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Steve Leimberg's Estate Planning Email Newsletter - Archive Message #1290

Date: 03-May-08
From: Steve Leimberg's Estate Planning Newsletter
Subject: **Planning Under Florida Trust Code**

LISI Commentator **Alan S. Gassman** and **Ken Crotty** provide members with an update and wealth of information on the new Florida Trust Code.

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LISI would like to thank Hats **Professor David F. Powell** of **Florida State University** and **Holland and Knight** for acting as Scrivener (and answering questions about several aspects of this new law), and **Barry F. Spivey** who was a member of the Ad Hoc Trust Code Revision Committee and who provided important feedback to the authors on this outline.

EXECUTIVE SUMMARY:

Many new provisions have recently been added to the Florida Trust Code that would be of interest to practitioners nationwide with clients or trusts in Florida. This outline provides insight into those important laws and sample trust provisions.

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Creditor, Beneficiary Disclosure, and Miscellaneous Items

FACTS AND COMMENTS:

I. INTRODUCTION TO THE NEW TRUST CODE:

The effective date of most of the provisions of the new Florida Trust Code is July 1, 2007. The Act was approved by the Governor on June 14, 2006, and is the subject of an excellent Scrivener's summary that can be obtained, among other places, by ordering the September 14, 2006 Florida's New Trust Code CLE Outline that was presented by the Real Property Probate and Trust Law Section – Course #0488R.

The new code is also the subject of a 2-part Florida Bar Journal article by **David F. Powell**. See pages 24 through 35 of the Florida Bar Journal, July/August 2006 issue and pages 22 through 33 of the October 2006 Florida Bar Journal issue. David F. Powell, The New Florida Trust Code, Part 1, 80 Fla. Bar J. 24 (July/August 2006).

Another Florida Bar Continuing Legal Education outline with either audio CDs or VHS videotapes is available by calling the Florida Bar at 850-561-5629. This is course numeric 0488 and the approval period is from September 14, 2006 until March 14, 2008.

II. CREDITOR PLANNING IMPLICATIONS

A. GENERAL RULES. As with prior law, new Florida Statute Section 736.0505 provides that property of a revocable trust is subject to the claims of the settlor's creditors.

With respect to an irrevocable trust a creditor of the settlor can reach "the maximum amount that can be distributed to or for the settlor's benefit." Where an irrevocable trust has multiple settlors, "the amount the creditor . . . may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution."

An exception to the above applies where the trustee of an irrevocable trust only has discretion to reimburse the settlor or to directly pay a taxing authority (the Internal Revenue Service) to the extent of any tax on trust income or principal that is payable by the settlor under the grantor trust rules. Fla. Stat. § 736.0505 (2007).

B. WHAT ABOUT CRUMMEY POWER HOLDERS? A crummey power holder (a person who has a power to withdraw assets from a trust after contribution thereto by the grantor) is considered to be the settlor of a trust

during the time that the withdrawal power can be exercised, and thus the creditors of the withdrawal power holder can reach into the trust to take what the withdrawal power holder can currently withdraw. The Scrivener's Report states that this rule appears to be consistent with Croom vs. Ocala Plumbing and Electric Company, 57 So. 243 (Fla. 1911), and therefore is not a change in existing Florida case law.

However, the new Trust Code makes it clear that after the withdrawal power has lapsed, is released, or has been waived, the property in the trust is protected from creditors of the withdrawal power holder to the extent that the annual lapse has not exceeded the gift tax exclusions applicable under Internal Revenue Code Sections 2041(b)(2), 2514(e), and 2503(b). This means that a lapsed withdrawal power will not be considered a contribution to the trust by the power holder to the extent that the lapse did not exceed the greater of (a) $12,000 or (b) 5% of the value of the trust assets. If the lapse of a power of withdrawal exceeds these limits, then the creditors of the power holder beneficiary will be able to reach into the trust and take assets attributable to the excess lapse, assuming that the power holder is still a beneficiary.

What about if there are multiple donors or gift splitting with a spouse, causing the withdrawal power holder's lapse to exceed the greater of $12,000 or 5% of the value of trust assets? The intention of the Scriveners was to permit a lapse of all amounts excludable under the gift tax rules, but the literal reading of the statute may expose assets attributable to lapses, releases or waivers exceeding the greater of $12,000 or 5%. The author expects that there will be a retroactive technical correction, and has been informed that the Trust Law Committee is reviewing this issue.

Statutory Explanation of the Preceding Paragraph - Florida Statute 736.0505 provides that the lapse, release or waiver of a holder who is not the settlor of a trust will not be exposed to creditors of the holder to the extent that the lapse, release or waiver does not exceed "the amount specified in Internal Revenue Code Section 2503(b)." Section 2503(b) provides that the first $12,000 of gifts to a person will not be included in the total amount of gifts made during the year. Sections 2041(b)(2) and 2514(e) provide for the 5% of the trust assets exception.

The Scrivener's Report states that there is no similar principal in existing Florida case law, and that the Committee views the provision to be a change in existing law.

NOTE – typically planners view withdrawal powers based upon annual amounts contributed, not the amounts that lapse each year. This provision will therefore cause significant confusion. An example would be a trust that the Grantor wishes to be treated for income tax purposes as entirely owned by a beneficiary, such as a trust that would hold the homestead of the beneficiary and qualify for the $250,000 income tax exclusion on the sale of a primary home. If an un-married Grantor wants to place $100,000 into such a trust for a child, then the child may initially have a $100,000 withdrawal power that reduces by $12,000 per year. In this example, the Grantor would file a gift tax return using $88,000 of his or her $1,000,000 lifetime gifting exclusion.

What if the Beneficiary is Sued Before the Powers Lapse? For example, many trusts have "hanging" withdrawal powers that only lapse at the rate of the greater of $5,000 or 5% of the value of trust assets each year in order to allow the trust to be "generation skipping?" Consider having the hanging powers disappear (lapse in an accelerated manner) with a clause such as the following:

> **A beneficiary's withdrawal right shall expire and lapse if the beneficiary is the subject of a bankruptcy proceeding, if the beneficiary is subject to an order to pay assets to a spouse or ex-spouse by reason of a divorce action, or a creditor**

acquires a judgment against the beneficiary that is otherwise enforceable against that beneficiary's rights in this Trust.

C. CREDITORS CANNOT ATTACH "ASCERTAINABLE STANDARD" DISTRIBUTION RIGHTS EVEN WHERE THE TRUSTEE IS THE BENEFICIARY. Whether or not a trust contains a spendthrift provision, under Florida Statute Section 736.0504 the creditor of a beneficiary who has not been considered a contributor to the trust (other than having withdrawal powers that are not counted as contributions by the beneficiary as described above) will not be able to compel a distribution that is subject to the trustee's discretion, or even subject to an "ascertainable standard" distribution right (a right in the debtor beneficiary to receive amounts as reasonably needed for health, education and/or maintenance, which under the Internal Revenue Code and applicable regulations would not result in the trust assets being subject to estate tax in the beneficiary's estate).

This protection for health, education and maintenance powers applies even if the beneficiary is the sole trustee, so long as the beneficiary trustee's discretion to make a distribution for his or her benefit is limited by an ascertainable standard.

This protection provided by Florida Statute Section 736.0504 does not limit the right of the beneficiary to proceed against a trustee for abuse of discretion or failure to make distributions.

D. THE TRUSTS NEED NOT ALWAYS STAY IN FLORIDA. Consider the following clause:

Removal of Beneficiary/Trustees. Notwithstanding any provision in this Article Six to the contrary, if a Primary Beneficiary is serving as sole Trustee of a separate trust established for such Primary Beneficiary's benefit, and if such Primary Beneficiary is insolvent or is unable to satisfy any financial or court or arbitration ordered obligation, or is in the process of being divorced, then such Primary Beneficiary shall be automatically removed as Trustee, and replaced with an Independent Trustee chosen by such Primary Beneficiary. The Independent Trustee chosen as a replacement shall be a descendant of Grantor (other than the applicable Primary Beneficiary) who has attained the age of thirty-five (35), a licensed attorney who has represented Grantors or who specializes in estate and trust law with an "AV" rating in the Martindale-Hubbell directory, a certified public accountant who has done Grantors' accounting work or has extensive experience preparing estate and income tax returns for a reputable trust company, or a licensed trust company. A Trustee Beneficiary who has been forced to no longer serve by reason of this provision shall have the right to regain the trusteeship when circumstances have clearly changed such that there is no longer an insolvency and/or the applicable divorce has been resolved or withdrawn and there is no imminent threat of creditor claims or claims of a family nature that could cause loss of trust assets. Further, if applicable state law where a beneficiary resides, or other applicable law, would make the Trust for such beneficiary creditor accessible if such beneficiary were the sole Trustee, then such beneficiary shall be required to choose an

Independent Trustee meeting the requirements as described above with respect to trusteeship of such Trust and shall be required to serve with an independent Co-Trustee so long as the state law where such beneficiary resides requires a Co-Trustee to facilitate creditor protection.

E. MANDATORY DISTRIBUTIONS ARE EXPOSED TO CREDITORS. Under Florida Statute Section 736.0506, once a mandatory distribution should have been made, then a creditor of a beneficiary may reach the distribution to the extent that the distribution has been withheld by the trustee.

F. TRUSTEE'S CREDITORS MAY NOT INVADE A TRUST HELD FOR THIRD PARTIES. Florida Statute Section 736.0507 codifies the concept that a trustee's interest in trust assets will not be subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt. This, of course, does not apply to the extent that the trustee is the settlor.

Under Florida Statute Sections 736.1013 and 736.1015, the trustee of a trust is not personally liable on contracts entered into on behalf of the trust unless the contract so provides or the trustee fails to reveal its fiduciary capacity. Pursuant to Florida Statute Section 736.1013(2), a trustee is personally responsible for torts committed in the course of administration of a trust where the trustee is personally at fault. As provided in Florida Statute Section 736.1015, the trustee has no personal liability for obligations of a general partnership where the general partner interest is held solely in his or her capacity as a trustee, unless the trust is a revocable trust and the trustee is the settlor.

G. SPENDTHRIFT CLAUSES. Pursuant to Florida Statute Section 736.0501, where a beneficiary's interest is not subject to a spendthrift provision, the court may "authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or by other means."

Florida Statute Section 736.0502(2) states that "(a) term of a trust providing that the interest of a beneficiary is held subject to a spendthrift trust, or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest."

Under Florida Statute Section 736.0502, a spendthrift provision will be valid only if the provision restrains both the voluntary and involuntary transfer of a beneficiary's interest. Because this is a change in the existing law, this new rule does not apply to any trust in existence on July 1, 2007, the effective date of the new code.

Spendthrift trust language, with the deletion of the words "or release" is as follows:

Spendthrift and Anti-Alienation Provision. No beneficiary of the income or any principal of any Trust created hereunder shall have any right or power to anticipate, pledge, assign, sell, transfer, alienate or encumber his or her interest in the Trust, in any way; nor shall any such interest in any manner be liable for or subject to the debts, liabilities or obligations of such beneficiary or claims of any sort against such beneficiary (including claims for alimony, child support, or other claims of a family nature), except that this provision shall not apply to and shall have no effect on myself as Grantor. Further, this shall not prohibit a disclaimer by a beneficiary of their interest in any Trust created hereunder if the

> **result thereof will be to benefit other beneficiaries described under this Agreement as opposed to any creditor or other third party not contemplated as a beneficiary under this Trust Agreement.**
>
> **I desire that the spendthrift clause protection accorded under this Section 8.14 apply to the fullest degree possible to this Trust and to each separate trust established under this Trust Agreement, and I therefore hereby authorize the Trustee to change the situs (location) of this Trust or any such separate trust, the assets held thereunder, and the administration thereof, to a jurisdiction that would facilitate protection of such assets, which may include a jurisdiction outside of the United States, and in the event of such a change in situs, the law of the jurisdiction where the Trustee declares that administration then exists shall be controlling for all purposes under this Agreement, provided that in no event may a Power of Appointment that this Trust Agreement expressly provides shall be a general power of appointment to avoid implementation of federal generation skipping tax be limited or curtailed by reason of any such change in situs.**

In the past, Florida Case Law apparently permitted spendthrift provisions to allow limited transfers among family members. See Bacardi v. White, 463 So.2d 218 (Fla. 1985) and Mason v. Mason, 798 So.2d 895 (Fla. 5th Dist. Ct. App. 2001). According to the Scrivener's Notes, although neither court discussed the ability of the beneficiaries to transfer their interest to family members, both courts upheld the validity of the spendthrift clauses.

The new rule contained in the Florida Trust Code would seem to limit the effectiveness of spendthrift clauses which allow limited transfers, such as a clause stating that a beneficiary would be able to release a trust interest if the release solely benefits other beneficiaries of the trust.

It should still be possible for a beneficiary to disclaim his or her interest even when the spendthrift clause restrains both voluntary and involuntary transfers. Pursuant to Florida Statute Section 739.104, a disclaimer is not a transfer. Therefore, a beneficiary should be able to disclaim his or her interest in a trust if the trust has a valid spendthrift provision. However, pursuant to Florida Statute Section 739.402, a disclaimer is barred if the disclaimant has accepted the interest sought to be disclaimed. Therefore, if a beneficiary has accepted an interest by receiving distributions from the trust, the beneficiary will not be able to disclaim his or her interest in the trust. Although there is no time limit during which the interest must be disclaimed, for a disclaimer to be a "qualified disclaimer" for federal tax purposes, the disclaimer must be made within nine months after the latter of the taxable transfer or the disclaimant's 21st birthday. If the disclaimer is not a "qualified disclaimer" for federal tax purposes, the disclaimant will be subject to federal gift tax on the value of the disclaimed interest.

Trust Law Committee Member Barry Spivey has commented that a settlor's objectives may be accomplished by providing in the trust document that if an interest is disclaimed it will inure to specified alternate beneficiaries.

Notwithstanding the above, pursuant to Florida Statute Section 736.0502(4), a " valid spendthrift provision does not prevent the appointment of interests through the exercise of a power of appointment."

Perhaps the beneficiary can be given a lifetime power of appointment to appoint his or her beneficial interest to other beneficiaries of a trust in order to qualify for spendthrift treatment, and indirectly provide the

beneficiary with the ability to in effect release or at least terminate the beneficial interest he or she may have in a trust.

This could be important where an individual does not want to be the beneficiary of an irrevocable trust, by reason of tax reporting purposes, divorce negotiation purposes, financial statement disclosure purposes, financial aid eligibility, or otherwise.

H. THREE MORE EXCEPTIONS?!?!. Florida Statute Section 736.0503 codifies three exceptions to otherwise applicable trust creditor protection:

I. Judgments or orders for support or maintenance against a beneficiary by a spouse, child or former spouse.

II. A judgment creditor of a beneficiary who has provided services for the protection of the beneficiary's interest in the trust.

The above two exceptions are only to apply "as a last resort upon an initial showing that traditional methods of enforcing the claim are insufficient." Fla. Stat. § 736.0503(3) (2007).

III. A claim by Florida or the United States to the extent of a law passed by Florida or the United States that allows penetration of the trust.

The authors are not aware of any such law, ...yet.

I. PLANNING IDEAS. The possible exceptions which would allow creditors to reach into a trust established in Florida or other states bring forth the following planning ideas:

GO OFFSHORE? APPOINT TRUST PROTECTORS WITH THE POWER TO DIRECT THE TRUST OFFSHORE OR GIVE THIS POWER TO AN INDEPENDENT TRUSTEE:

Language to permit appointment of an Independent Trustee who can be given, for example: 1) the power in the document to change the situs (state or country) of administration and holding of assets; 2) the power to give beneficiaries powers of appointment for generation skipping tax avoidance; and 3) the power to approve distributions of assets outright to a surviving spouse from a QTIP trust to get a stepped-up basis on those assets on the surviving spouse's death.

> **Independent Trustee. The term "Independent Trustee" means any Trustee who is neither (a) a transferor of property to this Trust, including a person whose qualified disclaimer results in property passing to this Trust, nor (b) a person who is or in the future may be eligible to receive income or principal pursuant to the terms of this Trust Agreement, including a person with only a remote contingent remainder interest, but excluding a person whose only interest is as a potential appointee under an unexercised Power of Appointment, nor (c) a person who is "related" or "subordinate" to any person described in (a) or (b) above, as such terms are defined in Section 672 (c) of the Internal Revenue Code. An Independent Trustee may, but need not, be a**

Corporate Trustee. Any party unrelated to the Grantor and the beneficiaries hereof named to appoint remote successor Trustees under this Agreement may appoint an Independent Trustee with approval of a Probate Court of competent jurisdiction after due notice to all adult beneficiaries of the applicable trust.

A Trust Protector Provision:

(a) The Grantors appoint _____, _____, and _____ as Trust Protectors hereunder. If no two of them can serve as Trust Protector, then the remaining Trust Protector shall select a board certified estate and probate attorney who has an "AV" rating in the Martindale-Hubbell law directory licensed to practice in the State of Florida to serve in such Trust Protector's stead. If there are only two Trust Protectors serving, then such Trust Protector may choose a third Trust Protector meeting the above requirements. No trust created under this instrument is required to have a Trust Protector acting with respect to that trust. Notwithstanding any provision under this Section to the contrary, no Trust Protector who is not a U.S. citizen or permanent "green card" residents may serve so long as the United States tax rules would cause this Trust to be treated as a "foreign trust" by reason of having one or more foreign Trust Protectors and any power otherwise vested in such an individual shall be null and void from inception.

(b) The Trust Protectors may, by majority vote, and for the sole benefit of the beneficiaries named or designated in this Agreement, as deemed appropriate by them in their absolute discretion, and with respect to any trust as to which the Trust Protector is acting, modify or amend:

(1) The trust administrative provisions relating to the identity, qualifications, succession, removal and appointment of the Trustee;

(2) The financial powers of the Trustee;

(3) The provisions relating to the identity of the contingent beneficiary of trust property;

(4) The withdrawal rights granted under this instrument (except a withdrawal right that has already matured at the time the Trust Protector seeks to exercise the power conferred under this subparagraph); and

(5) The terms of any trust created under this instrument with respect to:

(i) The purposes for which the Trustee may distribute trust income and principal, and the circumstances and factors the Trustee may take into

account in making distributions;

(ii) The termination date of the trust, either by extending or shortening the termination date (but not beyond any applicable perpetuities period); and

(iii) The identity of the permissible appointees under the testamentary power of appointment granted to the beneficiary for whom the trust is named.

(iv) With the consent of all Trust Protectors, and when deemed reasonably necessary by the acting Co-Trustees to avoid having Trust assets made available to creditors, divorcing spouses, or other non-beneficiaries, institutions, or to avoid causing a beneficiary to be eligible for governmental or institutional support, or to prevent monies from being spent unwisely, to divert assets from one trust or beneficiary herein designated to another trust or beneficiary herein designated.

(v) Benefits payable or to be paid to any descendant of the Grantor, establishing separate shares or trusts with trust assets for one or more specified descendants of the Grantor, and providing for assets which are held under any trust herein established to be transferred to another trust established under this Agreement for the benefit of one or more descendants of the Grantor, which may include provisions which permit one or more descendants, or descendants meeting certain qualifications, to receive amounts as deemed appropriate for health, education, and maintenance.

(c) The Trust Protectors acting from time to time, if any, may appoint any one or more individuals as successor Trust Protectors, but only by unanimous written approval of all of the originally named Trust Protectors. Further, by majority vote, the Trust Protectors acting at any time may appoint one or more successor Trust Protectors who meet the requirements set forth under subsection (a) above. Any appointment of an additional or successor Trust Protector hereunder shall be in writing, may be made to become effective at any time or upon any event, and may be single or successive, all as specified in the instrument of appointment. The Trust Protectors may revoke any such appointment before it is accepted by the appointee, and may specify in the instrument of appointment whether it may be revoked by a subsequent Trust

Protectors. In the event that two or more instruments of appointment or revocation by the same Trust Protectors exist and are inconsistent, the latest by date shall control.

(d) Any Trust Protector may resign by giving prior written notice to the Trustee. All trusts created under this instrument need not have or continue to have the same Trust Protector. The provisions of this instrument that relate to the Trust Protector shall be separately applicable to each trust held hereunder.

(e) Notwithstanding any other provision of this instrument, the Trust Protector shall not participate in the exercise of a power or discretion conferred under this instrument for the direct or indirect benefit of the Trust Protector, the Trust Protector's estate, or the creditors or either, or that would cause the Trust Protector to possess a general power of appointment with the meaning of Sections 2041 and 2514 of the Code.

(f) A Trust Protector acting from time to time, if any, on his or her own behalf and on behalf of all successor Trust Protectors, may at any time irrevocably release, renounce, suspend, cut down, or modify to a lesser extent any or all powers and discretions conferred under this instrument by a written instrument delivered to the Trustee.

(g) A Trust Protector shall have no duty to monitor any trust created hereunder in order to determine whether any of the powers and discretions conferred under this instrument should be exercised. Further, the Trust Protector shall have no duty to keep informed as to the acts or omissions of others or to take any action to prevent or minimize loss. Any exercise or non-exercise of the powers and discretions granted to the Trust Protectors shall be in the sole and absolute discretion of the Trust Protector, and shall be binding and conclusive on all persons. The Trust Protector is not required to exercise any power or discretion granted under this instrument. Absent bad faith on the part of the Trust Protector is exonerated from any and all liability for the acts or omissions of any other fiduciary or any beneficiary hereunder or arising from any exercise or non-exercise of the powers and discretions conferred under this instrument.

(h) If more than one Trust Protector is serving under this Trust, then the exercise of any power authorized under this Section shall require the consent of a majority of the Trust Protectors then acting, unless otherwise provided. If there is a sole Trust Protector serving under this Trust, then such Trust Protector shall have the ability to exercise any power authorized under this Section unilaterally, unless otherwise provided.

(i) Notwithstanding any provision herein to the contrary, unless or until such time as the Trust is taxed as a foreign trust under the Internal

> **Revenue Code and applicable regulations, a person who is not a permanent resident or citizen of the United States, and no entity that is not a United States entity shall have the power to act as Trust Protector without unanimous consent of an acting U.S. Trust Protector or Trust Protectors, and the Trustee or Co-Trustees.**
>
> **No Trust Protector, Trust Advisor, Trustee, or any other party who may be appointed under this Trust shall have any power or authority to make any change to any rights of a surviving spouse that would detrimentally effect the qualification of a marital devise for the federal estate tax marital deduction.**

III. QUALIFIED BENEFICIARIES, DESIGNATED REPRESENTATIVES, AND CONFIDENTIALITY OF TRUST INFORMATION AND ACCOUNTINGS.

Many clients do not want beneficiaries to have access to information about a trust they have formed, or the inner-workings thereof. Once a trust becomes irrevocable, the trustee has a statutory duty to inform beneficiaries of its existence and to give annual accountings, as described below at Section III. B. and C. Fortunately, the law also provides methods for avoidance of providing information to beneficiaries where an appropriate "proxy" exists.

A. QUALIFIED BENEFICIARIES ARE ENTITLED TO NOTICE. The new Florida Trust Code makes a distinction between a "beneficiary" and a "qualified beneficiary."[1]

The term "qualified beneficiary" is limited to living persons and other entities who are either present distributees or permissible present distributees of trust income or principal; individuals and other entities who would become present or present permissible distributees, if the interest of the present distributees, terminated as of the date that qualified beneficiaries are determined without causing the trust to terminate; or individuals and other entities who would be permissible distributees of income or principal if the trust terminated. Fla Stat. § 736.0103(14)(2007).

As reproduced below, the Scrivener's summary provides two good examples detailing the differences between a "beneficiary" and a "qualified beneficiary."

> **Example 1: Meaning of Beneficiary. At his death, ninety-year-old D leaves $1,000,000 to T as trustee "to pay the income to D's spouse S for life, then to distribute trust property to such of D's descendants as S by will appoints, and in default of appointment in continuing trust to spray income among D's children from time to time living, and at the death of the last child to distribute all trust property per stirpes to D's then living descendants and if there be none, to D's alma mater, QB University." D is survived by S, two children, C1 and C2, by a grandson Bob (C1's child) and by a great-granddaughter Fay (Bob's child). On these facts, the beneficiaries of D's trust include S, C1, C2, Bob, Fay, QB University, and an indeterminate and unascertainable class of as yet unborn descendants of D. Note that T's power to spray trust income among D's children does not make T a beneficiary because T holds that power as a trustee.**

Example 2: Meaning of Qualified Beneficiary. The qualified beneficiaries of D's trust, as of his death, include S, C1, C2 and Bob. S is included because she is a permissible distributee. C1 and C2 are included because they would become permissible distributees were S's interest to terminate at D's death (i.e., were she to die at that time). Bob is also a qualified beneficiary because he would take the trust property were the trust to terminate at D's death (because of the death of S, C1 and C2). As of D's death, neither Fay nor QB University are qualified beneficiaries. Note, however, that if Bob were to die after D's death, Fay would then become a qualified beneficiary because she would be entitled to trust property as a consequence of a hypothetical trust termination at that time. That is, the determination of who is a qualified beneficiary is made as of a specific point in time and can change over time.

B. DISCLOSURE REQUIREMENTS REGARDING QUALIFIED BENEFICIARIES. The settlor of a trust cannot relieve the trustee from the duty to keep "qualified beneficiaries" of an irrevocable trust reasonably informed of the trust and its administration. This duty does not extend to beneficiaries.

As a general rule, while a trust is revocable only the settlor is entitled to notices, information, accountings, or reports.

The duty to keep qualified beneficiaries of an irrevocable trust reasonably informed requires notification of

(1) The trustee's acceptance of the trust,

(2) The full name and address of the trustee within 60 days after acceptance,

(3) The existence of the trust,

(4) The identity of the settlor,

(5) The right to request a copy of the trust, and

(6) The right to accountings within 60 days of when the trustee acquires knowledge of the creation of an irrevocable trust.

The duties stated above do not apply to the trustee of an irrevocable trust created (or a revocable trust that became irrevocable) before July 1, 2007.

Upon reasonable request, a qualified beneficiary has the right to receive a complete copy of the trust.

Further, after July 1, 2007, the trustee of an irrevocable trust has an affirmative duty to furnish annual accountings to all qualified beneficiaries, as well as accountings when the trust terminates or the trusteeship changes. Fla Stat. § 736.0813(1)(d) (2007). This requirement also applies to a revocable trust only after it has become irrevocable. Fla Stat. § 736.0813(5) originally stated that the duty to render trust accountings applies to accounting periods beginning on or after January 1, 2008. However, this was an error, and the Legislature later changed January 1, 2008 to July 1, 2007. See Ch. 2007-153.

Previously, pursuant to Florida Statute § 737.303, a beneficiary was entitled to trust accountings annually, presumably upon request.

A qualified beneficiary may waive the trustee's duty to account, including a final accounting, and the qualified beneficiary may later withdraw such a waiver. If a qualified beneficiary does withdraw the waiver, the qualified beneficiary is entitled to trust accountings, but only for future accounting periods. Fla. Stat. § 736.0813(2) (2007).

C. TRUST ACCOUNTINGS. Florida Statute § 736.08135 states the requirements for trust accountings. A trust accounting must be a reasonably understandable report which provides information from the date of the last accounting, or, if there was no previous accounting, from the date on which the trustee became accountable. Fla Stat. § 736.08135(1) (2007).

The beginning of the trust accounting must include a statement which identifies the trust, the trustee, and the period for the accounting. Fla Stat. § 736.08135(2)(a) (2007).

The accounting must show all significant transactions related to the administration of the trust, the gains and losses realized during the accounting period, the acquisition value and current value of the trust assets, an estimate of all non-contingent liabilities, changes in investment holdings, changes of custodial institutions, and allocations between income and principal if the allocation affects the interest of any beneficiary. Fla Stat. § 736.08135(2) (2007).

Pursuant to Florida Statute Section 736.08135(3), these requirements apply to any trust accounting period beginning on or after January 1, 2003.

D. REPRESENTATION. Pursuant to the Florida Trust Code, certain individuals or companies may have the authority to "represent" beneficiaries for notice and waiver purposes.

There are four established vehicles by which a "proxy" may receive notice on behalf of a Qualified Beneficiary so that the Qualified Beneficiary does not have the right to receive information about the trust agreement and the inner-workings thereof. A proxy may also

be able to execute consents to waive accountings and to permit court orders or agreements to be entered into relating to the trust without the Qualified Beneficiary's knowledge or consent.

The four established vehicles and one other planning idea are as follows:

1. Representation by a parent or legal guardian of a minor.

2. Constructive representation by the holder of a power of appointment who has the power to divest the particular beneficiary, subject to the limitations set forth below.

3. Representation by a Designated Representative pursuant to the statutory rules described below.

4. Representation by a "nominee" or "benevolent beneficiary" who may provide "pass through benefits" to a "non-beneficiary."

5. In addition, it may be possible to not name a particular individual or individuals as beneficiaries, but to give Trust Protector the right to add beneficiaries if and when they deem it appropriate.

Planning Note – Notwithstanding that all notices may be provided to designated representative, the parent of a minor, the holder of a power of appointment, beneficiary who receives a benefit from a trust may have to receive a K-1 income tax reporting form by

January 31 of the following tax year. Alternatively, the K-1 form would be provided to a "nominee beneficiary" if the method described in Section 4 above is used.

More detail on the above referenced five methods:

1. REPRESENTATION BY A PARENT OR LEGAL GUARDIAN OF A MINOR. The parent may be the representative for a minor or unborn child for purposes of accounting requirements. Fla. Stat. § 736.0303 (5). Once the minor reaches the age of majority, however, the parent will not be the representative unless the parent is appointed as the "designated representative" under the trust documents, as further discussed below. If a minor, incapacitated individual, unborn, or unascertainable person is not otherwise represented, the individual may be represented by another beneficiary with substantially the same interest. Fla. Stat. § 736.0304. If a court determines that a beneficiary of the trust is not adequately represented, the court may appoint a representative for such beneficiary. Fla. Stat. § 736.0305(1).

2. CONSTRUCTIVE REPRESENTATION BY THE HOLDER OF A POWER OF APPOINTMENT. A holder of a power of appointment may represent the beneficiaries that would take if the power is not exercised, based upon the theory that a person who has the power to exclude a beneficiary should also have the power to receive notice and exercise consent on behalf of that excludable beneficiary.

This will not apply if the excludable beneficiary is an active, present beneficiary of the trust. For example, if the trustee has a sprinkle power to a surviving spouse and children, and the surviving spouse has a power of appointment only exercisable on death, then a child would not be considered as represented by the parent with the power of appointment, since the child would be considered an active, current beneficiary.
class=Section3>

Exception – the above representation statute will also not apply where the holder of the power of appointment is the sole trustee of the trust. Fla Stat. § 736.0302.

Joint Trustee Exception – if the holder of the power of appointment is a co-trustee of the trust, then he or she can represent qualified beneficiaries, although the language of the Statute is not perfectly clear as to whether this representation will apply with respect to disclosure of distributions. The intention of the Scriveners was that it will. Florida Statute Section 736.0302(2)(b) provides that the power of a trustee to distribute property will not be considered a power of appointment that allows the trustee to represent beneficiaries, but where a co-trustee has the power to designate successor ownership of assets or to facilitate assignment of assets under the trust that would divest a particular beneficiary, then such co-trustee can act as the constructive representative of such "defeasible" beneficiary or beneficiaries. For example, the beneficiary may not be entitled to accountings, investment reports, or notice of trust transactions, except to the extent relating to actual distributions made by the trust to one or more beneficiaries. Fla. Stat. § 736.0302 (2) (b). Therefore, such a trustee can represent beneficiaries in regards to information related to the investments and accounts held by the trust but the trustee would still be required to provide information regarding distributions of trust property.

3. REPRESENTATION BY DESIGNATED REPRESENTATIVES. To balance the privacy of the settlor and the interest of the beneficiaries in receiving information about the trust, the Trust Code extends the concept of representation, and creates the concept of a "designated representative."

Pursuant to Florida Statute Section 736.0306, a settlor can

appoint a designated representative to represent and bind a trust beneficiary or to receive notices, information, reports and accounts on behalf of the beneficiary. The designated representative can be appointed by the settlor in the trust document, or can be appointed by a process delineated in the trust document, such as by action of Trust Protectors.

A trustee cannot serve as a Designated Representative, but may have the power to appoint a Designated Representative, although Barry F. Spivey has commented that he does not believe that a trustee should be able to appoint a Designated Representative. The author finds nothing under Fla Stat. § 736.0306(2) (2007) that would prevent a trustee from being empowered under a trust document to select a Designated Representative, but it would be safer from a fiduciary standpoint to appoint separate Trust Protectors to hold and exercise this power. Also, future legislation may prevent trustees from having the power to appoint a Designated Representative to reduce the chance of fraudulent or underhanded conduct, or the perception thereof.

i. Individual as Beneficiary of Trust. If an individual is a beneficiary of the trust, he or she may serve as a designated representative for one or more other beneficiaries only if:

(a) The beneficiary designated representative was named by the grantor, either in the original trust document or by a power retained by the Grantor under the trust document, or,

(b) The individual "is the beneficiary's spouse or grandparent or a descendant of a grandparent of the beneficiary or the beneficiary's spouse." Fla Stat. § 736.0306(3) (2007).

These two restrictions cannot be waived by the trust document. Fla Stat. § 736.0105(2)(h) (2007).

A settlor or trust protectors can name a trusted CPA, an attorney, or any other individual who is not a trust beneficiary to act as a designated representative. This individual would receive all of the trust accountings and notices that are required to be sent out to the qualified beneficiaries.? By appointing such an individual, the settlor or the trust protectors can prevent qualified beneficiaries from receiving confidential information regarding the trust assets and/or operations.

A designated representative may be a licensed trust company or corporation according to Professor Powell. Although the Florida Trust Code does not define the word person, Florida Statute § 1.01(3) defines a person to include individuals, children, firms, associations, joint ventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

In addition, it is possible to draft a provision providing that the designated representative can be named after the trust has been formed and funded. Furthermore, if there are joint settlors, one can draft a provision in a joint trust agreement that states that only one settlor is needed to appoint the designated representative.

It appears to the authors that a trustee can petition a court to modify an irrevocable trust so that designated representatives could be named to prevent minor qualified beneficiaries from receiving trust accountings. Pursuant to Florida Statute § 736.04113(1)(b), a court may modify an irrevocable trust "because of circumstances not anticipated by the settlor [or if] compliance with the terms of the trust would defeat or substantially impair the accomplishment of the material purpose of the trust."

The designated representative may also waive the trustee's duty to provide accountings. Even if a qualified beneficiary, who is represented by a designated representative, specifically requests that the trustee furnish information regarding the trust, the trustee has no obligation or duty to furnish such information.

A designated representative is not liable to a beneficiary whose interests are represented for any action or failure to act that the designated representative made in good faith. Florida Statute § 736.0306 (4).

A settlor or trust protectors can name a trusted CPA, an attorney, or any other individual who is not a trust beneficiary to act as a designated representative. This individual would receive all of the trust accountings and notices that are required to be sent out to the qualified beneficiaries. By appointing such an individual, the settlor or the trust protectors can prevent qualified beneficiaries from receiving confidential information regarding the trust assets and/or operations.

A trustee is not liable for giving notice, information, accountings, or reports to any beneficiary who is represented by a designated representative. Further, nothing in the Trust Code prohibits a trustee from providing such information to a qualified beneficiary. Florida Statute § 736.0301(4)

ii. Others Treated As Qualified Beneficiaries. A charitable trust does not have any qualified beneficiaries, because the trust is designed to benefit the community rather than an individual or ascertainable beneficiary. In recognition of this, the Florida Trust Code permits any charitable organization that is entitled to receive distributions from a charitable trust to enforce the rights of a qualified beneficiary if the charitable organization would otherwise qualify as a charitable beneficiary under the terms of the trust. Fla. Stat. § 736.0110(1).

Further, the Attorney General may also assert the rights of a charity that would otherwise meet the definition of a qualified beneficiary under a charitable trust. It is important to note, however, that the trustee has no obligation to send notices, information, or accountings to the Attorney General until the Attorney General asserts the rights of the charity. Fla. Stat. § 736.0110(3).

iii. Sample Designated Representative Trust Language.

Sample designated representative trust language is as follows:

> **Designated Representatives. It is recognized that Florida Statute Section 736.0306, effective July 1, 2007, permits the appointment and service of a "Designated Representative" who can receive information and accountings that might otherwise be required to be delivered to Trust beneficiaries. Unless otherwise set forth under this paragraph, the Trustee or Trustees serving from time to time may select and alter the identification of one or more Designated Representatives to receive information and otherwise serve on behalf of one or more beneficiaries of this Trust or any trust established hereunder, provided that if names of specific individuals are enumerated below in this Section, then except to the extent required by statute, the first person named below shall be the Designated Representative, the second person named below shall be the alternate Designated Representative, and the third person named below shall be the second alternate Designated Representative. It is acknowledged that, pursuant to Florida Statute Section 736.0306, any Designated Representative chosen by a Trustee of the Trust and not specifically named below must**

be a relative who is a grandparent or a descendant of a grandparent of the beneficiary, or must be the beneficiary's spouse, or the grandparent or a descendant of a grandparent of the beneficiary's spouse. The first Designated Representative, if chosen, is _____, the alternate Designated Representative, if chosen, is _____, and the second alternate Designated Representative, if chosen, is _____. Any Designated Representative will be held harmless and indemnified from any and all trusts herein established for any liability or obligation incurred in serving as a Designated Representative, except in the case of conduct that is clearly malicious and willful except to the extent required under applicable law. A Designated Representative or an alternate Designated Representative shall not be considered a fiduciary unless circumstances otherwise dictate. It is the Grantors' intent to reduce expenses and responsibilities with reference to Trust reporting and accounting to beneficiaries, and the Grantors therefore request that this Trust shall be construed and administered accordingly.

Any Designated Representative then serving may resign by giving written notice to the persons then having the authority to appoint Successor Designated Representatives and to the Trustee.

Notwithstanding the above, the Grantors, by mutual consent, or one Grantor if the other Grantor is unable to participate in such decision, may replace a Designated Representative or change the successorship rules relating to Designated Representatives.

In the event that this Trust Agreement does not otherwise provide for the replacement of the retiring Designated Representative, and the Trustee requests that a Designated Representative be selected, then the following persons, in the order listed, shall have the ability, by written instrument delivered to the Trustee, to appoint a Successor Designated Representative or Designated Representatives subject to any guidelines herein imposed:

(a) The retiring Designated Representative, if such Designated Representative was appointed under Section 6.05 herein; and

(b) The party or parties named in Section 6.06 below who would be empowered to appoint a Successor Trustee if this Article otherwise fails to provide for a Successor Trustee.

iv. Sample Letter to Designated Representative.

DRAFT

[Date]

Designated Representative
Address of Designated Representative

Re: Designated Representative Waiver for the CLIENT'S GIFTING TRUST

Dear First Name of Designated Representative:

As you know Client's First Name and Client's Spouses Full Name have formed the Client's Gifting Trust with Trustee's Name as trustee.

As you are also aware the trust is intended to benefit [you, your siblings, and the descendants of you and your siblings].

Under the Florida statues, the trustee of an irrevocable trust has an affirmative obligation to provide notice of the trust and accountings to the trust beneficiaries.

Further, the trustee of a trust has an obligation to provide other information as and when it is requested by any beneficiary.

Client's First Name and Client's Spouses Full Name wish to limit the expenses associated with the above statutory requirements, and also wish to keep the trust information confidential.

Fortunately the Florida statutes allow for the appointment of a "designated representative" who is able to waive the above referenced disclosure requirements on behalf of the beneficiaries of an irrevocable trust.

We have therefore prepared the attached waiver, which I believe is self-explanatory.

Please review this and let us know if you have any questions. If the document appears to be satisfactory please sign it and return it to us.

Please be advised that we have prepared this document at Client's First Name and Client's Spouses Full Name request, and have not attempted to represent you individually either in your capacity as a beneficiary or as a designated representative under the trust.

If you would like to have independent legal counsel to advise you with respect to your rights and responsibilities as designated representative and as a beneficiary under the trust you have the right to do so.

If there were ever a dispute between you

and Client's First Name, as Trustee, Gassman, Bates & Associates, P.A. may be required by applicable Florida Bar Rules to withdraw from further representing one or more of the parties hereto or the Trust itself.

Notwithstanding the above, I would like to point out that under Florida statute 736.0306 "no person designated [as designated representative] is liable to the beneficiary whose interests are represented, or to anyone claiming through that beneficiary, for any actions or omissions to act made in good faith." Also, the trust document provides that you are to be indemnified and held harmless for any liabilities or obligations incurred as a result of serving as designated representative under the trust agreement.

Thanks very much for your participation in this trust arrangement, which will hopefully yield significant financial benefits for the family, as intended by Client's First Name and Client's Spouses Full Name.

Best personal regards,

Alan S. Gassman

ASG:
Enclosures
cc: Client's First Name and Client's Spouses Full Name

v. Sample Waiver on Behalf of Qualified Beneficiaries.

Sample waiver on behalf of qualified beneficiaries to be signed by designated representative is as follows:

WAIVER OF RIGHTS TO RECEIVE NOTIFICATION OF TRUST INFORMATION AND ACCOUNTINGS

The undersigned, DESIGNATED REPRESENTATIVE, on behalf of the trust beneficiaries under the CLIENT'S GIFTING TRUST, dated ____, that I am considered to "represent" as named "designated representative", and for myself individually, hereby waive all rights to receive notice of acceptance of the trust, the full name and address of the trustee, a copy of the trust instrument, and the right to accountings with respect to the trust on behalf of all beneficiaries under such trust, including the undersigned as and to the extent applicable, for so long as the trust or any trust established under such trust agreement is in existence. This Waiver may be revoked in the future as to future rights to receive trust information and accountings. This Waiver shall not prevent the trustee or trustees of such trust from providing the undersigned with notices, accountings, and other information, but the receipt thereof shall not be considered to nullify this Waiver unless or until this Waiver is

affirmatively revoked by written notice to the acting trustee or trustees.

The undersigned recognizes that I had been appointed as the designated representative for the beneficiaries of such trust, and that I am providing this waiver in order to reduce administrative expenses and to maintain confidentiality with respect to the trust arrangement.

IN WITNESS WHEREOF, the undersigned has executed this WAIVER OF RIGHTS TO RECEIVE NOTIFICATION OF TRUST INFORMATION AND ACCOUNTINGS this _____ day of _____, 2008.

_____
_____
Witness DESIGNATED REPRESENTATIVE

_____

Witness

Notwithstanding the waiver of an accounting by a Designated Representative on behalf of a Beneficiary, a Trustee may be well advised to nevertheless provide

accountings with appropriate disclosure language in order to take advantage of the Florida 6-month statute of limitations that applies with respect to items disclosed in an accounting.

4. DO NOT NAME THE INDIVIDUAL OR INDIVIDUALS OF CONCERN AS DIRECT BENEFICIARIES. Another approach recommended by some authorities is to not have the "intended ultimate beneficiary" actually named as a beneficiary in the trust document, and to instead rely upon trusted family friends, family members or others, as beneficiaries, to receive benefits and then to make them available to the "unbeneficiary."

Another published idea involves having a small trust established for the Qualified Beneficiary, and making that small trust a possible beneficiary of a larger trust that would not name the "unbeneficiary."

Of course, substance over form issues are involved in any such arrangements and/or patterns of conduct. See Bruce M. Stone and Amy D. Beller, Let the Sun Shine In; a Florida Law Update, 2007 University of Miami Institute – provided in course materials under Special Session Materials, Volume Two, Session IV-C.

IV. MISCELLANEOUS NEW RULES. Trust law points in general:

1. SIGNING FORMALITIES. If the settlor is a domiciliary of Florida at the time of execution, the testamentary aspects of revocable trusts and amendments to revocable trusts will be void unless the instrument is executed in the manner required for wills. Fla. Stat. § 736.0403(2)(b) (2007). Therefore, a revocable trust and amendments to revocable trusts should always be signed by the grantor and two witnesses. Many lawyers also suggest or require notarization, and often times lawyers make trust documents "self-proving." It is essential that any trust that will hold real estate be documented by a trust agreement executed with the same formalities as apply to a deed (two witnesses and a notary).

2. ADEQUATE DISCLOSURE ON TRUST ACCOUNTINGS. A trustee will also not be responsible for any matter adequately disclosed on a trust accounting that has been sent to a beneficiary with a limitation notice that relates to that accounting unless a claim is filed by the beneficiary within six months of receipt thereof. Fla. Stat. § 736.1008 (2007). The limitation notice must be in writing and must alert the beneficiary that a claim against the trustee for any action that the trustee disclosed on the trust accounting must be commenced within six months of the receipt of the trust accounting and limitation notice. If the beneficiary fails to commence the claim within the six-month period, the claim will be barred.

If the trustee makes adequate disclosure on the trust accounting and does not provide the beneficiaries with a limitation notice, then the statute of limitations for a beneficiary to bring a claim against the trustee is four years. Fla. Stat. § 736.1008(1)(a); Fla. Stat. § 95.11(3). The four-year period begins upon the date the beneficiary receives an adequate disclosure. Otherwise, a 12-year statute of limitations may apply if the trustee committed actual or constructive fraud. In this case, the 12-year period begins to run from the later of the time when the facts giving rise to the cause of action are discovered by the beneficiaries or such facts would have been discovered if the beneficiaries had exercised due diligence. Fla. Stat. § 95.031(2)(a).

3. DISINHERITANCE BY REASON OF CAUSING AN ACCIDENTAL DEATH. Florida Statute Section 736.1104 provides a presumption that a beneficiary who unlawfully and intentionally kills or who unlawfully and intentionally participates in the procurement of the death of a settlor or any other person upon whose death the interest of the beneficiary is accelerated is precluded from being a beneficiary under the trust. Should an exception be provided in a standard trust document that would allow a situation such as a DUI death of a spouse to not cause disinheritance?

SAMPLE CLAUSE:

Florida Statute Section 736.1104 shall not apply with respect to causing a beneficiary to lose the right to inherit by unintentionally causing my death.

4. IN TERROREM CLAUSES AND KING SOLOMON CLAUSES. Florida Statute Section 736.1108 provides that in terrorem clauses are unenforceable. Pursuant to this section, trusts created before October 1, 1993 are not subject to this requirement. For the purposes of this sub-section, however, a revocable trust is treated as having been created when the right of revocation terminates. Fla. Stat. § 736.1108(2) (2007). Therefore, an in terrorem clause is not enforceable in a revocable trust that was created before October 1, 1993 if the trust became irrevocable on or after October 1, 1993.

Consider having trusts divide into separate trusts for each beneficiary, even if there are outright distributions, so that the share of any challenging beneficiary would likely bear the costs associated with defending an action by such beneficiary.

Why not appoint a King Solomon or King Solomon Committee and provide the person or committee with the power to reapportion benefits between beneficiaries based upon any and every reason that might be deemed appropriate in his or her discretion. A "King Solomon Committee" clause used by the author is as follows:

> Trust Advisors _____, _____, and _____ are appointed as Trust Advisors of this Trust Agreement, and after the death of the survivor of myself and _____, the Trust Advisors, by majority vote, shall have the power to make all

decisions and determinations with respect to the determination and calculation of shares and the determination and calculation of distributions as between the Trusts for my children and/or other descendants, and, in particular, to interpret and advise the Trustee or Trustees on how to proceed with respect to administration under this Trust. In the event of any legitimate dispute between any beneficiaries under this Agreement or any beneficiary and any Trustee, and in particular, if a dispute is the result of an ambiguity, unforeseen circumstance, or creates uncertainty, delay or ill feelings as between members of my family, then the Trust Advisors, by majority vote, shall have the power to amend this Trust Agreement as determined appropriate in order to equitably confirm the respective rights and responsibilities of the beneficiaries, Trustees, and any other involved parties. If any of the above named Trust Advisors are unable or unwilling to serve then _____ shall serve as an alternate Trust Advisor. Each Trust Advisor shall be held harmless and indemnified for any and all expenses, obligations, or liabilities incurred as a result of any action or inaction with reference to serving or electing not to serve and/or acting or electing not to act with respect to being a Trust Advisor, even if such action or inaction is the result of negligence by one or more Trust Advisors, with such right to indemnification to include being reimbursed for time spent, attorney's fees and costs incurred, including insurance premiums that may be paid as a result of serving, or otherwise. No Trust Advisor shall be responsible for any action or inaction of any other Trust Advisor, Trustee, or fiduciary. Any such indemnification may be payable from any Trust or Trusts established under this Agreement as designated by the majority of the Trust Advisors. Notwithstanding the above, the Trust Advisors shall not have the power to make any change to a Trust that would qualify for the federal estate tax marital deduction if such change would alter the rights of a surviving spouse in such a manner as would cause loss of the federal estate tax marital deduction. Also, the Trust Advisors shall not be empowered to modify this Trust or any Trust herein established that is the beneficiary of any qualified retirement plan, IRA, or similar tax qualified saving plan ("Plan") by adding, or by giving any individual or other entity the power to add beneficiaries who are individuals, or who are older than the Designated Beneficiary of a particular trust, as such term is defined under Internal Revenue Code Section 401(a)(9) and the regulations thereunder, as then amended, and further that no assets held under any trust that is funded by or is the beneficiary of a Plan may be transferred to any other Trust or merged with any other Trust that would result in a non-individual, or an individual older than the Designated Beneficiary of the applicable trust, being a beneficiary thereof, and no fiduciary shall have the right to exercise any power that would violate the Designated Beneficiary rules under the regulations promulgated pursuant to Internal Revenue Code

Section 401(a)(9). The Board of Advisors, by majority vote, may limit any power or powers herein provided for them, which limitation may, if so specified, also limit any and all then serving and future Trust Advisors who may serve pursuant to this provision.

5. VESTED REMAINDERS. Florida Statute Section 736.1106 provides that vested remainders are contingent upon the taker surviving to the time of "possession or enjoyment." The intention of the drafters was that "possession or enjoyment" vests when the event causing entitlement occurs. To the layman the term "possession or enjoyment" would mean the time when the trustee actually hands the assets or monies over to the beneficiary. By the layman's interpretation, unless a trust instrument provides otherwise, the beneficiary of the trust who is entitled to a distribution loses the entitlement if the beneficiary dies before actual receipt thereof. The following was provided to the authors by committee member Barry Spivey for purposes of clarification:

My understanding of 736.1106 is that the "time when the future interest is to take effect in possession or enjoyment" is a term of art my understanding of 736.1106 is that the "time when the future interest is to take effect in possession or enjoyment" is a term of art that refers to the time a beneficiary becomes entitled to take possession of the gift (say, by reason of

the settlor's death or the death of a preceding income beneficiary) notwithstanding that there is a period of administration before taking actual possession. I checked this with Prof. Powell (who is the drafter of section 736.1106) and he agrees with my understanding. He gave the following example: "So, trust to pay income to A for life; remainder to B. B survives A but dies before the trustee distributes the trust. B has a will leaving all of his estate to Charity. B is survived by B Jr. On these facts, assuming no contrary provision in the trust instrument, the principal should be distributed to B's estate and then pass under B's will to Charity."

The authors expect that there will be litigation over this issue unless or until clarifying legislation is passed.

6. DESIGNATING APPLICABLE LAW. Florida Statute Section 736.0107 states that the law of the jurisdiction designated in the terms of a trust will be the governing law of the trust "provided there is a sufficient nexus to the designated jurisdiction at the time of the creation of the trust, or during the trust administration." The statute further provides that "a designation in the terms of a trust is not controlling as to any matter for which the designation would be contrary to a strong public policy of this state." Would this allow a creditor to pursue a trust set up in another jurisdiction by a Florida resident?

7. PET TRUSTS AND WHY EVERY WEALTHY PET OWNER SHOULD OWN TORTOISES AND PARROTS. Under Florida Statute Section 736.0409, a trust is not enforceable beyond a 21-year period if the trust is created for a non-charitable purpose without an ascertainable beneficiary.

Pursuant to Florida Statute Section 736.0408, a trust created to provide for the care of an animal or animals that are alive at the settlor's death will continue until the death of the last surviving animal – best to name a tortoise or a parrot or maybe five of each!

Here are two samples of animal trust language:

Pets Trust I. It is my desire that a trust be established for pets of mine and my spouse existing at the time of my death. The name of such trust shall be the PET TRUST. Funding of the PET TRUST shall occur only if my spouse does not survive me. If we die in a simultaneous accident or under circumstances where it is not possible to determine our order of deaths, then the PET TRUST shall be funded 50% from this trust with the expectation that the other 50% will be forthcoming from my spouse's trust, the _____ LIVING TRUST. The amounts funded to the PET TRUST from this trust and from my spouse's trust will be merged and held as one Trust.

The amount devised to the PET TRUST shall be based upon $100,000 per living pet. An additional $100,000 will be added to the PET TRUST for each pet that is pregnant at the time of my death to care for the offspring of such pregnant pet.

I appoint _____ to serve as Trustee of the PET TRUST. In the event that _____ is unable or unwilling to serve as Trustee, Sections 6.03 and 6.05 of this Trust Agreement shall apply. This trust is to be administered for the

sole benefit of our pets existing at the time of my death. As Trustee,_____ may choose to personally provide a home for any or all of our pets, and in such case be entitled to all reimbursements as set forth below. If _____ is not capable of personally providing a home for all of our pets, she shall determine who is best suited to care for each pet living at the time of my death. _____ shall have the power and authority to receive reimbursement for all expenses relating to proper care and maintenance of our pets and to provide a reasonable household allowance for each person accepting and providing proper care for a pet. A reasonable household allowance may be based upon $100 per month in addition to all out-of-pocket expenses with respect to food, veterinarian bills, grooming, training, dog sitters for when the primary care taker travels, equipment, and otherwise. I request that the Trustee of the PET TRUST shall additionally receive the amount of $50 per month for administering this Trust.

On the death of the last surviving of my pets owned (or in gestation) at the time of my death, the remaining assets held under the PET TRUST shall be devised to the SPCA of Pinellas County, Florida.

Pet Trust II. Upon the death of the survivor of myself and my spouse, the following disposition and trust shall be established as between my trust and my spouse's trust, each trust contributing one-half of the total amounts described above, provided that if one trust is unable to provide

such funding then the other trust shall provide such funding so that the amounts described below are funded. _____ shall serve as Trustee of such trust and be compensated solely for accepting and caring for pets as described above.

The amount of $200,000 shall be set aside for each animal who is a pet of myself or my spouse that survives the survivor of us, being $7,000 per pet to be paid to the person who agrees to take such pet in their home and make them a part of their household, and with the remaining moneys to be held as a pool for all pets in order to provide for disbursements relating to direct expenses incurred with respect to such pets by their various households.

The $7,000 payment will be made $5,000 upon acceptance and delivery of the pet to the person accepting the care thereof, with a binding written agreement to be executed to confirm that the person agrees to have such pet and to care for them for their lifetime absent extenuating and unexpected circumstances. The remaining $2,000 will be paid to such person upon the death of the pet.

The remaining pool for the common benefit of all pets will be used to pay or reimburse for actual out of pocket expenses relating to care, grooming, food, veterinarian bills, and similar appropriate expenses. Such expenses shall specifically include litter for cats, supplies, flea treatments, electronic collar systems, fences, training, and expenses for a caretaker to stay at the residence to cover reasonable vacation periods (up to four weeks annually) and business travel. The pool monies may also be spent by the trustee to have family friends be reimbursed for travel expenses for periodic visits (such as perhaps annually) to the household to check on the pet, an example being that $1,000 may be reimbursed for reasonable mileage if one or more of the pets is being kept by _____ when using a full time caretaker for vacation purposes.

In the event that the person who takes responsibility for a pet cannot fulfill

their obligations in the discretion of the trustee or by resignation of the person, then a suitable substitute household shall be identified by the trustee with reasonable and appropriate compensation paid, consistent with what is set forth above. Medical care shall be provided to keep the animal free from pain or discomfort, to allow for veterinary checkups at least every six months, to have appropriate inoculations, to have flea and parasite treatments, and to have appropriate grooming and other care as is recommended by a reputable veterinarian.

In the event of terminal illness of a pet every effort should be made to provide medical

treatment to keep the animal out of pain and/or discomfort and to help maintain their quality of life to the extent reasonably possible. No extraordinary means should be employed to keep any animal alive, such as chemotherapy treatments, if a reasonable quality of life cannot be maintained. Similarly, surgery that would result in an animal being in pain and not having a high quality of life should be waived in favor of euthanasia if deemed appropriate for the best overall quality of life experience by the animal by the caretaker and the applicable reputable veterinarian.

If _____ cannot serve as trustee of the trust set aside for such pets, then _____ shall serve.

After the death of the last surviving pet prepared for as described above, the remaining assets held in such trust shall be devised to SECOND CHANCE FOR ANIMALS in Ovieda, Florida.

V. **GOOD REASONS TO NOT USE FLORIDA AS THE JURISDICTION OF AN IRREVOCABLE TRUST.**

1. Power of invasion by a beneficiary's ex-spouse or unintended or undeserving descendants.

2. Obligations of a trustee to make extensive disclosures to beneficiaries who the settlor may not want to have annual reminders and extensive expenses relating thereto.

3. Issues relating to clauses in trusts requiring beneficiaries to have a certain religious orientation, sexual orientation, or to be married which may be reviewed as repugnant to Florida public policy but upheld by a foreign jurisdiction.

4. Creditor access to non-lapsed withdrawal powers, child support or alimony obligation situations, or future laws that may be enacted by Florida and/or the United States to allow entry into otherwise non-penetrateable irrevocable trusts.

5. Concern as to "court of equity" interpretations.

6. Application of equitable concepts in the event of a divorce of a beneficiary.

7. Concerns over future "liberal changes" to Florida law that are less likely to occur

in other jurisdictions.

VI. **SAMPLE TRUST LANGUAGE NOT NECESSARILY RELATED TO THE UNIFORM TRUST CODE.**

1. Trust Dependency Clause:

Except, and to the extent that, a Trust beneficiary has a bona fide physical or mental disability preventing the Trust beneficiary from being a productive member of society, it is Grantor's intention that no Trust beneficiary shall become "trust dependent" or otherwise induced or encouraged by the availability of "easy money,"

to not have a work ethic, to not contribute appropriately to society, to not work, to not raise their family, to not teach appropriate ethical and economic values to their descendants and loved ones, to not be rewarded for inactivity, to not be habitually dishonest, and to not lead a non-productive life in regard to society or the Trust beneficiary's family. Each of the aforementioned negative characteristics shall be considered as signs that a beneficiary is "Trust dependent." If a beneficiary becomes "Trust dependent," the Trustee is encouraged to withhold distributions to such Trust beneficiary on a permanent or temporary basis at the discretion of the Trustee until the Trustee determines that such Trust beneficiary is no longer "Trust dependent."

2. Fruit of the Tree Clause:

Clients like the "fruit of the tree" analogy so we have a fruit of the tree clause:

With respect to each Trust established for a child of the Grantors, except for legitimate and appropriate education expenses and living expenses incurred during sincere efforts of a beneficiary to obtain an appropriate education, it is requested that distributions be limited so as to facilitate the trust principal maintaining it's value once the beneficiary has been fully educated, and therefore distributions shall not exceed income produced by the trust assets in order to assure that the remaining trust assets, and growth thereon, shall at least keep up with inflation over time. The Grantors desires that the assets of the Trust be considered a tree, and that the income from the Trust be considered the fruit of the tree, with an objective that the tree should grow or at least maintain its size in order to allow the fruit to not be diminished in the future. The Grantors requests that the Trust be conducted so that the trust assets may grow and prosper, except to the extent that reduction thereof is necessary based upon extenuating circumstances. The Grantors, by means of example, would suggest that distributions be equivalent to what can conservatively be expected to allow for the remaining trust assets, and growth thereon, to at least keep up with inflation over time. By means of example and illustration, with reference to the economic conditions as of the date of execution of this trust, Grantors would suggest a 4% distribution amount, taking into consideration a conservative potential investment return of 7% and a potential inflation rate of 3%. If significant portions of the trust portfolio consist of assets that appreciate in value but pay nominal or very low income, the principal may be used to satisfy the intentions described above.

3. Minimum Dollar Amount Distribution Guideline:

Clause setting minimum dollar amount distribution guideline to apply if a beneficiary is not being useful and positively occupied with description of desired conduct:

Notwithstanding any provision herein to the contrary, after the death of the survivor and my spouse, it is my desire that our child be strongly encouraged to support herself, educate himself/herself, raise a family, work full-time for a charitable organization, and/or otherwise maximize his or her contribution to society, self-improvement, and self-sufficiency. Therefore, total distributions to _____ in any calendar year from the trust and all of the trusts established for his or her benefit shall not exceed an amount sufficient to provide him or her with conservative support during his or her lifetime, my intention being that he or she should have his or her own earnings and resources that he or she will develop during his or her lifetime to provide him or her with luxuries. If my said child is not applying himself/herself on a full-time and conscientious basis, then I request that distributions for his or her benefit during any calendar year not exceed $50,000 based upon 2008 dollars and adjustments to take into account the Consumer Price Index increases occurring after January 1, 2009, as described in Section 4.07 hereof. If my child, however, is applying himself/herself on a conscientious basis or has special needs, then additional amounts may be provided for him or her. In addition, the Trustees may pay for medical insurance to be maintained on my child, for emergency situations or under circumstances where payments must be made to third parties for his or her long-term benefit, such as for medical procedures or special education, and may make distributions for the benefit of my child's descendants as deemed appropriate.

4. Licensed Within the United States.

Use the following provision if licensed trust company will mean licensed within the United States as opposed to Florida only:

Licensed Trust Company. The term "licensed trust company" means any trust company or trust department of a bank or association with trust powers under the law of a state in the United States of America. Unless otherwise specifically provided, the term shall be construed to include only those licensed trust companies as herein defined that manage assets in excess of $500,000,000, it being the intention hereof that any power given to an individual to appoint a licensed trust company to act as Co-Trustee or successor Trustee shall require that such licensed trust company be managing assets of at least $500,000,000 worth. One of the ten largest trust companies in the United States of America means one of the ten trust companies licensed and registered to operate as trust companies in one or more of the United States of America, which has the largest capital base or the largest amount of assets under active management, based upon which criteria is selected by the individual selecting the applicable Co-Trustee.

5. Life Insurance Trusts.

So often, we see life insurance trusts where the life insurance policy is cashed in and there is no ability to make a distribution until the death of the insured. The following language may be useful:

Disposition of Trust Estate. On the death of last surviving Grantor, (or sooner if determined appropriate by the unanimous consent of all acting Trustees) the Trustee shall hold, manage, and control the property comprising the Trust Estate (the words "Trust Estate" shall include all property held in trust under this Trust Agreement either under the provisions of this instrument or by the terms of any instrument which directs that property be held in trust under this instrument), collect the income which shall be accumulated and added to principal, and shall hold, administer and distribute the property as follows:

6. Arbitration Clauses.

Florida Statute 731.401 specifically provides for the enforceability of arbitration clauses in wills and trusts "other than disputes over the validity of all or a part of a will or trust." In the authors' opinion mediation can be essential to dispute resolution. The clause used by the author is as follows:

Mediation and Arbitration. In order to save the cost of court proceedings and promote the prompt and final resolution of any dispute regarding the interpretation or administration of this Trust Agreement, Grantors direct and the Trustee agrees that the problem resolution processes of mediation and arbitration shall be used to resolve any dispute regarding the interpretation, administration, or any other aspect of this Trust.

If any party or beneficiary hereto wishes to resolve an issue under or relating to this Trust Agreement, then such party must give notice of a request for mediation to the other party which notice shall set forth the names of not less than four (4) court approved mediators from the lists available from the Circuit Court of Hillsborough County or such other list as the parties may agree upon. The party receiving such notice shall choose one or more of such mediators within seven (7) days of receipt of such notice and a mediation will be scheduled as soon as feasible between the parties and their respective advisors, and the parties and their advisors will cooperate fully with respect to sharing of information and attendance at meetings in order to seek resolution. If the party receiving notice does not choose a mediator within seven (7) days of receipt of such notice, then the party who has sent such notice may choose the applicable mediator or mediators and may schedule the mediation.

If resolution of the matters between the parties cannot be resolved in mediation within twenty (20) days of the selection of a mediator by the

> **party receiving such notice, then the dispute shall be settled by arbitration administered by the American Arbitration Association under its Arbitration Rules for Wills and Trusts then in effect. Nevertheless, the following matters shall not be arbitrable: questions regarding Grantor's competency, attempts to remove a fiduciary, or questions concerning the amount of bond of a fiduciary. In addition, arbitration may be waived by all parties in interest. The arbitrator(s) shall be a practicing lawyer who is licensed to practice law in the state of Florida and certified by The Florida Bar as a specialist in wills, trusts and estates law. The arbitrator(s) shall apply the substantive law (and the law of remedies, if applicable) of the state of Florida. The arbitrator's decision shall not be appealable to any court, but shall be final and binding on any and all persons who have or may have an interest in this Trust, including unborn or incapacitated persons, such as minors or incompetents. Judgment on the arbitrator's award may be entered in any court having jurisdiction thereof.**

7. Citizens Insurance.

According to Helen Huntley in the *St. Petersburg Times*, at least at one point Citizens Insurance was indicating that it would not cover real estate under a revocable trust unless the individual grantor / trustee was considered the named insured under the trust document. We have been using the following language to effectuate this:

> **With reference to any real estate held under this trust arrangement, I shall be considered the named insured on any liability, casualty, or other insurance policy relating to such real property, as appropriate to facilitate coverage that would typically apply for an owner entity. The preceding sentence has been provided based upon announcements by some insurance carriers in Florida that this type of provision is required to facilitate appropriate coverage.**

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Alan Gassman Kenn Crotty

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[1] The term "beneficiary" refers to any person who has a beneficial interest in a trust regardless of whether the interest is present, future, vested, or contingent. A person does not need to be ascertainable or even born yet to be a beneficiary. The term beneficiary also includes any person who has a power of appointment over trust property, if that power of appointment is exercisable in a capacity other than as trustee. Fla Stat. § 736.0103(4) (2007).