a spouse, sibling, parent, child, or other close relative of the decedent,[2] the restrictions on who may act as trustee of a Florida trust are much less stringent.

Under Florida law, anyone capable of taking legal title or beneficial interest in property may serve as trustee.[3] Those individuals and corporations capable of taking legal title or beneficial interest by virtue of "gift, grant, bequest, descent or operation by law, may take the same subject to a trust and they will become trustees."[4]

Florida law also permits trust companies incorporated in Florida, state banking and savings institutions, and national banking associations and federal savings and loan associations to act as trustee.[5]

II. Trustee Compensation – Fixed Fee versus "Reasonable Compensation"

In New York, trustees are entitled to a fixed fee, as outlined in New York's SCPA §§ 2308 and 2309. If a trust instrument fails to include a provision

[1]Fla. Stat. § 733.302.
[2]Fla. Stat. § 733.304.
[3]Hitchcolk v. Mortgage Sec. Corp., 95 Fla. 147, 177 (1928), citing JAIRUS WARE PERRY, A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES § 39 (3d ed. 1882).
[4]*Id.*
[5]Fla. Stat. § 660.41.

directing the commissions to which the trustee is entitled, these statutory provisions act as default rules.[6]

In Florida, trustees, including co-trustees,[7] are entitled to commissions for administering trusts, and if the terms of the trust do not specify the trustee's compensation, the trustee is entitled to "compensation that is reasonable under the circumstances."[8]

As stated in Florida Statute § 736.0708, if the terms of the trust do in fact specify the trustee's compensation, the trustee is entitled to be compensated as specified, but courts may allow more or less compensation if:

a) The trustee's duties differ substantially from those contemplated at the creation of the trust; or
b) The trust's specified compensation would be "unreasonably low or high."[9]

Finally, the trustee is allowed reasonable compensation for other services rendered, if any, in addition to the reasonable compensation received as trustee.[10]

As discussed below, courts consider a variety of factors to determine the reasonableness of a trustee's compensation, rejecting use of the lodestar method.

1. "Reasonable Compensation"

What constitutes "reasonable" compensation? In *West Coast Hospital Ass'n v. Florida National Bank of Jacksonville*, 100 So. 2d 807 (Fla. 1958), the Florida Supreme Court established the following factors to consider when assessing reasonableness:[11]

- The amount of capital and income received and disbursed by the trustee
- The wages or salary customarily granted to agents or servants for performing similar work in the community
- How successful the trustee is in administering the trust
- Whether the trustee used unusual skill or experience in administering the trust
- Fidelity or disloyalty of the trustee
- The level of risk and responsibility assumed by the trustee
- Time spent administering the trust

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[6]*See* Ilene Sherwyn Cooper & Erin Moody, *Reasonable Compensation for the Individual Fiduciary*, NYSBA JOURNAL, http://www.nysba.org/CustomTemplates/Content.aspx?id=64008.
[7]Fla. Stat. § 736.0103 (23).
[8]Fla. Stat. § 736.0708.
[9]*Id.*
[10]*Id.*
[11]*See* West Coast Hospital Asso. v. Florida Nat'l Bank, 100 So. 2d 807, 811 (Fla. 1958).

- Community's customary treatment of allowances to trustees by settlors or courts and of charges incurred by trust companies and banks
- Nature of the work done during the trust's administration (level of skill or judgment required)
- Estimates provided by the trustee of the value of his/her/its services
- Payments made by the beneficiary to the trustee and intended to go toward the trustee's compensation

2. Lodestar Method

Federal courts have applied the lodestar method—under which attorney fee calculations are determined by the number of hours required to perform the services multiplied by a reasonable hourly rate—to determine trustee fees in bankruptcy cases.[12] Although Florida courts have employed the lodestar method to calculate attorneys' fees, personal representatives' fees, and guardians' fees, use of this method to determine a trustee's fee remains controversial.[13] Specifically, in *Robert Rauschenberg Foundation v. Grutman,*[14] the District Court of Appeal, Second District rejected the lodestar method in determining the trustee's fee.[15]

In *Rauschenberg*, the trustees sought $51-55 million in fees based on the *West Coast* factors. The sole residuary beneficiary, the Robert Rauschenberg Foundation, Inc., argued that the trustees were entitled to a "reasonable fee" and requested that the Court use the lodestar method to arrive at such a fee, arguing that the trustees were only entitled to $375,000 under this method. The trial court rejected the lodestar method, employed the *West Coast* factors, and arrived at $24,600,000 as a reasonable trustee fee, and the District Court of Appeal affirmed.[16]

In light of the court's reasoning in *Rauschenberg*, Florida practitioners should continue to use the *West Coast* factors as a guide in determining reasonable compensation for trustees.

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[12]In re McKinney, 374 B.R. 726 (N.D. Cal. 2007).
[13]JON SCUDERI, ADMINISTRATION OF TRUSTS IN FLORIDA § 13.2 (8th 2014).
[14]Robert Rauschenberg Found. v. Grutman, 198 So. 3d 685 (Fla. 2d DCA 2016) rev. den. 2016 WL 3185202.
[15]*Id.*, at 688.
[16]*Id.*

III. In Terrorem Clauses

1. What Is An In Terrorem Clause?

An in terrorem clause, also known as a no-contest clause or a penalty clause for contest, is a provision which purports to penalize an interested person for contesting a will or other proceedings relating to an estate. While these clauses are enforceable in New York, unless contested based on probable cause,[17] they are unenforceable in Florida.[18] Similar clauses in trusts are also unenforceable in Florida.[19]

Here is Florida's "penalty clause for contest" provision:

> (1) A provision in a trust instrument purporting to penalize any interested person for contesting the trust instrument or instituting other proceedings relating to a trust estate or trust assets is unenforceable.
>
> (2) This section applies to trusts created on or after October 1, 1993. For purposes of this subsection, a revocable trust shall be treated as created when the right of revocation terminates.[20]

2. Enforceable Alternatives

A. Sign Instrument Prior to Moving to Florida

If a settlor, prior to moving to Florida, executes a trust instrument containing a valid in terrorem clause under the governing law of the trust, a beneficiary's attempt to contest the trust in Florida may trigger application of the in terrorem clause, enforceable in the governing state. The New York Surrogate's Court's decision in *In re Shamash v. Stark*[21] well illustrates this jurisdictional interchange.

The petitioner in *In re Shamash v. Stark* previously challenged a Will and a revocable trust (containing an in terrorem clause) in a Florida court, which dismissed for lack of jurisdiction.[22] The petitioner then filed an accounting and removal proceeding in New York, the governing jurisdiction of the trust. The court granted the respondents' motion to dismiss, which claimed that the

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[17]NY EPTL § 3-3.5.
[18]Fla. Stat. § 732.517.
[19]Fla. Stat. § 736.1108.
[20]*Id.*
[21]In re Shamash v. Stark, 2009 NYLJ LEXIS 3716.
[22]*Id.*, at 2.

petitioner had no standing, as "whatever interest the petitioner may have had in the trust was revoked pursuant" to the contest in Florida.[23]

The trust's governing law, therefore, critically affects the enforceability of an in terrorem clause.

B. Conditional Bequests

While provisions in trusts which force a beneficiary to forfeit her right to contest the instrument in order to receive the devise are against Florida public policy, a clause which allows an alternative devise to a statutory minimum benefit may be upheld by a Florida court.[24]

In *Dinkins v. Dinkins*, the 5th District Court of Appeals affirmed a trial court's order holding that a provision in a widow's late husband's trust was not an invalid penalty clause and that a separate trust created for her could be used to satisfy her elective share.[25] The widow challenged the enforceability of the "Conditional Specific Bequest of Cash" provision in her late husband's living trust agreement, copied below, arguing that it was an unlawful penalty clause, as it would penalize her for taking her elective share by inducing her to forfeit the $5 million cash bequest:

> If my spouse, JEANETTE M. DINKINS, survives me, and if she or her legal representative makes a valid disclaimer of all of her interest in the QTIP Trust created under Article VII of this Trust Agreement, and also makes a valid waiver of her right . . . to elect the elective share in my estate, then the Trustee shall distribute five million dollars ($5,000,000.00) to JEANETTE M. DINKINS, outright and free of trust. . . . My objective is to provide five million dollars ($5,000,000.00) of assets to JEANETTE M. DINKINS, in addition to . . . any . . . property to which JEANETTE M. DINKINS is entitled as a result of my death, except for the Elective Share.

The trial court and the District Court of Appeal rejected the widow's argument, reasoning that the clause at issue provided her with an optional alternative to a statutory minimum benefit, unlike a no contest clause, which forces the beneficiary to choose between the right to contest an instrument and the right to take anything under it.[26]

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[23] *Id.*, at 5.
[24] Dinkins v. Dinkins, 120 So. 3d 601 (Fla. Ct. App. 2013).
[25] *Id.*, at 602.
[26] *Id.*, at 603.

IV. Rule Against Perpetuities

1. New York's Rule

New York's rule against perpetuities is codified in NY EPTL § 9-1.1, as follows:

> (a)
>
> (1) The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee or estate in possession can be conveyed or transferred.
>
> (2) Every present or future estate shall be void in its creation which shall suspend the absolute power of alienation by any limitation or condition for a longer period than lives in being at the creation of the estate and a term of not more than twenty-one years. Lives in being shall include a child conceived before the creation of the estate but born thereafter. In no case shall the lives measuring the permissible period be so designated or so numerous as to make proof of their end unreasonably difficult.
>
> (b) No estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved. In no case shall lives measuring the permissible period of vesting be so designated or so numerous as to make proof of their end unreasonably difficult.

2. Florida's Rule

Florida's rule against perpetuities is codified in Fla. Stat. § 689.225, as follows in relevant part:

> (2) Statement of the rule.
>
> (a) A nonvested property interest in real or personal property is invalid unless:
>
> 1. When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or
>
> 2. The interest either vests or terminates within 90 years after its creation.
>
> (b) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

1. When the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive; or

2. The condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

(c) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

1. When the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or

2. The power is irrevocably exercised or otherwise terminates within 90 years after its creation.

(d) In determining whether a nonvested property interest or a power of appointment is valid under subparagraph (a)1., subparagraph (b)1., or subparagraph (c)1., the possibility that a child will be born to an individual after the individual's death is disregarded.

(e) If, in measuring a period from the creation of a trust or other property arrangement, language in a governing instrument (i) seeks to disallow the vesting or termination of any interest or trust beyond, (ii) seeks to postpone the vesting or termination of any interest or trust until, or (iii) seeks to operate in effect in any similar fashion upon, the later of:

1. The expiration of a period of time not exceeding 21 years after the death of a specified life or the survivor of specified lives, or upon the death of a specified life or the death of the survivor of specified lives in being at the creation of the trust or other property arrangement, or

2. The expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement, that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives.

(f) As to any trust created after December 31, 2000, this section shall apply to a nonvested property interest or power of appointment contained in a trust by substituting 360 years in place of "90 years" in each place such term appears in this section unless

the terms of the trust require that all beneficial interests in the trust vest or terminate within a lesser period.

V. Modification and Decanting

1. Modification

A. Trust Instrument Modification

One way to modify a trust non-judicially is to do so in accordance with the trust instrument. This approach can be facilitated during the drafting phase by inserting provisions which enable future modification and can expressly permit the trustee or others to modify the trust in certain circumstances.

If, however, the trust instrument is already in existence, the instrument may have provisions already built in which may still allow modification. Such provisions include the following, one or more of which may accomplish the intended change:

- Power of substitution
- Power to terminate the trust
- Trustee succession, removal, appointment
- Trustee power to delay distribution
- Change trust administration situs
- Change governing law
- Turn grantor trust powers on or off
- Trust division
- Power of amendment
- Disclaimer
- Powers of appointment
- Merge similar trusts

B. Statutory Modification – Judicial and Non-Judicial

i. Judicial Modification

Certain methods of statutory modification require judicial consent, as examined below:

- Trust Reformation[27]
  - An amendment of an unambiguous trust document to correct a mistake in order to reflect the grantor's actual intent.

[27]Fla. Stat. § 736.0415.

    - Two types: (1) reformation to correct a scrivener's error; (2) reformation to correct a mistake of law or fact.
    - Requires institution of a judicial action or proceeding with the court presiding over the trust.
    - Trusts created with the "old" Rule Against Perpetuities period (lives in being plus 21 years or 90 years) cannot be modified without court intervention, except by decanting.[28]
- Modification of Charitable Trusts[29]
    - Allows a court to modify or terminate a trust if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful.
- Modification Not Inconsistent with Settlor's Purpose[30]
    - A trust may be modified if the trust purpose has been fulfilled, becomes illegal, impossible, wasteful, or where, due to circumstances not anticipated by the settlor, compliance would defeat the material purpose of the trust.
    - In addition to showing an unanticipated change of circumstances, proponents of the modification must also establish that compliance with the existing terms of the trust would defeat or substantially impair the accomplishment of a material purpose of the trust as a result of the change in circumstances.
- Modification in Best Interests of Beneficiaries[31]
    - A court may modify an irrevocable trust if compliance with the existing terms of the trust is not in the best interests of the beneficiaries.
    - The phrase "best interests," due to its broadness, allows modification of almost any trust under this provision, provided that the trust itself meets the requirement of the statute.
    - Not available for (1) irrevocable trusts created prior to January 1, 2001 or (2) irrevocable trusts created after December 31, 2000 that either have the "old" Rule Against Perpetuities period (lives in being plus 21 years or 90 years), or expressly prohibit judicial modification.
- Modification to Achieve Settlor's Tax Objectives[32]

[28]Fla. Stat. § 736.0412.
[29]Fla. Stat. § 736.0413.
[30]Fla. Stat. § 736.04113.
[31]Fla. Stat. § 736.04115.
[32]Fla. Stat. § 736.0416.

- A court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intent in order to achieve the settlor's tax objectives. The modification may have retroactive effect.

- Modification or Termination of Uneconomic Trusts[33]
  - A court may modify or terminate a trust or remove a trustee and appoint a new trustee if the court determines that the value of the trust property is insufficient to justify the cost of administration.
  - If a trust is terminated under this section, the trustee shall distribute the trust property "in a manner consistent with the purposes of the trust."
  - Terminating the trust does not necessarily mean all assets are being paid to the current beneficiaries. Instead, the assets may be paid out among the current and remainder beneficiaries based on the actuarial value of their interests or some other agreement.

ii. Non-Judicial Modification

- Settlement Agreements[34]
  - "Interested persons" (those whose interest would be affected by a settlement agreement) may enter into a binding non-judicial settlement agreement with respect to any matter involving a trust.
  - Can be used to modify or terminate a trust as long as a court could approve such modification or termination pursuant to one of the foregoing judicial modification options under the Florida Trust Code.
- Consent Agreements[35]
  - A trust may be modified at any time after the settlor's death upon the unanimous agreement of the trustee and all qualified beneficiaries.
  - Not available for irrevocable trusts created prior to January 1, 2001 or irrevocable trusts created after December 31, 2000 that have the "old" Rule Against Perpetuities period (lives in being plus 21 years or 90 years), unless the trust terms expressly authorize non-judicial modification.

[33]Fla. Stat. § 736.0414.
[34]Fla. Stat. § 736.0111.
[35]Fla. Stat. § 736.0412.

- Not available for irrevocable trusts for which a charitable deduction is allowed until the termination of all charitable interests.

- Termination of Uneconomic Trusts[36]
  - After notice to qualified beneficiaries, a trustee may terminate a trust if the value of the trust property is less than $50,000 and the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.
  - If a trust is terminated under this section, the trustee must distribute the trust property in a manner consistent with the purposes of the trust.
- Division of Trusts[37]
  - A trust can be divided without a judicial proceeding.
  - A trust may be divided for many reasons, such as tax planning, simplified administration, litigation avoidance or resolution, economics or state income tax savings.
- Merger of Trusts[38]
  - Typically done to reduce administrative costs such as trustee's fees or income tax filings, or for investment reasons. Can also be a cost effective alternative to judicial proceedings aimed at correcting the trust defect.
  - Merging one trust into another trust is permissible if the result does not impair the rights of any beneficiary, even when the terms of the trust are not identical.

C. Comparison to New York

New York law allows trust revocation and amendment under certain limited circumstances, including the following:

- Upon the written consent of all beneficially interested persons, the creator of a trust may revoke or amend the whole or any part of the trust instrument.[39]
- Termination of an uneconomic trust in New York must be made through an application to the court.[40]
- For charitable trusts, upon petition, courts will enforce the *cy pres* doctrine.[41]

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[36]Fla. Stat. § 736.0414(1).
[37]Fla. Stat. § 736.0417.
[38]Fla. Stat. § 736.0417.
[39]NY EPTL § 7-1.9.
[40]NY EPTL § 7-1.19.

- Trustees may amend a trust to allow it to qualify for tax benefits the settlor intended to achieve.[42]

Although New York courts traditionally strictly adhered to the terms of the trust and thereby to the settlor's wishes, overtime, however, in order to address changing circumstances of trusts, New York courts have shifted toward a more liberal approach, increasingly in favor of trust modification and reformation.[43] For example, New York courts have allowed reformation of trusts to correct drafting errors[44] and to create supplemental needs trusts under certain circumstances.[45]

2. Decanting

Trust decanting—the phrase used to describe transfers by a trustee from one trust into a new trust—can serve various purposes, such as to correct a scrivener's error, to clarify ambiguities, to provide the trustee with more discretion, to lengthen the duration of the trust, or to change the trust situs. In Florida, courts recognize common law and state statute, in addition to the trust instrument itself, as authority for trust decanting.

A. Common Law Authority

i. Florida

In *Phipps v. Palm Beach Trust Co.*,[46] the first U.S. case to recognize the trustee's power to decant,[47] the trust at issue allowed a trustee, in the trustee's sole discretion, to transfer any part of the trust assets to the grantor's children and their descendants.

The individual trustee, the grantor's husband, instructed the corporate trustee to transfer the assets into a new trust with updated terms.[48] The corporate trustee then petitioned the court to determine whether the individual trustee had

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[41]NY EPTL § 8-1.1(c).
[42]NY EPTL § 11-1.11.
[43]*See* C. Raymond Radigan and Jennifer F. Hillman, *The Evolution of Trust Reformation and Modification Under New York Law*, NEW YORK LAW JOURNAL, July 9, 2012, http://rmfpc.com/wp-content/uploads/2012/07/The-Evolution-of-Trust-Reformation-and-Modification-Under-New-York-Law_CRR_JH_7.2012.pdf.
[44]In re Katz, 2007-364/D/E, N.Y.L.J. 1202719006763, at 1 (Sur. Ct. Richmond Cty. Feb. 2, 2015).
[45]In re Rappaport, 21 Misc.3d 919 (Sup. Ct. Nassau Co. 2008).
[46]Phipps v. Palm Beach Trust Co., 142 Fla. 782 (1940).
[47]ACTEC Comments on Transfers by a Trustee from an Irrevocable Trust to Another Irrevocable Trust (Sometimes called "Decanting") (Notice 2011-101) Released December 21, 2011, https://www.actec.org/resources/comments-on-transfers-by-a-trustee/.
[48]Phipps v. Palm Beach Trust Co., 142 Fla. 782, 784 (1940).

authority to provide such instruction.[49] The Supreme Court of Florida held that a trustee could invade trust property by transferring it to another trust so long as one or more of the beneficiaries of the original trust are also beneficiaries of the new trust.[50]

ii. New York

In *In re Hoppenstein*, which has been subsequently affirmed,[51] a common law right to decant in New York was recognized.[52] This is consistent with paragraph (k) of New York's decanting statute, which provides that the statute "shall not be construed to abridge the right of any trustee to appoint property in further trust that arises under the terms of the governing instrument of a trust or under any other provision of law or under common law, or as directed by any court having jurisdiction over the trust."[53]

As was the case in *In re Hoppenstein*, use of a common law right to decant or a decanting based on the terms of the trust instrument can be a method used to side-step requirements of New York's decanting statute, such as notice requirements to beneficiaries. It is unclear what limitations or restrictions exist with respect to a common law decanting or decanting based on the terms of a trust instrument, as there is limited case law on the topic.[54]

B. State Statute

i. Florida

Codifying *Phipps*, Florida enacted its first decanting statute in 2007.[55] Florida then passed a revised statute in 2018 designed to better conform to other states' decanting statutes and to clarify ambiguities in the 2007 statute. The 2018 statute includes the following major updates:[56]

- Expands trustee's ability to decant trust principal under the terms of the trust
- Provides support for disabled beneficiaries

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[49]*Id.*
[50]*Id.*, at 786.
[51]Matter of Hoppenstein, 2017 N.Y. Misc. LEXIS 3851.
[52]In re Estate of Hoppenstein, 2017 NYLJ LEXIS 2902, at 9.
[53]NY EPTL § 10-6.6 (k).
[54]*See* Brad Dillon & Michael S. Schwartz, *Who Needs a Decanting Statute?*, NEW YORK STATE BAR ASSOCIATION TRUSTS AND ESTATES LAW SECTION NEWSLETTER, Fall 2017, at 11.
[55]Fla. Stat. § 736.04117.
[56]House of Representatives, Final Bill Analysis, HB 413, https://www.flsenate.gov/Session/Bill/2018/413/Analyses/h0413z.CJC.PDF.

- Imposes greater notice requirements when a trustee exercises the ability to decant trust principal

ii. New York

New York's decanting statute, EPTL Section 10-6.6, shares much in common with Florida's decanting statute. The 2011 amendments to the statute, much like the 2018 amendments to Florida's decanting statute discussed above, aimed to enhance decanting flexibility. Although there are subtle differences between the two, both statutes provide a powerful tool for practitioners.

VI. Annual Accountings

1. New York

Trustees of a New York trust have a duty to account when the trust instrument requires it, when there is a change or removal of trustee, and when a court issues an order compelling an accounting, but there is no requirement for a periodic accounting unless provided for in the trust instrument.[57] A trust instrument cannot alleviate a trustee's duty to account.[58] Although not required, in practice, many trustees account after a number of years or when there has been a substantive matter in the trust administration which affects beneficiaries' rights.

A beneficiary may seek a court order compelling an accounting, and a court may at any time order an accounting when in the best interests of the trust.[59] In addition to a beneficiary seeking such relief, New York law provides that right to others, including a creditor (presumably of an estate), a successor fiduciary, a co-fiduciary, and even the surety on a fiduciary bond.[60] A person whose interest in a trust is contingent nonetheless may seek to compel an accounting.[61] A trustee may also seek judicial settlement of a voluntary accounting.[62]

2. Florida

Trustees of a Florida trust have a duty to keep the qualified beneficiaries of a trust reasonably informed of the trust and its administration.63 More specifically, the Florida Trust Code imposes a duty upon the trustees of an

[57]SCPA 2205 and Comments thereto.
[58]EPTL 11-1.7; Matter of Malasky, 290 A.D.2d 631, 736 N.Y.S.2d 152 (3d Dep't 2002).
[59]SCPA 2205
[60]Id.
[61]Matter of Castellucci, N.Y.L.J. July 18, 2014, at 37, col 2.
[62]SCPA 2208.
[63]Fla. Stat. § 736.0813.

irrevocable trust to provide an accounting of the trust to all qualified beneficiaries "at least annually" and on termination of the trust or change of the trustee.64 The annual accounting requirement for irrevocable trusts often comes as a surprise to trustees who are represented by out-of-state counsel. The requirement applies not just to trusts which were irrevocable from inception, but also to revocable trusts which have become irrevocable by their terms (usually upon the death of the settlor), as well as testamentary trusts such as marital and credit shelter trusts. This duty to account cannot be avoided by drafting, as it is a mandatory provision for which the Florida statute governs notwithstanding any contrary language in the trust instrument.[65]

The contents of a required accounting are also specified in the Florida Trust Code, and include:

- A statement identifying the trust, the trustee, and the time period covered by the accounting;
- Information showing all cash and property transactions and all significant transactions affecting administration, including compensation paid to trustees and trustees' agents;
- Gains and losses during the accounting period;
- To the extent feasible, identification and value of trust assets on hand, showing both carrying value (acquisition value) and estimated current value;
- Identification of noncontingent liabilities with estimated current amounts;
- To the extent feasible, identification of significant transactions that do not affect the amount for which the trustee is accountable, including name changes in investments, adjustments to carrying value, change of custodial institutions, and stock splits;
- A statement reflecting allocation of receipts, disbursements, accruals, or allowances between income and principal when the allocation affects any beneficiary of the trust;
- In a final accounting, a plan of distribution.[66]

A failure to provide an annual accounting for an irrevocable trust is itself a breach of duty under Florida law.[67] Thus, when trustees of an irrevocable trust have failed to render an annual accounting as required by the Florida Trust Code, a complaint by a beneficiary seeking to compel an accounting will frequently include a claim for damages and attorneys' fees, denial or disgorgement of

[64]Fla. Stat. § 736.0813(1)(d).
[65]Fla. Stat. § 736.0105(2)(s).
[66]Fla. Stat. § 736.08135.
[67]Fla. Stat. § 736.1001(1): "A violation by a trustee of a duty the trustee owes a beneficiary is a breach of trust."

trustees' compensation, and sometimes even removal of trustees, under the available remedies for breach of fiduciary duty.[68]

A qualified beneficiary is defined in the Florida Trust Code as a living beneficiary who, on the date of the beneficiary's qualification, is a distributee or permissible distributee, would be a distributee or a permissible distributee if the current distributee's interest terminated on that date, or would be a distributee or permissible distributee if the trust terminated on that date.[69] In other words, both the current beneficiary and the next-in-line beneficiaries are considered qualified beneficiaries and are entitled to an annual accounting. A charitable organization expressly designated to receive distributions has the rights of a qualified beneficiary if the above requirements are met.[70]

A qualified beneficiary of an irrevocable trust may waive the accounting requirement and may withdraw a previous waiver.[71] Both the waiver and the withdrawal must be in writing.[72]

Finally, Florida's annual accounting requirement does not apply to revocable trusts, which are part of the typical pour-over-will and revocable trust Florida estate plan. A trustee of a revocable trust only owes duties to the settlor as long as the trust is revocable.[73]

VII. Limitation Notice Procedures

1. General Statute of Limitations for Breach of Trust

Although not expressly stated in Florida statutes, it is likely that the general statute of limitations in Florida for acts constituting breach of trust by a trustee is four years, based on the catchall "all other matters" in the statute.[74] The Florida Trust Code sets forth the outside limitations periods for breach of trust matters as the latter of:

- Ten years after the date the trust terminates, the trustee resigns, or the fiduciary relationship ends if the beneficiary had actual knowledge of the trust and its beneficiary status;
- Twenty years after the date of the act or omission of the trustee that is complained of if the beneficiary had actual knowledge of the existence of the trust and its beneficiary status;

[68]Fla. Stat. § 736.1001 (remedies for breach), § 736.1004 (attorneys' fees in breach cases).
[69]Fla. Stat. § 736.0103(16).
[70]Fla. Stat. § 736.0110.
[71]Fla. Stat. § 736.0813(2).
[72]*Id.*
[73]Fla. Stat. § 736.0813(4) and 736.0603(1).
[74]Fla. Stat. 95.11(3)(p).

- Forty years after the date the trust terminates, the trustee resigns, or the fiduciary relationship ends.[75]

When a beneficiary shows by clear and convincing evidence that the trustee actively concealed facts supporting the breach claim, any existing statute of repose shall be extended by thirty years.[76]

2. Florida's "Limitation Notice"

The Florida Trust Code provides a means to shorten the statute of limitations for breach of trust from four years to six months. Florida Statute Section 1008(2) provides:

> Unless sooner barred by adjudication, consent, or limitations, a beneficiary is barred from bringing an action against a trustee for breach of trust with respect to a matter that was adequately disclosed in a trust disclosure document unless a proceeding to assert the claim is commenced within 6 months after receipt from the trustee of the trust disclosure document or a limitation notice that applies to that disclosure document, whichever is received later.

A limitation notice is defined as "a written statement of the trustee that an action by a beneficiary against the trustee for breach of trust based on any matter adequately disclosed in a trust disclosure document may be barred unless the action is commenced within 6 months after receipt of the trust disclosure document or receipt of a limitation notice that applies to that trust disclosure document, whichever is later."[77]

3. Trust Disclosure Document

A trust disclosure document is defined as "a trust accounting or any other written report of the trustee. A trust disclosure document adequately discloses a matter if the document provides sufficient information so that a beneficiary knows of a claim or reasonably should have inquired into the existence of a claim with respect to a matter."[78]

4. When Limitation Notice Applies to Trust Disclosure Document

A limitation notice applies to a trust disclosure document when:

- it is contained in the trust disclosure document;

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[75]Fla. Stat. § 736.1008.
[76]*Id.*
[77]Fla. Stat. § 736.1008(4)(c).
[78]Fla. Stat. § 736.1008(5).

- it is part of a different trust disclosure document received within one year;
- it accompanies the trust disclosure document or another trust disclosure document received within one year;
- it is delivered separately within 10 days after delivery of the trust disclosure document or of another trust disclosure document received within one year;
- it is received more than 10 days after delivery of the trust disclosure document but only if the limitation notice references that trust disclosure document.[79]

In addition, a limitation notice is not considered to have been "delivered separately" if the notice is accompanied by another written communication, other than a written communication that refers only to the limitation notice.[80]

5. Demystifying the Limitation Notice Concept

If you're confused by the above, you are not alone. Florida lawyers struggle with the applicable limitation notice provisions. To make it simple, the best practice is that whenever you serve beneficiaries with any accounting or information relating to trust administration matters, even if it is just a letter advising of a change in investments, in custodial institutions or investment advisers, a distribution, or payment of compensation to a trustee, attorneys or accountants, you should include at the same time a separate document called "Limitation Notice" which includes the suggested statutory notice language set forth above. A sample Limitation Notice is included at the end of these materials. Again, best practices would have the Limitation Notice sent by means which can be proven to have been delivered to the beneficiary, although that is not required. If you provide a limitation notice along with a trust disclosure document, the beneficiary will have six months to bring a breach of fiduciary duty claim based upon any matters which are "adequately disclosed" in the trust disclosure document.

Some financial institutions are now including limitation notice language in their account statements. This is particularly helpful when beneficiaries are receiving monthly, quarterly or annual account statements. In this case, the beneficiary will again be limited to six months to bring any action based on the information disclosed in the account statement.

The question of what is adequately disclosed may present a wrinkle. In one recent case, a beneficiary successfully argued in court that the trustee's accounting did not adequately disclose matters concerning his expenditures when

[79] *Id*.
[80] *Id*.

the accounting listed payments to stores like Home Depot but did not specify what the payments were for. When it turned out the purchases were for improvements which the trustee undertook on a home which was being distributed to the trustee individually, the court refused to impose the six month limitation on the beneficiary's claim of breach.[81] Thus, if you want to be sure to have the six month limitation apply, detailed disclosure is recommended.

VIII. Incorporation By Reference

Florida Statute § 732.512, a provision in the Florida Probate Code, expressly provides for incorporation by reference of a trust into a testator's will:

> (1) A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests the intent and describes the writing sufficiently to permit its identification.
>
> (2) A will may dispense of property be reference to acts and events which have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator's death. The execution or revocation of a will or trust by another person is such an event.[82]

Incorporation by reference is typically used in Florida estate plans, where a will references and incorporates by reference the provisions of a revocable trust executed immediately prior to execution of the will. However, where the will incorporates the terms of the trust into a will only if the trust is no longer in existence at the time of the testator's death, there may not be an effective incorporation by reference because the writing.[83] A trust referenced in a will which does not exist cannot be incorporated by reference.[84]

Because a trust must be in existence when the will is executed in order to be incorporated by reference, when a will and trust are to be executed at the same execution ceremony, the trust must be executed first. Of course, if the trust is a previously existing trust at the time the will is executed, there is no issue as to the "writing in existence" requirement.[85]

Application of the incorporation by reference doctrine has its issues. In *Pasquale v. Loving*,[86] the decedent, Mary, executed her will in 2005, and died in 2009 at the age of 98. The Pasquale brothers filed a complaint challenging "all

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[81]In re Pearl Donohue Cross Trust, 24 Fla. L. Weekly Supp. 808a (Fla. 15th Jud. Cir. Jan. 4, 2016) (copy appended hereto).

[82]Fla. Stat. § 732.512

[83]Bravo v. Sauter, 727 So. 2d 1103 (Fla. 4th DCA 1999)(second wife's election of her statutory elective share did not extinguish her interest in the trust income).

[84]Swan v. Florida Nat'l Bank, 445 So. 2d 622 (Fla. 3d DCA 1984).

[85]

[86]82 So. 3d 1205 (Fla. 4th DCA 2012).

trust documents and amendments thereto and the probate administration." The Pasquales' complaint was dismissed by the trial court because, although their trust contest was valid, the trial court held that the complaint was not a will contest, and the Pasquales were required to file a timely challenge to validity of the will because the will incorporated the trust by reference. The Fourth District Court of Appeal reversed, finding that the complaint did sufficiently allege the elements of a will contest, but importantly reaffirmed the notion that "the Pasquales could not challenge the validity of the trust without also contesting the will. The trust was incorporated by reference into the 2005 will. … Because the trust was incorporated into the will, the Pasquales could not properly challenge the validity of the trust while adequate remedies were available in probate."[87]

The *Pasquale* case caused a stir in the Florida trusts and estates community. Because the time to contest a will is relatively short (three months from service of a notice of administration)[88], *Pasquale* creates a trap for the unwary if the will incorporates a trust by reference which trust is the subject of a challenge. This is only true, however, if there are probate assets; where the trust has been fully funded and there are no assets subject to probate, a will contest would not be necessary. One should be mindful of relying on an assumption that there are no probate assets, because often probate assets are discovered well after a probate proceeding has been commenced.

To address the potential trap identified in the *Pasquale* case, the Real Property, Probate and Trust Law Section of the Florida Bar is working on a draft statutory fix to require a warning to be included in the Notice of Administration warning that one may be required to file a will contest in order to pursue a challenge to a trust.

Related to but distinct from incorporation by reference is the Separate Writing for Tangible Personal Property (sometimes called a TPP Memo). Florida law recognizes and will enforce a written statement or list referred to in the decedent's will seeking to dispose of items of tangible property.[89] The writing must be signed by the testator and must describe the items and the devises with reasonable certainty.[90] The writing may be prepared before or after execution of the will; it may be revised after execution; and the latest-in-time TPP Memo will prevail of earlier conflicting versions.[91] Notably, the statute specifically provides for reference in a decedent's will as opposed to a trust. Although theoretically a settlor should be able to incorporate the terms of a Separate Writing in existence when the trust is executed, to be safe, any attempt to dispose of tangible personal

[87] *Id.* at 1207.
[88] Fla. Stat. § 733.212.
[89] Fla. Stat. § 732.515.
[90] *Id.*
[91] Fla. Stat. § 732.515.

property should be addressed either specifically in the trust (or the will), or by reference to a Separate Writing in the will.

IX. Fee Shifting in Trust Cases

The Florida Trust Code provides that a prevailing party in a breach of fiduciary duty, modification, or construction case may be entitled to assessment of legal fees and costs.[92] Specifically, Florida Statute § 736.1004 provides:

> (1)(a) In all actions for breach of fiduciary duty or challenging the exercise of, or failure to exercise a trustee's powers; and
>
> (b) In proceedings arising under ss. 736.0410-736.0417 [modification, construction, decanting],
>
> The court shall award taxable costs as in chancery actions, including attorney fees and guardian ad litem fees.
>
> (2) When awarding taxable costs under this section, including attorney fees and guardian ad litem fees, the court, in its discretion, may direct payment from a party's interest, if any, in the trust or enter a judgment that may be satisfied from other property of the party, or both.

Attorney fee claims under Fla. Stat. § 736.1004 are distinct from fee claims for attorneys who rendered services to the trust[93] and trustee's attorney fees.[94]

Florida statutes provide a specific procedure for dealing with the payment of a trustee's attorneys' fees during pendency of a breach of duty action.[95] The special procedure starts with the premise: "As between a trustee and the beneficiaries, a trustee shall administer the trust solely in the interests of the beneficiaries."[96] The argument, then, when trustees wished to use trust assets to pay their attorneys to defend against breach of trust claims, was that such use of trust funds for defense constituted a breach of the duty itself. Cases in Florida[97] created a problem for trustees who sought to defend themselves using trust assets. Thus, a statutory procedure was enacted to give clarity to both trustees and beneficiaries on this murky defense-fee issue.

Under Florida Statute §736.0802(10)(b), a trustee may pay attorney fees and costs in defense of a breach claim made in a filed pleading without approval of any person and without court authorization, but the trustee must serve a written notice of intent upon each qualified beneficiary of the trust whose share of the

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[92]Fla. Stat. § 736.1004.
[93]Fla. Stat. § 736.1005.
[94]Fla. Stat. § 736.1007.
[95]Fla. Stat. § 736.0802(10).
[96]Fla. Stat. § 736.0802(1).
[97]J.P. Morgan Trust Co. v. Siegel, 965 So. 2d 1193 (Fla. 4th DCA 2007); Brigham v. Brigham, 934 So. 2d 544 (Fla. 3d DCA 2006); Shriner v. Dyer, 462 So. 2d 1122 (Fla. 4th DCA 1984).

trust may be affected by the payment of fees. The notice of intent must be served by commercial delivery service, by service of process, or if the court already has jurisdiction over the beneficiary, in the manner provided for service of pleadings (at this time, mostly electronic service through an e-filing portal or email service).

Once a beneficiary is served with the notice of intent, the onus is on the beneficiary to file a motion to prohibit payment of the trustee's defense fees and costs, and obtain a court order. The court shall deny the motion unless it finds a reasonable basis to conclude that there has been a breach of trust. The court may also deny the motion for good cause. If a trustee has paid defense fees and costs either prior to service of a notice of intent or after, a qualified beneficiary may move to compel repayment to the trust, with statutory interest. If a trustee fails to comply with an order prohibiting payment of attorney fees and costs, the court may impose sanctions including the striking of pleadings filed by the trustee.

In practice, the procedure based on Florida Statute § 736.0802(10) after a motion by a beneficiary to prohibit fees has been filed has been likened to a preliminary injunction hearing. The beneficiary will attempt to establish that the trustee has breached a duty, and the trustee will defend, using affidavits, discovery responses and deposition transcripts, and other evidence including witness testimony and documents.

Because a mini-trial is required for a beneficiary to prohibit payment of a trustee's attorney fees and costs defending a breach claim, a beneficiary may choose to forego pursuing such relief for fear of damaging his or her case if the judge finds in the trustee's favor. Conversely, a trustee seeking to pay his or her attorney fees must consider whether there is a possibility a court will pre-judge the case on scant evidence in order to preserve the status quo. These considerations are serious, and must be assessed on a case-specific basis.

X. Homestead in Trusts

1. Overview

Florida homestead is a very complex subject worthy of an entire treatise. It is a creation of constitutional law in Article X, § 4(c), of the Florida Constitution as well as Florida statutes. Homestead essentially encompasses three distinct principles: (1) ad valorem property tax exemption and limitation on increase; (2) protection from creditors; and (3) restrictions on devise.[98] Homestead laws apply to up to 160 contiguous acres of land if outside a municipality, and one-half acre

[98]For a discussion of homestead, *see "Florida Homestead,"* NYSBA Trusts and Estates Law Section Newsletter (Spring 2010).

of contiguous land if within a municipality.[99]Homestead protections inure to a surviving spouse or heirs of the owner.[100]

Most out-of-state practitioners understand homestead to apply to creditor protection but are unaware of the restrictions on devise. In Florida, the owner of homestead property is limited in his or her ability to devise the homestead if survived by a spouse or a minor child:

> The homestead shall not be subject to devise if the owner is survived by a spouse or minor child, *except* the homestead may be devised to the owner's spouse if there be no minor child. (Emphasis added)[101]

If an attempted devise of homestead is invalid (because the decedent was survived by a spouse and a minor child and the attempted devise is not a fee simple devise to spouse), the Florida law provides that the homestead passes by operation of law, with a life estate to spouse and remainder to the decedent's lineal descendants.[102] A spouse instead may elect a one-half tenant-in-common interest in the homestead property, which permits the spouse to force a partition sale.[103]

As a result of the homestead restrictions on devise, it is essential for New York lawyers who draft estate planning documents for Florida clients to understand how real property held in trust is viewed for homestead purposes.

2. What is Not Homestead

Homestead laws apply only to property which is the primary residence of the homestead owner.[104] Tenants-by-the-entireties property or property owned jointly with right of survivorship is not considered "protected homestead."[105] In addition, real property owned in an irrevocable trust is not considered homestead subject to the restrictions on devise, because it is not owned by "a natural person" as specified in the Florida Constitution.[106]

The meaning of homestead has different meanings depending on the context in which it is used: (1) exemption from ad valorem taxation, (2) protection

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[99]Fla. Const., Art. X § 10.
[100]*Id.*
[101]*Id.*
[102]Fla. Stat. § 732.401(1).
[103]Fla. Stat. § 732.401(2).
[104]*See, e.g.*, Endsley v. Broward Cnty., 189 So. 3d 938 (Fla. 4th DCA 2016); Cutler v. Cutler, 994 So. 2d 341 (Fla. 3d DCA 2008).
[105]Fla. Stat. § 731.201(3)
[106]*But see* Cutler, 994 So. 2d at 343-344.

from forced sale by creditors, and (3) limitations on alienation and devise.[107] Because homestead involves several distinctly different concepts, what may constitute homestead for one purpose may not constitute homestead for another. It is important to identify what specific homestead concept is at issue when analyzing whether the subject property is, or is not, protected homestead.

3. Alienation of Homestead and Transfers to Irrevocable Trusts

Notwithstanding the homestead devise restrictions, property owners may give away or dispose of homestead property during their lifetimes, including by transfer to a trust. Section 732.4017, Florida Statutes, provides:

> (1) If the owner of homestead property transfers an interest in that property, including a transfer in trust, with or without consideration, to one or more persons during the owner's lifetime, the transfer is not a devise for purposes of s.731.201(10) or s.732.4015, and the interest transferred does not descend as provided in s.732.401 if the transferor fails to retain a power, held in any capacity, acting alone or in conjunction with any other person, to revoke or revest that interest in the transferor.
>
> (2) As used in this section, the term "transfer in trust" refers to a trust under which the transferor of the homestead property, alone or in conjunction with another person, does not possess a right of revocation as that term is defined in s.733.707(3)(e). A power possessed by the transferor which is exercisable during the transferor's lifetime to alter the beneficial use and enjoyment of the interest within a class of beneficiaries identified only in the trust instrument is not a right of revocation if the power may not be exercised in favor of the transferor, the transferor's creditors, the transferor's estate, or the creditors of the transferor's estate or exercised to discharge the transferor's legal obligations. This subsection does not create an inference that a power not described in this subsection is a power to revoke or revest an interest in the transferor.
>
> (3) The transfer of an interest in homestead property described in subsection (1) may not be treated as a devise of that interest even if:
>
> (a) The transferor retains a separate legal or equitable interest in the homestead property, directly or indirectly through a trust or other

[107]Stone v. Stone, 157 So. 3d 295 (Fla. 4th DCA 2014), *reh'g denied*, 2015 Fla. App. LEXIS 3971 (Fla. 4th DCA Mar. 16, 2015); Engelke v. Estate of Engelke, 921 So.2d 693, 695–96 (Fla. 4th DCA 2006) (*citing* Snyder v. Davis, 699 So.2d 999 (Fla.1997)).

> arrangement such as a term of years, life estate, reversion, possibility of reverter, or fractional fee interest;
> (b) The interest transferred does not become a possessory interest until a date certain or upon a specified event, the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including, without limitation, the death of the transferor; or
> (c) The interest transferred is subject to divestment, expiration, or lapse upon a date certain or upon a specified event, the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including, without limitation, survival of the transferor.
> (4) It is the intent of the Legislature that this section clarify existing law.[108]

This provision of Florida law clarifies that an inter vivos transfer of homestead property to other persons, including through a trust, is not a devise for homestead purposes, provided the transferor does not retain the power to revoke the transfer or revest title to the property in himself.

4. Homestead in Revocable Trusts

Section 732.4015, Fla. Stat., provides:

> (1) … the homestead shall not be subject to devise if the owner is survived by a spouse or a minor child or minor children, except that the homestead may be devised to the owner's spouse if there is no minor child or minor children.
> (2) For the purposes of subsection (1), the term:
> (a) "Owner" includes the grantor of a trust described in s. 733.707(3) that is evidenced by a written instrument which is in existence at the time of the grantor's death as if the interest held in trust was owned by the grantor.
> (b) "Devise" includes a disposition by trust of that portion of the trust estate which, if titled in the name of the grantor of the trust, would be the grantor's homestead.

Florida Statute § 733.707(3) refers to "[a]ny portion of a trust with respect to which a decedent who is the grantor has at the decedent's death a right of revocation, as defined in paragraph (e), either alone or in conjunction with any

[108]Fla. Stat. §732.4017.

other person…." Subsection (e) provides that a "right of revocation" is a power retained by the decedent, held in any capacity, to (1) amend or revoke the trust and revert the principal of the trust in the decedent, or (2) withdraw or appoint the principal of the trust to or for the decedent's benefit.

Some conflicting case law in Florida raised doubts as to whether homestead property held in a revocable trust was "protected homestead."[109] This question appears to have been settled.[110] Homestead which is titled in the name of a revocable trust is subject to the devise restrictions set forth in the Florida Constitution and Florida statutes. What this means is that if a married testator who owns homestead property, either in his own name or in his revocable trust, wishes to devise that homestead property in a way other than a fee simple outright devise to spouse, that devise will be deemed invalid, the spouse will get a life estate (or elect a fifty percent tenant-in-common interest), and the testator's lineal descendants will get the rest. This is true even if: (1) the attempted devise is to a marital trust or credit shelter trust for spouse's benefit, (2) the decedent expressly wished to disinherit one or more of his lineal descendants, and (3) the default disposition of homestead is expressly contrary to the testator's intent.

5. Waiver

The news is not all bad. Homestead can be waived by the spouse in a prenuptial agreement, a post nuptial agreement, or in a separate homestead waiver.[111] A recent Florida case, *Stone v. Stone*,[112] held that homestead rights were waived by a spouse when she executed a warranty deed transferring property into a QPRT (the grantor did not survive the QPRT term, the property reverted back into the grantor's estate, and the question was whether the grantor's attempt to devise the property to his daughter was an invalid devise).

Conclusion

Florida differs from New York in many ways other than the tropical landscape and balmy winter temperatures. While it is common for New York estate planning practitioners to encounter issues relating to Florida trusts, practitioners must be aware that significant variations in trust law issues and practice could have a major impact on the client. When dealing with Florida trust matters, the careful practitioner will not take for granted that the New York law or practice will apply in the Sunshine State. Careful research, and consultation with

[109]In re Bosonetto, 271 B.R. 403 (Bankr. M.D. Fla. 2001).
[110]Estate of Engelke, 921 So. 2d 693, 697 (Fla. 4th DCA 2006) (stating "revocable trusts are treated similarly to wills. *See, e.g.*, § 732.4015, Fla. Stat.").
[111]Fla. Stat. § 732.702.
[112]Stone, 157 So. 3d 295.

qualified Florida counsel, is the safest course to ensure that the client's objectives are properly implemented.