**FLORIDA TRUST PLANNING FOR THE AFFLUENT**

**AND SUCCESSFUL: HOW TO KEEP THEM THAT WAY**

***presented to***

**THE FLORIDA BAR ANNUAL WEALTH PROTECTION 2012-04-10**

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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).

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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.