Revocable Trusts Under the Florida Trust Code

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SYNOPSIS: Revocable trusts are a special type of inter vivos trust under Florida law that can be used effectively for some clients and some assets. This article explores revocable trusts under the Florida Trust Code, considering the important provisions and elements of a trust in general and of revocable trusts in particular. This article compares the provisions of Florida law and the Uniform Trust Code, as well as legislative history, and raises questions that have not been addressed by the Florida Trust Code. It considers which assets are appropriate for revocable trusts. The article also discusses important provisions for planning and drafting revocable trusts to administer and marshal assets during lifetime, to provide an alternative to guardianship, and to dispose of assets on or after death in conjunction with a will.

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A revocable trust is a special type of inter vivos trust under Florida law
that provides a useful estate planning tool for some clients and some assets.
The laws involving revocable trusts have evolved over time, and there are
similarities between wills and revocable trusts. Generally, wills and trusts
are governed by different laws, with wills being governed by the Florida
Probate Code and trusts being governed by the Florida Trust Code (FTC)

1. The Florida Probate Code is the short title for chapters 731–35 of the Florida Statutes. FLA. STAT. § 731.005 (2009). Most of the will provisions are in chapters 732 and 733 of the Florida Statutes. In addition, Florida Statutes section 731.201 contains general definitions for wills. All references to the Florida Statutes are to the official Florida Statutes (2009) unless otherwise indicated.
and, by default, the common law of trusts and principles of equity.\(^3\) A revocable trust is a conceptual hybrid of a will and a trust, and there are many trust laws governing revocable trusts that parallel will laws. This article will consider revocable trusts under Florida law, with particular emphasis on private trusts under the Florida Trust Code and the similarities and differences between revocable trusts and other trusts and wills.

I. INTRODUCTION

A revocable trust is a recognized form of an inter vivos trust that has developed over the years. Historically, revocable trusts were challenged in Florida on the basis that they were illusory or attempted testamentary dispositions and that they operated as a fraud against the surviving spouse, particularly when the settlor retained day-to-day control over the trust property and retained the right to revoke all of the provisions of the trust during the settlor’s lifetime.\(^4\) In 1969, the Florida Legislature preempted these arguments for written trust instruments, providing that a trust which is otherwise valid and “which has been created by a written instrument shall not be held invalid or an attempted testamentary disposition for any” one or more of a number of

\(^2\) The Florida Trust Code is the short title for chapter 736 of the Florida Statutes. FLA. STAT. § 736.0101. The general effective date of the Florida Trust Code was July 1, 2007, and prior to that, chapter 737 of the Florida Statutes governed selective aspects of trust law. See FLA. STAT. § 736.1303; see, e.g., FLA. STAT. § 736.0403(4).

\(^3\) FLA. STAT. § 736.0106. The FTC does not address all issues of trust law, and “[t]he common law of trusts and principles of equity” apply to the extent that they have not been modified by the FTC. Id. The common law of trusts can be found in the case law of Florida as well as the Restatement of Trusts, such as the provisions of the Second and Third Restatements. See UNIF. TRUST CODE § 106 cmt. (amended 2005). Whether Florida courts will look to the draft provisions of the Third Restatement or final provisions when adopted is unclear. The substance of Florida Statutes section 736.0106 and Uniform Trust Code (UTC) section 106 are the same, and the comments to that section provide:

To determine the common law and principles of equity in a particular state, a court should look first to prior case law in the state and then to more general sources, such as the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Ristitution. The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the Code in no way restricts. The statutory text of the Uniform Trust Code is also supplemented by these Comments, which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation.

UNIF. TRUST CODE § 106 cmt.

\(^4\) See, e.g., Hanson v. Denckla, 100 So. 2d 378, 383–84 (Fla. 1956) (holding trust provisions on settlor's death to be invalid as testamentary provisions and illusory because the cumulative effect of the powers reserved by the settlor "divested the settlor of virtually none of her day-to-day control over the property or the power to dispose of it on her death"), rev'd on jurisdictional grounds, 357 U.S. 235 (1958).
reasons specified in the statute, such as the retention by the settlor of the
power to revoke the trust, or remove or control the trustee, or the right to
withdraw property from it, or receive the income from the trust. 5

In some regards, a revocable trust goes against type and has developed
as an exception to the general rules of trusts and wills. To understand revo-
cable trusts, it is important to consider the general rules of trusts and, in some
cases, wills, as well as the special exceptions that apply to revocable trusts.
Further, it helps to consider the differences between revocable and irrevo-
cable inter vivos trusts, as well as to contrast revocable trusts with wills and
testamentary trusts. In general, revocable trusts differ from testamentary
trusts with respect to the timing of their creation, their funding, and their
termination. In general, revocable trusts differ from irrevocable trusts with
respect to their amendment or modification, or their revocation or termina-
tion.

A revocable trust is one of several tools that an attorney can use to
effectuate a client’s estate plan. The client’s intent is key in determining
whether to transfer property during lifetime or upon death, outright or in
trust, and whether to use a will or an inter vivos or testamentary trust. For
example, an inter vivos trust can be used when the owner of property wants
to make an irrevocable gift of the property, but does not want the donee to
have complete access to the property or control over it. In such a case, the
donor could create an irrevocable trust, selecting a person, other than the
donor or the donee, to serve as trustee and to hold the trust property for the
benefit of the designated donee as the beneficiary of the trust. By contrast, a
will can be used when the owner wants to retain complete control over
property during lifetime, with the testator executing a will that does not
become effective until the testator’s death—a will that the testator may
amend or revoke during lifetime. Further, a will can provide for outright
devises, or it can provide for devises in trust, so that after the testator’s death
the property can be held in trust—a testamentary trust—for the benefit of one
or more persons.

Ideologically, a revocable trust falls between an irrevocable outright gift
and a testamentary gift in trust. A revocable trust allows a settlor to make a
transfer during lifetime that can be changed or revoked. 6 Further, it allows
the settlor to be the beneficiary of the trust during the settlor’s lifetime and to
serve as the trustee if the settlor desires. 7 It also allows the settlor to provide
in the trust who will be the trustees and beneficiaries after the settlor’s death.

7. See Fla. Stat. § 689.075(1)(f)–(g).
A revocable trust requires a transfer of ownership or declaration of trust during lifetime as would an irrevocable trust; however, it differs from an irrevocable trust because the settlor can amend or revoke the trust and recall the transfer or the declaration during lifetime. Further, a revocable trust differs from a will in this regard because the trust requires a transfer or declaration during lifetime that would not be required if the property were devised by will.\(^8\)

Creating a revocable trust does not avoid the need for probate; however, it can accelerate the process and substitute a trust process for the assets that will be held in the revocable trust. Creating the revocable trust for certain assets involves the process of marshalling and transferring those assets during lifetime instead of upon death. Creating a revocable trust also can provide the settlor with an alternative to a guardianship in the event the settlor becomes incapacitated during lifetime. Further, creating a revocable trust can provide a repository to which an attorney-in-fact under a durable power of attorney can transfer assets in the event the principal becomes unable to manage his or her property.\(^9\) In addition, creating a revocable trust can dispose of assets when the settlor dies by means of the trust rather than the settlor's will. Thus, the provisions of the trust may substitute for outright devises or devises with testamentary trusts.

As the use of revocable trusts has expanded in ways usually reserved for wills, Florida trust law has expanded to include provisions that parallel rules applicable to wills. Nevertheless, not all of the will provisions or default rules have parallel components in trust law. Florida did not adopt the general provision of the Uniform Trust Code (UTC) that interprets trusts and their dispositive provisions by reference to the rules that govern wills and their dispositive provisions.\(^10\) Instead, the legislature chose which specific will rules to codify as trust rules, so that drafting a revocable trust may require

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8. Some might argue that the change of ownership is one of form rather than substance when the settlor is the sole trustee and the sole beneficiary during lifetime. Nevertheless, there is a difference between (1) making a transfer during lifetime that may be revoked, and (2) signing a will while retaining complete ownership until death.

9. See Fl. Stat. § 709.08(7)(b)5.

10. Compare Fl. Stat. §§ 736.1102–1108, with Unif. Trust Code § 112 (“The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.”). The UTC does not provide that the rules of construction for testamentary trusts apply to trusts, but instead provides that the rules of construction for wills apply to trusts. See Unif. Trust Code § 112 cmt. See also Unif. Trust Code Prefatory Note (amended 2005) (“The UPC, in Article II, Part 7, extends certain of the rules on the construction of wills to trusts and other nonprobate instruments. The Uniform Trust Code similarly extends to trusts the rules on the construction of wills.”).
more provisions than would be needed in a will because there are fewer default rules for trusts. Further, revocable trusts require inter vivos transfers or declarations as well as administration during lifetime that would not be required for wills. Revocable trusts have more potential pitfalls and less statutory default provisions and safeguards than wills and can be a trap for the unwary, especially when a lay person attempts to create a revocable trust without the benefit of competent legal counsel. Thus, it is important that an estate planning attorney be involved to help the client decide if a revocable trust is appropriate, and if so, to draft the necessary documents and facilitate the proper funding of the trust.\textsuperscript{11}

When designing a revocable trust, it is important to make sure that the trust contains all of the necessary elements of a trust and complies with the formalities required by law. In some cases, the revocable trust must satisfy the same requirements for an irrevocable trust and a testamentary trust. In other cases, a revocable trust will qualify for an exception or contain special provisions that would not be allowed or required in an irrevocable trust or a will.

This article focuses on private trusts created under Florida law for individuals as opposed to charitable trusts created for charitable uses. Special rules apply to out of state trusts created by a person who is domiciled in Florida or trust instruments executed in another state.\textsuperscript{12}

\textsuperscript{11} See, e.g., Fla. Bar re Advisory Opinion—Nonlawyer Preparation of Living Trusts, 613 So. 2d 426, 427–28 (Fla. 1992) (finding that “the assembly, drafting, execution, and funding of a living trust document constitute the practice of law” and agreeing “that a lawyer must make the determination as to the client’s need for a living trust and identify the type of living trust most appropriate for the client.”). The opinion also notes that “gathering the necessary information for the living trust does not constitute the practice of law, and nonlawyers may properly perform this activity.” Id. at 428; see also Fla. Bar v. Am. Senior Citizens Alliance, Inc., 689 So. 2d 255, 259 (Fla. 1997) (enjoining the unauthorized practice of law with respect to preparation of revocable trusts).

The referee found that ASCA improperly solicited customers for the purchase of legal instruments; made repeated misrepresentations; shared fees with nonlawyers; commingled advance fee payments with operating funds; restricted the exercise of independent professional judgment of corporate lawyers; made repeated advertising violations; failed or refused to communicate with clients; and disclosed confidences for profit . . . concluding that a lawyer participating in these same activities would be subject to sanction by The Florida Bar. Am. Senior Citizens Alliance, Inc., 689 So. 2d at 257. Further, “[l]ife insurance agents may properly sell life insurance that will fund a living trust and may offer advice on funding the trust from a financial standpoint.” Fla. Bar re Advisory Opinion, 613 So. 2d at 428.

\textsuperscript{12} FLA. STAT. § 736.0403(1). The FTC recognizes inter vivos trusts created by a settlor who is not domiciled in Florida when the trust is created if the “trust complies with the law[s] of the jurisdiction . . . [where] the settlor was domiciled” at the time of the creation of the trust. Id. The laws with which the settlor must comply would govern the requirements for creating the trust, including any formalities. FLA. STAT. § 736.0403(2)(b). Further, the FTC recognizes the validity of a trust instrument, executed outside of Florida, if the creation of the
The general requirements for trusts are discussed in Section II. The application of these requirements to revocable trusts and any exceptions or additional rules for revocable trusts are considered in Section III. Then the important provisions of a revocable trust are explored in Section IV.

II. PARTIES AND REQUIRED ELEMENTS OF EXPRESS TRUSTS

GENERAL RULES

Generally, an express private trust involves several parties and required elements regarding:

1) the settlor,
2) the res or trust property,
3) the trustee, and
4) the beneficiaries.\(^{13}\)

In general: 1) the settlor is the person who creates and funds the trust for a valid purpose; 2) the res is the specific property set aside to be held in trust; 3) the trustee is the individual or corporation that holds legal title to the trust property and has the obligations and powers of ownership as well as fiduciary duties; and 4) the beneficiaries are the persons who benefit from the trust property presently, or will benefit in the future.\(^{14}\)

Florida law also allows the creation of certain trusts, such as charitable trusts, without individual beneficiaries.\(^{15}\)

In general, a private trust can be created under Florida law when a settlor, with the capacity and intent to create a trust, creates a trust for a lawful, attainable purpose if that trust has a res, a trustee with fiduciary duties, and definite beneficiaries. The FTC has codified the general requirements to create a trust,\(^{16}\) as well as the manner in which a trust can be created, under Florida law.\(^{17}\) For purposes of this article, these requirements are presented under three basic categories, regarding:

\(^{13}\) See generally FLA. STAT. § 736.0103(4), (16), for general definitions of the terms, beneficiary and settlor; and id. § 736.0103(13), (21), for the general use of the terms, property and trustee, in the FTC.

\(^{14}\) See id.

\(^{15}\) See id.

\(^{16}\) FLA. STAT. § 736.0402 (addressing the creation of the trust but not the continuing validity of the trust). Once the trust is created, what happens if one of these requirements is no longer met? See also FLA. STAT. §§ 736.0404-.0405 (regarding the purpose requirement).

\(^{17}\) See FLA. STAT. § 736.0401.
1) the settlor and the settlor’s capacity, intent, and purpose;
2) the trust res and the formalities for creating the trust; and
3) the trustee and the beneficiaries and their relationship.

These three topics are discussed in general in this section regarding all trusts and then again in section III with respect to revocable trusts.

A. Settlor—Capacity, Intent, and Purpose

In order for a trust to be created, the person who creates the trust—the settlor—must have the capacity and the intent to create the trust and must indicate that intent. Thus, there must be a settlor and that settlor must have the capacity to create a trust and must evidence that intent to create one. Further, the trust must be created for a valid purpose.

1. Settlor—Definition and Alternative Terminology

The FTC defines the term “settlor” to mean:

a person, including a testator, who creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person’s contribution except to the extent another person has the power to revoke or withdraw that portion.

Thus, the FTC uses the term “settlor” to refer to the creator of an inter vivos trust as well as the creator of a testamentary trust. When the trust is created by will, i.e., a testamentary trust, the settlor of the trust is the testator. In the case of trusts created during lifetime, i.e., inter vivos trusts, some documents and Florida statutes have or still refer to the creator of a trust as the grantor. Further, a person who contributes property to a trust, even though he or she did not create the trust or sign the trust instrument, also is a settlor of a trust.

18. Fla. Stat. § 736.0402(1)(a), (b).
21. See, e.g., Fla. Stat. § 732.4015(2)(a), (b); however, id § 731.201(19) defines the term “grantor” to include the term “settlor.” Kunce v. Robinson, 469 So. 2d 874, 875 (Fla. 3d Dist. Ct. App. 1985) (discussed in infra note 110). The settlor or grantor also can be referred to as the trustor; however, this is rarely done. See Fla. Stat. § 731.201(19).
A trust may have more than one settlor when the trust is created, or at a later date. For example, two individuals may create a trust together (a joint trust), or one individual may create a trust and a second individual may add property to that trust at a later date.

2. Capacity to Create Trust

With respect to capacity, the FTC addresses the capacity that is required to create a revocable trust, i.e., the capacity to make a will. The FTC does not specifically address the capacity required to create an irrevocable trust or a testamentary trust—thus, this capacity is derived from the common law of trusts, including the Restatement, and principles of equity. Further, the comments to the uniform laws are helpful.

To place the issue in context, it is important to realize that the creation of an irrevocable trust includes an irrevocable gift, while the creation of a testamentary trust requires the execution of a valid will. In order to make an irrevocable gift, the donor must have the capacity to make an inter vivos gift, and in order to make a will, the testator must have testamentary capacity. Thus, at a minimum, a settlor who creates an irrevocable trust must have the capacity to make an inter vivos gift, and a testator who creates a testamentary trust must have the capacity to make a will. The question, then, is whether trust law requires a settlor to have any additional capacity in order to create an irrevocable gift in trust, or a will containing a testamentary trust. Further, since the FTC adopts the capacity requirement from the UTC, the comments to the UTC are instrumental. The UTC comments rely on the authority of the Second Restatement of Trusts as well as the tentative draft of the Third Restatement of Trusts, noting:

To create a trust, a settlor must have the requisite mental capacity.
To create a revocable or testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the set-

25. See Fla. Stat. § 736.0106; Freeman v. Lane, 504 So. 2d 1297, 1300 (Fla. 5th Dist. Ct. App. 1987) (regarding the capacity to revoke a trust, holding that “[i]n order to revoke a trust, one merely needs to have the capacity to understand the nature of the transaction, not necessarily an aptitude in dealing with financial matters”).
26. See Restatement of Property (Third): Wills and Donative Transfers § 8.1(c) (2003) (to make an irrevocable gift the donor must have testamentary capacity and “must also be capable of understanding the effect that the gift may have on the future financial security of the donor and of anyone who may be dependent on the donor”); Saliba v. James, 196 So. 832, 835 (Fla. 1940) (discussing capacity to gift and invalidity of gifts by insane donor).
tlor must have capacity during lifetime to transfer the property free of trust.\textsuperscript{28}

Thus, the drafters of the UTC did not impose any additional capacity requirements to make an irrevocable gift in trust or a devise in trust.

From a planning standpoint, a settlor who creates a trust or a testator whose will includes a trust should have a greater capacity than the capacity to make an irrevocable gift or a devise by will. The settlor or testator should understand what a trust is and should participate in the process of determining the essential provisions of the trust, including who will serve as the trustee, who will be designated as the beneficiaries, what distributions will be authorized, and whether distributions will be within the discretion of the trustee or mandatory. Thus, the settlor or testator should understand the difference between making a gift or devise outright and making a gift or devise in trust. By contrast, from a litigation standpoint, if there is an issue regarding capacity, it is arguable that the settlor merely needed the capacity to make an outright gift or devise in order to create a trust. For further discussion regarding the issue of the capacity to create a revocable trust, see section III.A.

3. Intent to Create Trust

In order to create a trust, the settlor must indicate an intention to create it.\textsuperscript{29} This requirement is what distinguishes an express trust from an implied trust, such as a constructive trust or a resulting trust.\textsuperscript{30} In general, a constructive trust is created by a court as a remedy in order to prevent a person who owns property that belongs to another from retaining ownership, while a resulting trust arises when a person transfers property, but does not intend for the transferee to have beneficial ownership of the property.\textsuperscript{31} In the case of an express trust, the settlor’s intent usually is evidenced by a written trust document such as a will or a trust agreement that designates a trustee and indicates that the trustee is to hold the trust property in trust and designates the beneficial interests of the trust. The FTC refers to this document as a “trust instrument,” meaning “an instrument executed by a settlor that con-

\begin{itemize}
  \item \textsuperscript{28} Unif. Trust Code § 402 cmt. (amended 2005) ("See Section 601 (capacity of settlor to create revocable trust), and see generally Restatement (Third) of Trusts Section 11 (Tentative Draft No. 1, approved 1996; Restatement (Second) of Trusts Sections 18-22 (1959); and Restatement (Third) of Property: Wills and Other Donative Transfers Section 8.1 (Tentative Draft No. 3, 2001).")
  \item \textsuperscript{29} Fla. Stat. § 736.0402(1)(b).
  \item \textsuperscript{30} See Wadlington v. Edwards, 92 So. 2d 629, 631 (Fla. 1957); Restatement (Third) of Trusts § 7 cmt. a (2003).
  \item \textsuperscript{31} See id.
\end{itemize}
tains terms of the trust, including any amendments to the trust." The FTC’s
definition of the “terms of a trust” reflects the intent requirement, providing
that the “[t]erms of a trust’ means the manifestation of the settlor’s intent
regarding a trust’s provisions as expressed in the trust instrument or as may
be established by other evidence that would be admissible in a judicial pro-
ceeding.” Although some trust instruments are styled or named as trust
agreements, they evidence a form of ownership between the trustee and
beneficiaries that is created by the settlor rather than a contractual agreement
between the settlor and the trustee. Thus, the term “trust instrument” is more
appropriate.

When creating an express trust, precatory language evidencing a mere
wish or desire that a person hold property in trust for another should not be
used. The creation of the trust should be mandatory; however, the trustee
may be granted discretion to exercise fiduciary powers regarding the admin-
istration or distribution of the trust.

4. Purpose of Trust

In order for a trust to be created, the trust must have a lawful purpose,
whether private or charitable, that does not contravene public policy and that
is possible to achieve, and the trust and its terms must be for the benefit of its
beneficiaries. The comments to the Uniform Trust Code provide the
following additional guidance:

32. FLA. STAT. § 736.0103(20).
33. FLA. STAT. § 736.0103(19).
34. See, e.g., Magnant v. Peacock, 25 So. 2d 566, 566–67 (Fla. 1946) (explaining that the
testator’s “wish that the sons surviving him should ‘form a Board of Arbitration’ to accom-
plish a peaceable distribution of the estate and the ‘desire’ that his ‘beloved granddaughter
[appellant] be provided for in such manner’ as to the executors and the members of the so-
called board of arbitration should seem meet” was insufficient to create a trust). In order for a
trust based on precatory language to be valid, the language that appears to be precatory must
be construed as being obligatory. Some courts refer to this as a “precatory trust.” See id. at
567, In re DeRoche’s Estate, 330 So. 2d 860 (Fla. 2d Dist. Ct. App. 1976); however, in neither
case was the precatory language sufficient to create a trust. Because the term “‘precatory
trust” is a misnomer or an oxymoron, it should be avoided.
35. See, e.g., FLA. STAT. §§ 736.0103(3), 736.0814 (regarding discretionary powers, such
as a trustee’s power to make distributions for a beneficiary’s health, education, support, and
maintenance).
36. FLA. STAT. § 736.0404. It is unclear how the latter requirement applies to a charitable
trust.
37. UNIF. TRUST CODE § 404 cmt. (amended 2005) (“For an explication of the require-
ment that a trust must not have a purpose that is unlawful or against public policy, see Re-
statement (Third) of Trusts §§ 27–30 (Tentative Draft No. 2, approved 1999); Restatement
(Second) of Trusts §§ 59–65 (1959).”)

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A trust with a purpose that is unlawful or against public policy is invalid. Depending on when the violation occurred, the trust may be invalid at its inception or it may become invalid at a later date. The invalidity may also affect only particular provisions. Generally, a trust has a purpose which is illegal if (1) its performance involves the commission of a criminal or tortious act by the trustee; (2) the settlor’s purpose in creating the trust was to defraud creditors or others; or (3) the consideration for the creation of the trust was illegal.38

“Purposes violative of public policy include those that tend to encourage criminal or tortious conduct, that interfere with freedom to marry or encourage divorce, that limit religious freedom, or which are frivolous or capricious.”39

When a settlor decides to create a trust rather than make an outright transfer, the settlor has one or more reasons for creating the trust. These reasons may translate into the purposes of the trust. For example, the settlor may create a testamentary trust to provide first for the support of his or her spouse and then, after the spouse’s death, to provide for the support and education of their children. Ancillary reasons may be to save taxes, such as through the use of a marital trust or a creditor shelter trust,40 or to protect beneficiaries from creditors through the use of a spendthrift provision.

Usually the trust purposes are discerned from the trust distribution provisions.41 Some trusts may contain provisions that further explain the settlor’s intent and purpose in creating the trust and that affect the trustee’s duties, such as a provision that the primary purpose of the trust is to care for the income beneficiary and that fiduciary decisions can be made that benefit the income beneficiary rather than remainder beneficiaries.42 Settlors also

38. Id. ("See Restatement (Third) of Trusts § 28 cmt. a (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 60 cmt. a (1959.").)
39. Id. ("See Restatement (Third) of Trusts § 29 cmts. d–h (Tentative Draft No. 2, 1999); Restatement (Second) of Trusts § 62 (1959.").)
41. In the pre-FTC case of Schwarzkopf v. American Heart Ass’n of Greater Miami, Inc., 541 So. 2d 1348 (Fla. 3d Dist. Ct. App. 1989), the court held that a trust established to distribute income to four charities for ten years, with the remainder payable to those four charities, was an active trust, and "the ownership and investment of its assets, the temporary preservation of capital, the postponement but eventual delivery of the corpus—constitute perhaps the most essential and common purposes of a trust entity." Schwarzkopf, 541 So. 2d at 1350.
42. See Fla. Stat. § 738.103(2) (regarding the trustee’s fiduciary duty of impartiality with respect to income and principal decisions "except to the extent the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries").
may add provisions that express a purpose of the trust, such as the material purpose to aid a court when determining whether to permit a modification of the trust, or the dominant charitable purpose and the means to accomplish that purpose when a court is applying the cy pres doctrine. 43

B. Trust Res and Formalities for Trust Creation

A trust requires a res (trust property) 44 and the type of res affects whether a written trust instrument is required. 45 The FTC addresses the res requirement as well as the formalities and standard of proof for oral trusts. 46

1. Res and Funding of Trust

The FTC addresses the res element under the “methods of creating” a trust rather than as one of the specific “requirements for creation” of a trust. 47 Nevertheless, a trust cannot be created without a trust res. 48

A settlor who owns property can create a trust during his or her lifetime by transferring that property to another person as trustee or by declaring that he or she holds that property as trustee. 49 A testator can create a trust by will by devising that property in trust. 50 In addition, a settlor can create a trust by another disposition taking effect on death. 51 Further, a person who holds a power of appointment exercisable during lifetime or by will, may exercise the power in favor of a trustee, thereby funding an inter vivos or testamen-

43. See, e.g., FLA. STAT. § 736.04113(1)(a), (c) (regarding judicial modification of a trust when “[t]he purposes of the trust have been fulfilled or have become illegal, impossible, wasteful, or impracticable to fulfill” or when “[a] material purpose of the trust no longer exists”); see FLA. STAT. § 736.0413 (regarding cy pres and the trust’s charitable purposes). With respect to other reasons that the trust’s purposes are important, see, for example, sections 736.0405 and 736.0409 of the Florida Statutes, regarding charitable and noncharitable trusts and purposes, and section 736.0108(4), regarding a trustee’s “continuing duty to administer the trust at a place appropriate to its purposes.”

44. See FLA. STAT. § 736.0401.
45. See FLA. STAT. §§ 689.05, 736.0403(2)(a).
46. See FLA. STAT. §§ 736.0401, .0403, .0407.
47. FLA. STAT. §§ 736.0401, .0402.
48. Generally inter vivos trusts are created and funded during lifetime; however, sections 732.513 and 689.075 of the Florida Statutes provide an exception that allows an inter vivos trust instrument to be executed in writing during lifetime and created and funded upon the settlor’s death by a pour-over devise under the settlor’s will.
49. FLA. STAT. § 736.0401(1)–(2). In the case of a declaration of trust, the statute requires the declaration to be “that the owner holds identifiable property as trustee.” FLA. STAT. § 736.0401(2) (emphasis added).
50. FLA. STAT. § 736.0401(1).
51. FLA. STAT. § 736.0401(1).
tary trust. Thus, there are a number of different methods authorized by the FTC for funding a trust.

The general definition of property under the FTC is “anything that may be the subject of ownership, real or personal, legal or equitable, or any interest therein.” Thus, there are many different types of property that can be placed in trust. Most, but not all, property may be held in trust, but not all property that can be held in trust should be.

2. Written and Oral Trusts—Formalities and Burden of Proof

The FTC addresses the formalities required for the terms of a written trust instrument and the standard of proof for establishing the terms of an oral trust under Florida law. In addition to the formalities or standard of proof required for trusts, other laws may apply with respect to how trusts are funded. Thus, there may be additional formalities required to transfer an asset to the trustee or to declare that the owner is holding the property as trustee. For example, in order to transfer shares of stock in a publicly held corporation, the stock certificate and a duly executed assignment of the shares may need to be delivered to the corporation’s transfer agent for transfer on the stock record books.

An express trust created during lifetime that contains Florida real estate, such as “any messuages, lands, tenements, or hereditaments,” must comply with the Florida statute of frauds for land; thus, the trust instrument must be in writing and it must be “signed by the party authorized by law to declare or

52. FLA. STAT. § 736.0401(3).
53. FLA. STAT. § 736.0103(13).
54. See, e.g., Professional Service Corporation and Limited Liability Company Act, FLA. STAT. ch. 621. Florida Statutes section 621.09(1) provides:

   No corporation organized under the provisions of this act may issue any of its capital stock to anyone other than a professional corporation, a professional limited liability company, or an individual who is duly licensed or otherwise legally authorized to render the same specific professional services as those for which the corporation was incorporated.

FLA. STAT. § 621.09(1). Although the term “property” includes an equitable interest, the provisions of one trust may prevent the beneficiary from transferring its beneficial interest in the first trust to a second trust. See FLA. STAT. § 736.0103(13); see also FLA. STAT. § 736.0502(2).
55. FLA. STAT. §§ 736.0403, 689.05.
56. FLA. STAT. § 736.0407.
57. FLA. STAT. §§ 689.05, 736.0403(2)(a). Special rules apply to Florida land trusts under Florida Statutes section 689.071, which are not subject to the provisions of the FTC except as provided in Florida Statutes section 689.071(7). FLA. STAT. § 736.0102. It is unclear why Florida Statutes section 689.071(9)(a) expressly states the provisions of Florida Statutes section 763.0705 do not apply.
create such trust or confidence." Further, the interest in land should be transferred to the trustee—identifying the trust by name or date—by a deed signed by the grantor/settlor or by his or her lawfully authorized attorney or agent "in the presence of two subscribing witnesses." A trust created by a will, i.e., a testamentary trust, requires a validly executed will.

If a settlor domiciled in Florida creates a revocable trust and the trust has testamentary aspects—"provisions of the trust instrument that dispose of the trust property on or after the death of the settlor other than to settlor’s estate"—then the trust must be executed with the formalities required for a will in Florida in order for those trust provisions to be valid when the settlor dies. If the trust is not executed like a will, then the invalidity of the testamentary aspects will not affect the validity of the provisions of the trust that apply during the settlor’s lifetime. When the settlor dies, however, those trust provisions disposing of the trust property after the settlor’s death will not be effective. Instead, the trust will revert to the settlor’s estate when the settlor dies and the trust assets will be subject to administration and pass pursuant to the provisions of the settlor’s will or the laws of intestacy.

Generally, other trusts and provisions may be created by oral statements of the settlor, provided that "the creation of an oral trust and its terms may be established only by clear and convincing evidence." This standard is greater than the general civil standard of the greater weight or preponderance of the evidence, but less than the criminal standard of beyond a reasonable doubt. A settlor may orally create an irrevocable trust funded with personal property, whether tangible or intangible. Further, a settlor may orally

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58. FLA. STAT. § 689.05.
59. FLA. STAT. § 689.06. Although the deed is not required to be recorded, a notary is recommended so that the deed is recordable. FLA. STAT. § 695.03; see also FLA. STAT. § 689.07(1) (to determine appropriate language to identify the trust by title, date, beneficiaries, nature, or purpose so that the trustee will not be treated as the fee simple owner); Raborn v. Menotte, 974 So. 2d 328, 331 (Fla. 2008); Charlie Nash, Various Courts Weigh in on Florida Homestead and Transfers of Real Estate to Trusts, 29 ACTIONLINE 26–27 (Fla. Bar Real Prop., Prob. & Tr. L. Sec., Spring, 2008). But see Flinn v. Van Devere, 502 So. 2d 454, 455 (Fla. 3d Dist. Ct. App. 1986) (where real estate passed pursuant to the settlor’s will rather than her trust because title to the real estate was not deeded to the trustee).
60. See FLA. STAT. §§ 732.502, .504. A self-proof affidavit is optional. FLA. STAT. § 732.503; see also FLA. STAT. §§ 689.05, .06 (with respect to a testamentary trust for real estate). The will must contain a valid devise of the real estate. That devise might be a specific devise of real estate. Alternatively, it might be a residuary devise that includes real estate as part of the residuary estate.
61. FLA. STAT. § 736.0403(2)(b).
62. FLA. STAT. § 736.0407.
63. FLA. STAT. §§ 736.0403(2)(a), .0407; see also Rosen v. Rosen, 167 So. 2d 70, 72 (Fla. 3d Dist. Ct. App. 1964) (a pre-FTC case).
create a revocable trust funded with personal property if the property is to be distributed to the settlor's estate upon death. Although oral trusts can be created during the settlor's lifetime for personalty if proven by clear and convincing evidence, they are not recommended. Instead, written trust instruments are preferred in order to provide a written record of the settlor's intent identifying the beneficiaries and delineating the distributive duties and powers of the trustees.

Alternatively, if an inter vivos trust is executed in a jurisdiction outside of Florida, it will be valid if it complies with the formalities of that jurisdiction. Further, if the inter vivos trust is created by a settlor who is domiciled in a jurisdiction other than Florida, the creation of the trust will be valid if its creation complies with the laws of that jurisdiction—which should include the formalities and all other requirements for creating a trust.

Florida law also authorizes a trustee to provide a certification of trust containing information regarding the trust and the trustees and settlor, including whether the trust is revocable, or the name of any person who holds a power of revocation. The FTC does not require any formalities for the certification, although it provides that it “may be signed or otherwise authenticated by any trustee.”

C. Trustee and Beneficiaries

In order for a trust to be created, the trustee must have duties to perform. Further, in order to create a trust, the trust must have a definite beneficiary, i.e., a beneficiary who “can be ascertained now or in the future, subject to any applicable rule against perpetuities” or the trust must be a

64. See Fla. Stat. §§ 736.0403(2)(a), (b), .0407.
65. See, e.g., Rosen, 167 So. 2d at 71-72 (a pre-FTC case requiring appellate litigation to determine that $35,000 of life insurance proceeds paid to the insured's father were to be held in trust by him for the benefit of his grandchildren pursuant to an oral trust created by his son; however, it is unclear from the opinion as to what distributions the trustee had the discretion to make or was required to make for the benefit of the grandchildren and when the trust was to terminate).
67. See id.
68. Fla. Stat. § 736.1017(1).
69. Fla. Stat. § 736.1017(2). A statutory form certificate of trust—or a judicial form like a probate form—would be helpful, with a space to add additional information, regarding special powers or other provisions. See Fla. Stat. §765.203. See also id. §§ 709.08(4), 732.503.
70. Fla. Stat. § 736.0402(1)(d).
charitable trust\textsuperscript{71} with a charitable purpose.\textsuperscript{72} In the case of a private trust, if there is a sole trustee who is a beneficiary of the trust, that sole trustee must not be the sole beneficiary.\textsuperscript{73}

1. Trustee with Duties to Perform

The requirement that a trustee must have duties to perform has two elements. The first is implicit—that the trust must have a trustee, and the general maxim that a trust will not fail for lack of a trustee should apply.\textsuperscript{74} The second is expressed—that the trustee must have duties to perform.\textsuperscript{75}

The FTC does not define the term “trustee” except to clarify that the FTC uses the term “trustee” to mean “the original trustee and includes any additional trustee, any successor trustee, and any cotrustee.”\textsuperscript{76} Nor does the FTC address who may serve as a trustee or restrict who may serve as a trustee in the manner that personal representatives are restricted.\textsuperscript{77} The comments to the UTC provide: “[a]ny natural person, including a settlor or beneficiary, has capacity to act as trustee if the person has capacity to hold title to property free of trust.”\textsuperscript{78} Nevertheless, a person who lacks the capacity to exercise powers of ownership because of age or mental capacity should not be able to serve as a trustee.

Generally, corporations may serve as trustees,\textsuperscript{79} and some corporations are permitted to serve as trustees, but are precluded from serving as personal

\textsuperscript{71} FLA. STAT. §§ 736.0402(1)(c), .0103(5) ("Charitable trust’ means a trust, or portion of a trust, created for a charitable purpose as described in [section] 736.0405(1).”).

\textsuperscript{72} FLA. STAT. § 736.0402(1)(c)(1); § .0103(5) ("Charitable trust’ means a trust, or portion of a trust, created for a charitable purpose as described in [section] 736.0405(1).’’); § .0405. Alternatively, a trust may be created to care for an animal or for a noncharitable purpose pursuant to Florida Statutes sections 736.0408 and 736.0409.

\textsuperscript{73} See FLA. STAT. § 736.0402(1)(e).

\textsuperscript{74} See FLA. STAT. § 736.0106 ("The common law of trusts and principles of equity supplement this code, except to the extent modified by this code . . .’’); see also UNIF. TRUST CODE § 401 cmt. (amended 2005) ("While this section refers to transfer of property to a trustee, a trust can be created even though for a period of time no trustee is in office. See Restatement (Third) of Trusts Section 2 cmt. g (Tentative Draft No. 1, approved 1996); Restatement (Second of Trusts Section 2 cmt. i (1959). A trust can also be created without notice to or acceptance by a trustee or beneficiary.’’). See also RESTATEMENT (THIRD) OF TRUSTS § 31, RESTATEMENT (SECOND) OF TRUSTS §§ 32-33.

\textsuperscript{75} FLA. STAT. § 736.0402(1)(d).

\textsuperscript{76} FLA. STAT. § 736.0103(21).

\textsuperscript{77} See FLA. STAT. §§ 733.302–.305 (establishing who may or may not serve as a personal representative).

\textsuperscript{78} UNIF. TRUST CODE § 103 cmt. (amended 2005). “State banking statutes normally impose additional requirements before a corporation can act as trustee.” Id.

\textsuperscript{79} FLA. STAT. § 617.2101; see Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 44 (1980) (affirming a judgment declaring Florida Statutes section 659.141(1) (1972) unconstitutional.
representatives of estates. Nevertheless, when a settlor chooses a corporate fiduciary, the settlor generally chooses a corporation with fiduciary expertise and generally does not choose a general business corporation with limited liability. Further, most general business corporations without fiduciary expertise choose not to serve as trustees because of the fiduciary duties and liabilities that would be imposed on them.

A Florida not-for-profit corporation may serve as a trustee of a trust when the corporation is the beneficiary of the trust. In addition, a Florida nonprofit corporation may serve as a trustee of a trust when “any other eleemosynary institution or nonprofit corporation or fraternal, benevolent, charitable, or religious society or association” has a beneficial interest in the trust property.

Florida regulates the conduct of trust business by certain corporate fiduciaries, requiring “every trust company and every state or national bank or state or federal association having trust powers” to provide “satisfactory security” before “transacting any trust business” in Florida. A trust com-

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because it “directly burdens interstate commerce in a manner that contravenes the Commerce Clause’s implicit limitation on state power”). The statute provided:

[No bank, trust company, or holding company, the operations of which are principally conducted outside this state, shall acquire, [or] retain, [or] own, directly or indirectly, all, or substantially all the assets of, or control over, any bank or trust company having a place of business in this state where the business of banking or trust business or functions are conducted, or acquire, [or] retain, [or] own all, or substantially all, of the assets of, or control over, any business organization having a place of business in this state where or from which it furnishes investment advisory services [to trust companies or banks] in this state.

Lewis, 447 U.S. at 32 n.2.

80. FLA. STAT. § 660.41. This statute, entitled “Corporations; certain fiduciary functions prohibited,” provides:

All corporations are prohibited from exercising any of the powers or duties and from acting in any of the capacities, within this state, as follows:

(1) As personal representative of the estate of any decedent, whether such decedent was a resident of this state or not, and whether the administration of the estate of such decedent is original or ancillary; however, if the personal representative of the estate of a nonresident decedent is a corporation duly authorized, qualified, and acting as such personal representative in the jurisdiction of the domicile of the decedent, it may as a foreign personal representative perform such duties and exercise such powers and privileges as are required, authorized, or permitted by section 734.101. . . . This section does not apply to banks or associations and trust companies incorporated under the laws of this state and having trust powers, banks or associations and trust companies resulting from an interstate merger transaction with a Florida bank pursuant to section 658.2953 and having trust powers, or national banking associations or federal associations authorized and qualified to exercise trust powers in Florida.

Id.

81. FLA. STAT. § 617.2101.

82. Id.

83. See FLA. STAT. § 658.12(20)–(23); see also FLA. STAT. §§ 658.16, .23(4), .25, .2953(14), .30, .33; FLA. STAT. §§ 660.27, .28, .30, .34.

84. FLA. STAT. § 660.27(1).
pany is defined as "any business organization, other than a bank or state or federal association, which is authorized by lawful authority to engage in trust business" and "[t]rust business’ means the business of acting as a fiduciary when such business is conducted by a bank, state or federal association, or a trust company, and also when conducted by any other business organization as its sole or principal business." 86

Generally, the settlor designates the trustee and the successor trustees or may authorize a trustee or a beneficiary to appoint the successors; however, if there is a vacancy, qualified beneficiaries or the court will appoint a trustee to fill a vacancy. 87 A vacancy may arise in the event the trustee is unable or unwilling to serve for any number of reasons, including the trustee’s incapacity, resignation, removal, or death. 88 Florida law also restricts which corporations may serve as a “receiver or trustee under appointment of any court in this state;” 89 however, it is unclear whether this restriction applies when a court fills a vacancy in an express trust. 90

If the trustee designated by the settlor refuses to accept the appointment, the trust should not be invalid and a successor trustee should be appointed pursuant to the trust provisions or pursuant to the statutory provisions for filling a vacancy. 91 Further, if the settlor transferred assets to that trustee, the transfer should be construed as a transfer to the trustee rather than to the individual who failed to accept the trusteeship.

The legislative history for the FTC recites the general definition of a trust as “a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it” 92 and states that “[t]he trustee is the person who holds the legal title to the property held in trust, for the benefit of the beneficiary.” 93 Designating someone as trustee usually involves the creation of a fiduciary relationship and includes the creation of

88. Fla. Stat. § 736.0704(1).
89. Fla. Stat. § 660.41(2).
90. See Fla. Stat. § 736.0704(3)(c)–(4)(c) (providing when a vacancy is filled “[b]y a person appointed by the court”).
91. See Fla. Stat. § 736.0704(2)–(4).
93. Id. at 3 (quoting 55A Fla. Jur. 2d Trusts § 1).
beneficial interests as well; however, merely designating someone as trustee on a deed or opening a bank account in trust for an individual may be insufficient to create an express trust. The trustee’s duties usually involve both administrative and distributive duties that are expressed in the trust instrument as well as provided by trust law.

The statutory requirement that the trustee must have duties in order to create a trust is a requirement of the UTC. The comments to the UTC indicate that this requirement “recites standard doctrine that a trust is created only if the trustee has duties to perform.” Further, the UTC comments state:

Trustee duties are usually active, but a validating duty may also be passive, implying only that the trustee has an obligation not to interfere with the beneficiary’s enjoyment of the trust property. Such passive trusts, while valid under this Code, may be terminable under the enacting jurisdiction’s Statute of Uses.

Thus, the intent of the uniform law was to codify the general requirement that a trustee must have duties, but to allow such duties to be passive for purposes of creating a trust. This general requirement would be in addition to any other requirement that a trust containing real property have an active use in order to avoid application of the Statute of Uses.

The Florida legislative history is less clear. It states: “The trust must not be passive, meaning that the trustee must have enforceable duties to perform.” Further, it states in a footnote: “The requirement that the trustee’s duties be enforceable means that the same person may not be the sole trustee and sole beneficiary of the trust.” This analysis combines the requirement that a trustee have duties with the requirement that the sole trustee cannot be the sole beneficiary. This analysis raises the concept of an active or passive use—which arises under the Florida Statute of Uses—as well as the doctrine of merger—which involves the separation of legal and

94. UNIF. TRUST CODE § 402(a)(4).
95. UNIF. TRUST CODE § 402(a)(4) cmt. (citing RESTATEMENT (THIRD) OF TRUSTS § 2 (2003); RESTATEMENT (SECOND) OF TRUSTS § 2 (1959)).
96. UNIF. TRUST CODE § 402 cmt. (citing RESTATEMENT (THIRD) OF TRUSTS § 6; RESTATEMENT (SECOND) OF TRUSTS §§ 67–72).
equitable title. Under the Statute of Uses, a trust for real estate will be executed when the trustee has no active duties, and by operation of law the beneficiary will become the sole owner of the trust property. Under the merger doctrine, there must be a separation of legal and equitable title for a trust to exist or continue, so that if there is a sole trustee and that trustee is the sole beneficiary of the trust, the legal and equitable titles will merge and the beneficiary will become the outright owner. The result can be the same in a passive real estate trust and under the merger doctrine in that the trust terminates and the beneficiary becomes the outright owner; however, a passive trust and merger generally arise under different factual situations. In the case of a passive trust, legal and equitable title may be separate—for example, the trustee and the beneficiaries may be different and there may be more than one trustee or more than one beneficiary under a passive trust. In the case of the merger doctrine, the trustee may have active duties, but the only trustee is the only beneficiary thereby merging the legal title with the equitable title.

The Florida legislative history implies the requirement that the trustee have enforceable, active duties in order for a trust to be created. This may extend the requirement that a trust have an active use beyond real estate trusts; however, the end result under the FTC may differ from that under the Statute of Uses when the settlor attempts to create a passive trust. If the FTC is interpreted to require active duties for the creation of a trust and if the settlor transfers property to a trustee for the benefit of beneficiaries without imposing any active duties, the trust will not be created. If the settlor has not created a trust, what is the effect of the transfer? If the property trans-

100. See Contella v. Contella, 559 So. 2d 1217 (Fla. 5th Dist. Ct. App. 1990) (pre-FTC case stating: "[M]erger applies only when the legal and equitable interests are held by one person and are coextensive and commensurate—i.e., the legal estate and the equitable estate are the same. . . . This may occur where, by operation of law, the entire beneficial interest passes to the trustee, or the legal title passes to a sole beneficiary."). See also Hansen v. Bothe, 10 So. 3d 213, 216 (Fla. 2d Dist. Ct. App. 2009) (pre-FTC facts). An example of a trust to which the doctrine of merger would apply is a trust of which the settlor is sole trustee, sole beneficiary for life, and with the remainder payable to the settlor's probate estate. On the doctrine of merger generally, see Restatement (Third) of Trusts Section 69 (Tentative Draft No. 3, 2001); Restatement (Second) of Trusts Section 341 (1959).
UNIF. TRUST CODE § 402 cmt.
101. See, e.g., FLA. STAT. § 689.09; Clement, 137 So. 2d at 615 (passive trust involving individual co-trustees and sole corporate beneficiary).
102. See supra note 100.
103. See CS for SB 1170 Staff Analysis, supra note 92, at 13, 14 & n.124.
104. See FLA. STAT. § 736.0402(1)(d) ("A trust is created only if: . . . (d) The trustee has duties to perform.").
ferred were real estate, would Florida’s Statute of Uses apply to execute the use and thus transfer title to the beneficiaries? If the property transferred were personal property, such as an intangible, would this mean that the settlor is still the owner of the property or would it mean that the transfer is valid and the beneficiaries are the owners? The answer may depend on whether the attempted trust was revocable or irrevocable; however, the FTC does not provide the answer.

Presumably, the requirement that a trustee have duties is in addition to the duties imposed on all trustees by statute and common law, such as the duty of loyalty and the duty to account, and could be satisfied even if the trustee has only one duty. Arguably, these duties are the types of duties that would prevent the Florida Statute of Uses from terminating an active trust holding real estate. From a planning standpoint, express trusts drafted by attorneys should not have this deficiency because the distributive and administrative provisions of the trust should result in the trustee having significant, active fiduciary duties to the beneficiaries with respect to the income and the principal of the trust. Nevertheless, it would be helpful to have more legislative or judicial clarification on this requirement.

2. Definite Beneficiary or Special Purpose

In order for a trust to be created, the trust must have a definite beneficiary, i.e., a “beneficiary [who] can be ascertained now or in the future, subject to any applicable rule against perpetuities,” or the trust must be a charitable trust with a charitable purpose. Alternatively, the settlor may

105. See supra note 99 and accompanying text.
106. See, e.g., FLA. STAT. § 736.0801 (duty to administer trust); FLA. STAT. § 736.0802 (duty of loyalty); FLA. STAT. § 736.0803 (duty of impartiality); FLA. STAT. § 736.0813 (duty to inform and account). It should be noted, however, that one of a trustee’s statutory duties is to administer the trust “in accordance with its terms.” FLA. STAT. § 736.0801.
107. See, e.g., Elvins v. Seestedt, 193 So. 54, 57 (Fla. 1940) (conveyance of real property to a trustee followed by execution of a trust agreement by trustee and the beneficiaries was “a mere naked or passive trust,” when the “naked trustee [was] to hold the title for the cestui que trustent and the only obligations assumed by the trustee were to pay over to the cestui que trust any proceeds coming into his hands from the property and to convey the same if and when the beneficial owners should agree upon and request such conveyances”); Clement, 137 So. 2d at 616 (trust of real estate created in 1945 for the active purpose of forming a corporation and constructing a hospital, did not contain “any language which impose[d] active duties and responsibilities upon the trustees after the construction of the hospital,” which was completed in 1947, and was “a dry and passive trust . . . executed by the Florida Statute of Uses,” Florida Statutes section 689.09, resulting in the beneficiary of the trust owning full title to the trust property).
108. FLA. STAT. § 736.0402(1)(c)(2).
109. FLA. STAT. § 736.0402(1)(c)(1); see FLA. STAT. § 736.0405(2).
give the trustee the power “to select a beneficiary from an indefinite class,” provided that power is exercised within a reasonable period of time. This power merges the concept of a fiduciary power with a general power of appointment, raising questions as to what fiduciary standards apply to the exercise of such a power. If this power is used, the trust should include provisions for takers in default in the event the fiduciary does not exercise the power, and the settlor may want to specify a time period for its exercise—to avoid litigation over what constitutes a reasonable period of time.

The FTC defines the term “beneficiary” to mean “a person who has a present or future beneficial interest in a trust, vested or contingent,” and also includes a person “who holds a power of appointment over trust property in a capacity other than that of trustee.” Further, the FTC defines the term “interests of the beneficiaries” to mean “the beneficial interests provided in the terms of the trust.” Usually, a private trust will have more than one beneficiary, and usually it has present and future beneficiaries who may receive either mandatory or discretionary distributions of income or principal, or both. Further, the trustee may be required to accumulate rather than distribute income for some period of time. Although, the trustee may be granted significant discretion whether to make distributions and the discretion may be absolute or limited by standards, the trustee of a private trust will have a mandatory duty to distribute the trust assets when the trust terminates. By contrast, a charitable trust may continue in perpetuity.

3. Separation of Legal and Equitable Interests—Co-Trustees or Beneficiaries

In order for a trust to be created, the same person must not be the sole trustee and the sole beneficiary; i.e. there must be some separation of the legal and equitable interests so that they are not identical. Thus, the trust must either have more than one trustee or more than one beneficiary—

110. FLA. STAT. § 736.0402(3). This reverses the result in Kunce v. Robinson, 469 So. 2d 874 (Fla. 3d Dist. Ct. App. 1985). The trust in Kunce provided:
   After Grantor’s death, the Trustee shall manage the trust property and shall make distributions of income and principal in accord with the provisions of this Trust for the benefit of Grantor’s children and the natural born children of Grantor’s children, and others as the Trustee in his discretion may deem appropriate.

Kunce, 469 So. 2d at 876.

111. FLA. STAT. § 736.0103(4).

112. FLA. STAT. § 736.0103(10).

113. See FLA. STAT. § 736.0817 (with respect to the trustee’s duty to act expeditiously when making terminating distributions and the trustee’s common law rights with respect to the final trust distribution).

114. FLA. STAT. § 736.0402(1)(e).
whether present or future beneficiaries. The sole trustee may be the sole beneficiary for a period of time, provided that there is at least one other beneficiary who may receive a trust distribution in the future.

A trust would serve no purpose if it were created with the sole trustee being the sole beneficiary; however, that situation may arise after the trust is created. For example, a settlor would not create a trust with income payable to one beneficiary for a term of years and with the principal payable to that beneficiary, or the beneficiary’s estate at the expiration of the term of years, and also appoint that same beneficiary to serve as the sole trustee. If the settlor were to do that, the transfer by the settlor to the trustee would be valid; however, legal title would merge with the equitable title and the beneficiary would be the outright owner of the property free of the trust.\(^\text{115}\) If the settlor wanted to create such a trust for that beneficiary, the settlor would appoint a different person as the trustee or would appoint the beneficiary and another person as co-trustees. Instead, the merger doctrine may apply after the creation of the trust in the event that the only trustee also becomes the only beneficiary.\(^\text{116}\) For example, the settlor could create a trust with the settlor’s children as the trustees, with income payable to the settlor’s spouse for life and with the remainder distributable to the settlor’s surviving children. If the spouse and all of the children except one should die, then that surviving child would be the sole trustee and the sole beneficiary. In such case, the trust would terminate under the merger doctrine as well as under the terms of the trust, and the question would be whether this occurs by operation of law immediately upon the death of the spouse, or occurs by reason of the terms of the trust, with the trustee having a reasonable period of time to wind up the trust and distribute the trust assets.

Although the settlor may want some of the beneficiaries to be trustees, the settlor usually does not want the only trustee to be the only present beneficiary of a trust. For example, in creating a marital trust,\(^\text{117}\) the testator might designate the surviving spouse to serve as a co-trustee of the marital trust but would not want the spouse to serve as the only trustee for a number of reasons, including income tax reasons.\(^\text{118}\) One exception is that when a settlor creates a revocable trust, the settlor may choose to be the sole trustee and the sole beneficiary, during the settlor’s lifetime.

\(^{115}\) See supra note 100.

\(^{116}\) See id.

\(^{117}\) A marital trust could be created to qualify for the marital deduction for a year in which the federal estate tax applies or to qualify for the spousal property basis increase if there is no federal estate tax. See I.R.C. §§ 2056, 1022(c).

\(^{118}\) See, e.g., I.R.C. § 678.
III. PARTIES AND REQUIREMENTS FOR REVOCABLE TRUSTS

The general statutory requirements for an express trust apply to revocable trusts; however, because of the special nature of a revocable trust, there are some exceptions and additional rules for revocable trusts. A revocable trust, as defined by the FTC, is a trust that is "revocable by the settlor without the consent of the trustee or a person holding an adverse interest." 119

The exceptions and rules for revocable trusts are particularly important because the lines between the parties can blur in a revocable trust, such as when the settlor serves as the trustee or when the settlor is the only beneficiary during the settlor's lifetime. In the case of a revocable trust, fiduciary duties under trust law and under the provisions of a revocable trust only apply to the settlor during his or her lifetime. 120 A spendthrift provision in a revocable trust generally will not protect the settlor's interest in a revocable trust from the reach of the settlor's creditors during the settlor's lifetime but will protect beneficial interests after the settlor's death. 121 Further, certain aspects of revocable trusts may require additional formalities. 122

Section 689.075 of the Florida Statutes provides additional exceptions when a trust, that is otherwise valid, will not be invalid because the settlor or another person, or both, possess any of the following powers:

(a) "the power to revoke, amend, alter, or modify the trust in whole or in part;"

(b) "the power to appoint by deed or will the persons and organizations to whom the income shall be paid or the principal distributed;"

(c) "the power to add to, or withdraw from, the trust all or any part of the principal or income at one time or at different times;"

(d) "the power to remove the trustee or trustees and appoint a successor trustee or trustees;" and

(e) "the power to control the trustee or trustees in the administration of the trust." 123

In addition, if a trust is otherwise valid, it will not be held invalid because:

122. See, e.g., Fla. Stat. § 736.0403(2)(b) (formalities for testamentary aspects).
123. Fla. Stat. § 689.075(1)(a)–(e).
(f) "the settlor has retained the right to receive all or part of the income of the trust during her or his life or for any part thereof;" or

(g) "the settlor is, at the time of the execution of the instrument, or thereafter becomes, sole trustee."\(^{124}\)

Section III discusses the requirements for creating a revocable trust, including the application of these general rules and the special exceptions under the FTC and the Florida Statutes, including section 689.075.

A. Settlor—Capacity, Intent, and Purpose for Revocable Trusts

In order to create a revocable trust during the settlor’s lifetime, the settlor must have the capacity and intent to create the trust and must indicate that intention.\(^{125}\) Further, the trust must have a valid purpose.\(^{126}\) These are the same requirements that apply for all trusts; however, the FTC specifically addresses the capacity requirement for revocable trusts. The FTC provides that the capacity that the settlor must have to create "a revocable trust, is the same as that required to make a will."\(^{127}\) In addition, in order for the settlor to "amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee," the settlor needs the same capacity as "that required to make a will."\(^{128}\)

1. Capacity to Create Revocable Trust

Florida adopted the same test that is recommended by the UTC, and the comments indicate that the UTC included "a capacity standard for creation of a revocable trust because of the uncertainty in the case law and the importance of the issue in modern estate planning."\(^{129}\) Part of this uncertainty was because the Second Restatement of Trusts from 1959 provided "A person has capacity to create a trust by transferring property inter vivos in trust to the extent that he has capacity to transfer the property inter vivos free of trust."\(^{130}\)

The comment states:

124. FLA. STAT. § 689.075(1)(f), (g).
125. FLA. STAT. §§ 736.0402(1)(a), (b), .0601.
126. FLA. STAT. § 736.0404.
127. FLA. STAT. § 736.0601.
128. Id.
129. UNIF. TRUST CODE § 601 cmt. ("No such uncertainty exists with respect to the capacity standard for other types of trusts. To create a testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have the capacity that would be needed to transfer the property free of trust."). See FLA. STAT. § 736.0601.
If, but only if, the owner of property has capacity to transfer the property inter vivos to another person to be held by him for his own benefit, he has capacity to transfer it inter vivos to be held by the transferee in trust. The rules as to capacity to transfer property inter vivos are not peculiar to the law of Trusts and a statement of the rules is not within the scope of the Restatement of this Subject.  

The FTC and the UTC chose to align revocable trusts with wills rather than irrevocable trusts for purposes of the capacity required to create revocable trusts, instead of creating a separate capacity in between the capacity to create a will and the higher capacity to create an irrevocable trust. This is true even though the creation of a revocable trust requires more than the execution of a will. In order to create a revocable trust, the settlor must fund it during lifetime by transfer, declaration, or designation; whereas, a testator when making a will does not need to transfer any assets or create any beneficial interests during lifetime. Further, a settlor can create a revocable trust that grants the trustee the power to make irrevocable gifts during the settlor’s lifetime or incapacity.

The reason given in the uniform act for choosing the capacity to make a will is:

The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor’s death. To solidify the use of the revocable trust as a device for transferring property at death, the settlor usually also executes a pourover will. The use of a pourover will assures that property not transferred to the trust during life will be combined with the property the settlor did manage to convey. Given this primary use of the revocable trust as a device for disposing of property at death, the capacity standard for wills rather than that for lifetime gifts should apply.

In order to make a will under Florida law, the testator must be of “sound mind” and have attained the age of eighteen or be an emancipated minor.

131. Id. at cmt. a.
133. A settlor may grant the trustee the discretion to make distributions to other beneficiaries, such as the settlor’s children, during the settlor’s lifetime. See also I.R.C. § 2035(e).
135. Fla. Stat. § 732.501. Further, funding a trust during lifetime requires the application of non-trust law, such as corporate and securities law when transferring stocks, real estate law when transferring real estate, and those laws may require additional capacity to effectuate
Thus, in order for a settlor to create a revocable trust, the settlor must be an adult or an emancipated minor, who is of sound mind. Generally, for wills:

[b]y “sound mind” is meant the ability of the testator to “to mentally understand in a general way the nature and extent of the property to be disposed of, and the testator’s relation to those who would naturally claim a substantial benefit from the will, as well as a general understanding of the practical effect of the will as executed.”

This definition must be adapted to a revocable trust. One possible way to adapt the definition would be to require the settlor to mentally understand in a general way the nature and extent of the property that the settlor could dispose of by will or trust and the settlor’s relation to those who would naturally claim a substantial benefit from his or her estate by will or intestacy, as well as a general understanding of the practical effect of the will—or intestacy—and the trust as executed.

In most cases, when a settlor creates a revocable trust, he or she is also executing a pourover will—a will that devises the residuary estate to the

those transfers; unless section 736.0601 of the Florida Statutes is construed as superseding any other capacity requirement for transfers of property in trust.

136. In re Wilmott’s Estate, 66 So. 2d 465, 467 (Fla. 1953) (quoting Newman v. Smith, 82 So. 236, 241 (Fla. 1918)). In deciding the test for capacity, the Supreme Court of Florida also quoted a New York opinion that used an expanded definition of testamentary capacity—“sound mind and memory”:

We have held that it is essential that the testator has sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must, in the language of the cases, have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them. A testator who has sufficient mental power to do these things is, within the meaning and intent of the statute of wills, a person of sound mind and memory, and is competent to dispose of his estate by will.

Newman, 82 So. at 248 (quoting Delafield v. Parish, 25 N.Y. 9, 29 (1862)); see also Hamilton v. Morgan, 112 So. 80, 82 (Fla. 1927) stating:

If the testator comprehends perfectly the condition of his property, his relation to those who would, should, or might have been the objects of his bounty, the scope and effect of his will, which comprehends sufficient active memory to collect voluntarily in his mind the complexities of the business to be transacted and keep them in mind long enough to perceive their relation to each other, and to form a rational judgment in relation to them, he is said to have mental capacity.

Hamilton, 112 So. at 82.

137. See In re Wilmott’s Estate, 66 So. 2d at 467 (quoting Newman, 82 So. at 241). See also RESTATEMENT OF PROPERTY (THIRD): WILLS AND DONATIVE TRANSFERS § 8.1(b) (2003).
trustees of the revocable trust. In order for the testator to have the requisite capacity to execute the pourover will, the testator must have a general understanding that his or her estate will be distributed pursuant to the provisions of his or her will and revocable trust—which would include the testamentary aspects of the revocable trust. Thus, the capacity required to create a revocable trust should be the same as the capacity to execute a will that contains a devise that pours over to that revocable trust, and the testator should have a general understanding of who will receive the estate and trust assets when the settlor dies. In some cases, the beneficiaries of the settlor’s will are different from the beneficiaries of the settlor’s revocable trust; so that in order for the settlor to have the capacity to create the revocable trust, the settlor should understand in a general way who will receive the trust assets when the settlor dies. In other cases, the settlor may add property to an existing revocable trust that the settlor created, or may withdraw property from it without revoking or changing his or her will. In such cases, being of sound mind should include the settlor having a general understanding of the effect on such property.

When a settlor creates a revocable trust and acts as the sole trustee and the sole beneficiary during his or her lifetime, the effect of the trust is the same as a will—no one else really benefits from the trust until the settlor’s death. Thus, it is not as important that the settlor have a capacity greater than testamentary capacity. If however, the settlor is creating the trust so that a third party trustee will be responsible for managing the assets and making distributions for the benefit of the settlor or others, then it is important that the settlor understand the provisions of the trust during his or her lifetime, including whether the trustee can make irrevocable gifts from the trust. Further, if the settlor includes provisions in the event of the settlor’s incapacity as an alternative to guardianship, regarding who will serve as trustee and the trustee’s administrative and distributive powers during the settlor’s lifetime, it is important that the settlor understand the choices he or she is making. This would require a capacity greater than testamentary capacity. If the settlor lacks this additional capacity, the revocable trust would not be invalid; however, it might require the appointment of a guardian to review the actions of the trustee and determine whether to exercise the settlor’s

138. See Fla. Stat. § 732.513. See also supra text accompanying note 134. A pourover will is a misnomer because the will may contain other devises and provisions in addition to the residuary, pourover devise. Alternatively, a will could contain a specific, demonstrative, or general devise that pours over to a revocable trust, with a residuary devise to another devisee.

139. This raises a question as to the capacity required to serve as trustee: What capacity does one need to serve as trustee?
powers of amendment for the benefit of the settlor. If the settlor becomes incapacitated, and a guardian is appointed for the settlor's property, the guardian may petition to amend the trust for the settlor's benefit during the settlor's lifetime in the event the guardian believes that the existing provisions are not in the best interest of the settlor; and the settlor's capacity at the time of the creation of the trust may factor into whether a court will authorize the amendment. 140

It is clear that the settlor should have the capacity to make a will in order for the testamentary aspects of the trust to be valid, because these provisions substitute for provisions in a will. On the other hand, it is arguable that to protect settlors, the legislature should require a higher standard of capacity in order for the settlor to be able to transfer assets to a revocable trust during the settlor's lifetime, and for the provisions of the trust to be effective during the settlor's lifetime.

2. Intent to Create Revocable Trust

In order to create a revocable trust, the settlor must have the intent to create the trust and must indicate that intent. 141 This requirement is the same for all types of trusts, with no special requirements for revocable trusts. In most cases, the intent to create a revocable trust will be expressed in a written trust instrument.

3. Purpose of Revocable Trust

In order to create a revocable trust, the trust must have a lawful purpose that is possible to achieve and not contrary to public policy. 142 This lawful purpose may be a private or a charitable purpose. 143 Most revocable trusts are private trusts, benefitting the settlor exclusively during the settlor's

140. See Fla. Stat. § 744.441(19) (granting the power to "[c]reate or amend revocable trusts" but not mentioning revocation); see also Fla. Stat. § 744.441(2) (granting a guardian the power to exercise "any powers as trustee . . . that the ward might have lawfully exercised . . . if not incapacitated, if the best interest of the ward requires such . . . exercise"). However, it is difficult to understand how an incapacitated ward could have the power to act as trustee or how the ward's guardian would be able to exercise the ward's power as trustee. Generally, the trust would provide for a different trustee in the event the settlor becomes incapacitated. See also Fla. Stat. § 736.0704(1)(f) (regarding the vacancy that occurs when a "trustee is adjudicated to be incapacitated"). See also text accompanying infra notes 311-14 regarding these powers.

141. See Fla. Stat. § 736.0402(1)(b).

142. Fla. Stat. § 736.0404; see, e.g., Fla. Stat. § 736.0409(1); see also Restatement (Third) of Trusts § 27 (2003).

143. See Fla. Stat. § 736.0405(1).
lifetime and then providing for other individuals after the settlor’s death; however, the settlor may also provide for distributions to charitable beneficiaries or for charitable purposes. In some cases, the trust instrument will state its purpose; however, the purposes of a revocable trust may be discerned from the administrative and distribution provisions of the trust.  

A revocable trust can be created for a number of different purposes. For example, 1) it may be created to provide for distribution of trust assets upon the settlor’s death as a substitute for a devise by will, with potentially more privacy than may be provided by a will; 2) it may be created to provide for fiduciary management of the settlor’s assets when the settlor designates a trustee other than the settlor to serve for this purpose; 3) it may be created to provide for the settlor in the event of the settlor’s incapacity and provide a viable alternative to a guardian, appointing a trustee to administer the trust assets and distribute them for the benefit of the settlor; or 4) it may be used in lieu of a testamentary trust, with the trust continuing after the settlor’s death. Thus, a revocable trust may be created for asset management during lifetime or incapacity and as a substitute for a devise by will, providing an alternative to a guardianship and providing for trust administration rather than probate of assets. It also may be created to hold non-Florida real property and avoid the need for an ancillary administration in another state or jurisdiction.

In order to create a trust, the “trust and its terms must be for the benefit of its beneficiaries.” Although this requirement applies on its face to all trusts, and thus to revocable trusts, it should be qualified by the fact the terms of the trust are subject to the settlor’s right to amend or revoke the trust and any other rights retained by the settlor. Further, it should be qualified by the law that during the settlor’s lifetime, the trustee of a revocable trust only owes duties to the settlor.

B. Trust Res and Formalities for Creation of Revocable Trust

The general rule that a trust requires a res—trust property—applies to revocable trusts with certain liberal exceptions. The formalities required
for the creation and implementation of a revocable trust depend on the type of property being held in trust and the distributive provisions of the trust.  

1. Res and Funding of Revocable Trusts

The creation of a revocable trust requires a res. That res may consist of real property, tangible personal property, or intangible personal property; and the res may include the right to receive life insurance proceeds payable on the settlor's death. If a revocable trust has a res, the validity of the trust will not be affected by the fact that the settlor has "the power to add to, or withdraw from, the trust all or any part of the principal or income at one time or at different times."  

Funding a revocable trust may be accomplished by a transfer, declaration, or designation. The settlor may transfer the property to the trustee of the revocable trust during the settlor's lifetime; or if the settlor is the sole trustee of the revocable trust, the settlor may declare that he or she holds the property in trust. Alternatively, the settlor may fund a revocable trust by exercising a power of appointment during the settlor's lifetime. In addition, the settlor may fund a revocable trust by designating the trustee as a beneficiary to receive life insurance proceeds or other assets or benefits payable on the death of the settlor. Further, a statutory exception allows a testator to fund a revocable trust instrument at death by devising property to the trustees if the trust instrument is in writing and was in existence when the will was executed, or was subscribed concurrently with the execution of the will. A settlor also may fund a revocable trust by exercising a power of appointment by will.  

Florida adopted the rules from the UTC regarding the manner by which a trust can be created. The comments to the UTC acknowledge that

151. Fla. Stat. § 689.075(1).
152. Fla. Stat. § 733.808(1).
156. Fla. Stat. § 736.0401(2).
"[u]nder the methods specified for creating a trust in this section, a trust is not created until it receives property." Further the comments state:

A revocable designation of the trustee as beneficiary of a life insurance policy or employee benefit plan has long been understood to be a property interest sufficient to create a trust. . . . Furthermore, the property interest need not be transferred contemporaneously with the signing of the trust instrument. A trust instrument signed during the settlor’s lifetime is not rendered invalid simply because the trust was not created until property was transferred to the trustee at a much later date, including by contract after the settlor’s death. A pourover devise to a previously unfunded trust is also valid and may constitute the property interest creating the trust.

When the settlor wants to serve as the sole trustee, the settlor does not need to transfer the title to the settlor as trustee because the settlor already owns the property. Instead, the settlor can declare that he or she is serving as trustee, and this declaration can result in the settlor transferring the beneficial interests in the property, retaining only the legal title. In the case of a revocable trust where the settlor is the sole beneficiary and trustee during the settlor’s lifetime, this results in the settlor transferring only the future equitable interests, and that transfer is subject to the settlor’s right of revocation. Although a settlor who is the trustee may create the trust by declaration rather than transfer, it is better to change the title to the name of the settlor as trustee in order to avoid a dispute when the settlor dies as to whether these assets are part of the probate estate or are trust assets. The comments to the UTC note:

A trust created by self-declaration is best created by reregistering each of the assets that comprise the trust into the settlor’s name as trustee. However, such reregistration is not necessary to create

162. **UNIF. TRUST CODE § 401 cmt.** (amended 2005) ("For what constitutes an adequate property interest, see Restatement (Third) of Trusts Sections 40-41 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 74–86 (1959).")

163. **UNIF. TRUST CODE § 401 cmt.** (internal citation omitted) ("See Unif. Testamentary Additions to Trusts Act Section 1 (1991), codified at Uniform Probate Code Section 2-511 (pourover devise to trust valid regardless of existence, size, or character of trust corpus). See also Restatement (Third) of Trusts Section 19 (Tentative Draft No. 1, approved 1996).")

164. **FLA. STAT. § 736.0401(2).**

165. **See, e.g., In re Estate of Pearce, 481 So. 2d 69, 70–71 (Fla. 4th Dist. Ct. App. 1985)** (where settlor declared herself trustee of stock; however, title to the stock was not transferred to her name as trustee).
the trust. A declaration of trust can be funded merely by attaching a schedule listing the assets that are to be subject to the trust without executing separate instruments of transfer. But such practice can make it difficult to later confirm title with third party transferees and, for this reason, is not recommended.\textsuperscript{166}

Not all assets may be transferred to a trust, and not all assets that can be held in trust should be held in a revocable trust. Some laws or agreements prohibit certain types of assets from being held in trust. For example, interests in professional service corporations may only be owned by licensed professionals and may not be held in trust.\textsuperscript{167} Further, the owners of interests in other entities, such as corporations, limited liability companies, or partnerships, may have entered into agreements that restrict the ownership or transfer of the interests, prohibiting them from being held in trust. Alternatively, they may have entered into agreements that allow a transfer on an interest only with the prior consent of the other owners, and the other owners may be unwilling to consent to a transfer in trust.

Some assets may have special exemptions, benefits, restrictions, or uses that make it inadvisable to transfer them to a trust because it may limit the settlor’s planning opportunities or it may jeopardize the exemption or complicate the process of claiming it. Assets that require special consideration include homestead real property and tangible personal property, including exempt personal property.\textsuperscript{168} These special types of property are discussed in Section III.B.2. The settlor also may want to retain certain assets in his or her individual name for psychological reasons. The settlor might not want to be reminded of the settlor’s mortality or potential for incapacity on a frequent basis, and this might occur if the settlor is the trustee and holds assets in trust, such as a bank account that is used frequently.

A settlor may choose to keep funds in a bank account in the settlor’s name so that the settlor has ready access to those funds without making any request of the trustee, or if the settlor is the trustee, without complying with any trust formalities. In addition, the settlor may choose to own his or her car, furniture, jewelry, and other tangible personal property in his or her sole name, outside of the trust. The settlor also may choose to own his or her home outright, or if married, in a tenancy by the entirety. Further, the settlor

\textsuperscript{166} \textit{UNIF. TRUST CODE} § 401 cmt. (internal citation omitted) (amended 2005) ("See, e.g., \textit{In re} Estate of Heggstad, 20 Cal. Rptr. 2d 433 (Cl. App. 1993); Restatement (Third) of Trusts Section 10 cmt. e (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 17 cmt. a (1959).”).

\textsuperscript{167} \textit{See} FLA. STAT. § 621.09(1) (quoted in \textit{supra} note 54).

\textsuperscript{168} \textit{See} FLA. CONST. art. X, § 4(a); FLA. STAT. § 732.402.
may choose to own life insurance policies in his or her own name and designate the trustee as the beneficiary of the policy, if the trust is to continue after the settlor's death. In addition, the settlor may choose to own his or her business outright and not transfer business interests to a revocable trust, especially when the settlor actively and materially participates in that business. This then leaves the settlor with investment assets, usually intangibles (e.g., stocks, bonds, certificates of deposit, treasury instruments), that the settlor may choose to transfer into a revocable trust.

2. Special Types of Property

a. Homestead Real Property

Homestead ownership in Florida has many advantages and certain restrictions. It is questionable whether transferring homestead property to the trustee of a revocable trust creates any additional advantages, and in some cases, it may create problems.

A homestead that is owned by a natural person consisting of real estate that does not exceed certain acreage requirements is exempt from the owner's creditors' claims because liens may not attach to the homestead, and the property may not be subject to forced sale by judicial process.\(^\text{169}\) Notwithstanding, the homestead can be subject to forced sale and liens, such as mechanics liens, that can attach with respect to: 1) property taxes and assessments on the homestead; 2) "obligations contracted for the purchase, improvement, or repair thereof"; 3) "obligations contracted for house, field, or other labor performed on the realty;" and 4) federal taxes.\(^\text{170}\) Further, a homestead may be subject to foreclosure in the event of a default when there is a validly executed mortgage—joined by the owner's spouse if married.\(^\text{171}\)

The Florida Constitution does not provide any dollar limitation on the exemption for homestead realty; however, Congress has attempted to impose a dollar limitation on the Florida constitutional exemption in bankruptcy when the debtor has not satisfied a sufficient period of residency in Florida prior to acquiring the interest in the homestead.\(^\text{172}\) The Florida Constitution

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\(^{169}\) FLA. CONST. art. X, § 4.


\(^{171}\) See FLA. CONST. art. X, § 4(c).

\(^{172}\) See 11 U.S.C. § 522(p)(1) (2006); see also In re Landahl, 338 B.R. 920 (Bankr. M.D. Fla. 2006). There is, however, a constitutional objection to this provision of the Bankruptcy Code.
does limit the exemption by acreage. The exemption is limited to a maximum of one-half an acre within a municipality and a maximum of 160 contiguous acres outside a municipality. While an urban homestead is “limited to ‘the residence of the owner or the owner’s family,’” a rural homestead may include improvements used in a business, such as a working farm.

The Florida Constitution provides restrictions on the owner’s right to alienate or devise homestead property. A married owner may not mortgage, sell, give, or otherwise alienate the homestead without the joinder of the spouse. An owner may not devise the homestead if survived by a minor child, and if the owner is married, the surviving spouse will receive a life estate in the home and the owner’s descendants will receive a vested remainder, per stirpes. If the owner is not married but is survived by a minor child, all of the owner’s descendants will receive the homestead, per stirpes. A married owner who is not survived by a minor child may devise all of the owner’s interest in the homestead to his or her surviving spouse by the use of a specific or residuary devise. When the owner dies, if the homestead is devised or passes by law to the deceased owner’s spouse or heirs, i.e. any person within the class of persons who could inherit under

174. Id.
175. Davis v. Davis, 864 So. 2d 458, 458, 460 (Fla. 1st Dist. Ct. App. 2003) (the decedent’s homestead included acreage, outside a municipality, that did not exceed 160 acres and that included his residence and contiguous land on which the decedent operated a mobile home park for rental income).
176. See FLA. CONST. art. X, § 4(c).
177. Id.
178. Id.
179. FLA. STAT. § 732.401(1). Proposed legislation would allow the spouse to elect to receive an undivided one-half interest in the homestead, as a tenant in common with the lineal descendants, in lieu of the life estate. See Fla. SB 1544 (2010) (identical to HB 1237).
180. FLA. STAT. §§ 732.401(1), .103(1).
181. FLA. CONST. art. X, § 4(c); see In re Estate of Finch, 401 So. 2d 1308, 1309 (Fla. 1981) (holding a married testator with two adult daughters could devise the homestead to his spouse or allow his spouse to receive a life estate with the testator’s daughters receiving the vested remainder, but could not devise a life estate to his spouse and the vested remainder to only one of the daughters); see also Estate of Murphy, 340 So. 2d 107, 108–09 (Fla. 1976) (holding a testator survived by a spouse and an adult son could devise his homestead, acquired after the execution of his will, to his spouse by a specific or a residuary devise). In Murphy, the court stated: “Unquestionably a specific devise is to be preferred, but in the absence of a specific devise, we conclude that the general language of a residuary clause is a sufficiently precise indicator of testamentary intent.” Murphy, 340 So. 2d at 109.
intestacy, then the exemption—from the deceased owner’s creditors—inures to those persons. Under such circumstances, the homestead is considered a “protected homestead” for purposes of the Florida Probate Code. By contrast, if the homestead is lawfully devised to a friend or other person who could not inherit from the decedent under any circumstances, then the homestead is not protected from the decedent’s creditors because the exemption does not inure to the benefit of the devisee.

When the homestead is a protected homestead, the personal representative does not take possession or control of it, and the protected homestead is exempt from the apportionment of any estate taxes. The probate court has jurisdiction to determine if property is a protected homestead, and there are procedures and forms to petition the court for this determination. Further, the probate court has jurisdiction to apportion the tax on the homestead. When a person owns property outright, the probate process is available to establish homestead status so that the benefit of the exemption can inure to the surviving spouse and heirs. Thus, although protected homestead is not subject to probate, it can benefit from the process. By contrast, when ownership of the homestead is transferred to the trustee of a revocable trust, an action would be required in the general division of the circuit court rather than in the probate division to determine the homestead status of the property when the settlor dies. Further, the general rules of

182. Snyder v. Davis, 699 So. 2d 999, 1000, 1003 (Fla. 1997) (applying the “class definition” rather than the “entitlement definition,” holding that: “the word ‘heirs,’ when determining entitlement to the homestead protections against creditors, is not limited to only the person or persons who would actually take the homestead by law in intestacy on the death of the decedent,” and that instead, “the constitution must be construed to mean that a testator, when drafting a will prior to death, may devise the homestead (if there is no surviving spouse or minor children) to any of that class of persons categorized in section 732.103 (the intestacy statute”).

183. FLA. CONST. art. X, § 4(b); Snyder, 699 So. 2d at 1000.

184. FLA. STAT. § 731.201(33).

185. See FLA. CONST. art. X, § 4(b). The exemption would inure to the decedent’s heirs; however, they would not benefit from the exemption because they did not also receive the property.

186. FLA. STAT. § 733.607(1).

187. FLA. STAT. § 733.817(2); see also FLA. STAT. § 733.817(5)(c). If the owner dies in a year when there is no federal or Florida estate tax, the issue of tax apportionment is moot.

188. See FLA. PROB. R. 5.405. See generally, FLA. CONST. art. V, §§ 5, 7. See also In re Noble’s Estate, 73 So. 2d 873 (Fla. 1954).

189. FLA. STAT. § 733.817(7)(b).

190. See FLA. PROB. R. 5.405(c).

191. The rules of the Florida Probate Court regarding protected homestead apply to “homestead real property owned by the decedent.” FLA. PROB. R. 5.405(a).
A homestead may be owned by a husband and wife as tenants by the entireties and qualify for the homestead exemption from creditors during their lifetimes in addition to the exemption provided by entireties ownership. Further, when the first spouse dies, the surviving spouse will be the surviving sole owner, even if the deceased spouse had a minor child. Many married couples choose entireties ownership for homestead. Entireties ownership allows the spouse to avoid the effect of the prohibition against devise when there is a minor child. By contrast, if one spouse owned the homestead and transferred it to a revocable trust, the surviving spouse would not be entitled to the entire homestead if the settlor died survived by a minor child. Further, if both spouses owned the homestead and transferred it to a joint revocable trust, they would no longer own the homestead by the entireties even if they were both settlors and trustees of the trust and even if they were the only beneficiaries during their lifetime.

If the settlor transfers his or her homestead to a revocable trust, it makes it more complicated to identify the settlor's interests in the homestead and to determine whether those interests qualify for the exemption from the settlor's creditors during lifetime. To the extent the settlor has created a remainder interest in the homestead, even though the interest is contingent on the settlor's death and subject to revocation by the settlor, that equitable future interest is not the settlor's homestead; however, it can be protected from creditors of the remainder beneficiaries by a spendthrift provision. To the extent the settlor retains rights and interests as the settlor or the beneficiary of the trust and the home is the residence of the settlor or the settlor's family, those equitable interests should qualify for the homestead creditor exemption and the Florida courts and most bankruptcy courts agree. One bankruptcy

192. FLA. STAT. § 736.0201(1).
193. See FLA. CONST. art. X, § 4(c); FLA. STAT. § 732.401(2).
194. See Aetna Ins. Co. v. LaGasse, 223 So. 2d 727, 729 (1969) ("By great weight of precedent a claim of homestead may not attach to either vested or contingent future estates or interests in land, because a remainder expectant upon cessation of a preceding estate creates no present right to possession . . . ." (quoting Anemia v. Martin-Senour Co, 114 So. 2d 23, 27 (Fla. 2d Dist. Ct. App. 1959))). Generally, the remainder interests in a revocable trust are disregarded for purposes of determining if the homestead is exempt from the settlor's creditors during the settlor's lifetime or if the settlor is subject to the constitutional restriction on devise upon death. See, e.g., FLA. STAT. § 732.401(1), (2); Johns v. Bowden, 66 So. 155, 159 (Fla. 1914); Engelke v. Estate of Engelke, 921 So. 2d 693, 696–97 (Fla. 4th Dist. Ct. App. 2006); In re Estate of Johnson, 397 So. 2d 970, 973 (Fla. 4th Dist. Ct. App. 1981).
195. See generally FLA. STAT. §§ 736.0501–0504.
opinion even allowed the exemption for homestead real estate transferred to the trustee of a revocable trust when the trust instrument contained land trust language that the beneficial interests in the trust were personal property;\(^{197}\) however, this is not advisable to do because the unlimited homestead exemption only applies to real estate. Another bankruptcy opinion held that a homestead in a revocable trust did not qualify for the Florida exemption from creditors because it was not owned by a natural person.\(^{198}\) Thus, the transfer of homestead property to a revocable trust creates a risk in bankruptcy that the exemption may be questioned and that an appeal may be required in order to gain the benefit of the exemption.

If a settlor transfers his or her homestead to the trustee of a revocable trust, the homestead will be subject to the restrictions on inter vivos alienation and devise, so that the trustee cannot alienate it without joinder of the beneficial owner’s spouse, if married.\(^{199}\) Further, if the owner is survived by a minor child, the owner cannot devise the homestead.\(^{200}\) The provisions of a revocable trust cannot provide for the distribution of the homestead when the settlor dies survived by a minor child, and the homestead will pass by statute rather than by will or trust provision.\(^{201}\) The owner’s descendants—including adult and minor children—will receive a vested remainder in the homestead, per stirpes, if the owner’s spouse survives, or all of the homestead by intestacy if there is no surviving spouse.\(^{202}\)

The Supreme Court of Florida has held that an owner of homestead cannot use a revocable trust to avoid the constitutional restrictions on devise,\(^{203}\) and the Florida Legislature has enacted legislation that assumes the converse—that a settlor can dispose of homestead as and to the extent permitted by the constitution through the testamentary aspects of a revocable trust.

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197. See In re Cocke, 371 B.R. 554, 557–58 (Bankr. M.D. Fla. 2007) (following Engelke even though the trust agreement provided that the beneficial interests in the trust were personal property).
198. Crews v. Bosonetto (In re Bosonetto), 271 B.R. 403, 407 (Bankr. M.D. Fla. 2001). It is unclear from the opinion whether the trustee was an individual or a corporate fiduciary; however, the decision used entity language for a trust rather than looking at the beneficial or equitable ownership of the homestead stating: “This Court finds that the Trust does own the Florida property by the express terms of the Trust or, alternatively, under a resulting trust and because a trust is not a natural person, Defendant Bosonetto may not claim the Florida property is covered by the homestead exemption.” Id.
199. See FLA. CONST. art. X, § 4(c); see also FLA. STAT. § 732.4015.
200. FLA. CONST. art. X, § 4(c).
201. See FLA. STAT. § 732.4015(1)–(2). The will or trust provisions disposing of the homestead at death will be void if the Florida Constitution prohibits devise of the homestead.
202. FLA. CONST. art. X, § 4(c); FLA. STAT. §§ 732.401(1), .103(1).
203. See Johns v. Bowden, 66 So. 155, 159 (Fla. 1914); see also In re Estate of Johnson, 397 So. 2d 970, 973 (Fla. 4th Dist. Ct. App. 1981).
The Florida Constitution permits a married testator to devise his or her homestead to his or her surviving spouse if the testator is not survived by a minor child. The Florida Probate Code provides that a married testator can "devise" homestead to a surviving spouse by reason of a provision in a revocable trust, defining a devise to include "a disposition by trust of that portion of the trust estate which, if titled in the name of the grantor of the trust, would be the grantor’s homestead." The usual meaning of the term "devise" refers to a disposition by will, not by inter vivos trust; however, the general definition of the term "devise" has been expanded under the Florida Probate Code to mean "to dispose of real or personal property by will or trust" when the term is "used as a verb." Thus, the term "devise" under the Florida Probate Code would include the testamentary aspects of a revocable trust. Whether the legislature has the authority to expand the definition of a devise for purposes of the Florida Constitution is a separate question; however, it would appear that the persons who would contest the constitutionality of these provisions of the Florida Probate Code would be adult children of the testator or descendants of deceased children who would be entitled to a vested remainder in the homestead if the testator did not devise the homestead to the spouse as permitted by the constitution. Given the fact that a settlor must have testamentary capacity to create a revocable trust and that the testamentary aspects of a revocable trust must be executed with the formalities required for a will, the Supreme Court of Florida might agree that the disposition of the settlor’s homestead to the settlor’s surviving spouse should be considered a devise within the meaning of the constitution when the homestead is to pass to the surviving spouse by a specific or residuary distribution from the trust. If the trust disposition were held to be invalid, the homestead would pass by statute, with the spouse receiving a life estate and the descendants receiving a vested remainder,

204. FLA. STAT. § 732.4015(1)–(2).
205. FLA. CONST. art. X, § 4(c).
206. FLA. STAT. § 732.4015(2)(b).
207. Compare FLA. STAT. § 733.805 (regarding the order of abatement for intestacy and devises under wills), with FLA. STAT. § 736.05053(2)–(3) (regarding the order of abatement for trust distributions).
208. FLA. STAT. § 731.201(10).
209. See FLA. CONST. art. X, § 4(c); FLA. STAT. §§ 732.401(1), .103(1).
210. See Estate of Murphy, 340 So. 2d 107, 109 (Fla. 1976) (permitting a married testator to devise homestead to the surviving spouse by a residuary devise in his will; although the court noted that "a specific devise is to be preferred"); see also City Nat’l Bank of Fla. v. Tescher, 578 So. 2d 701, 703 (Fla. 1991) (applying a state statute allowing a spouse to waive homestead rights to determine whether a testator was treated as being survived by a spouse for purposes of the constitution).
unless the testator’s will also devised any interest the settlor might have at
the time of death in his or her homestead to the testator’s surviving spouse.211

The Florida Constitution provides a homestead tax exemption and dis-
count in addition to the creditor exemption, additional benefits for home-
steads that qualify for the tax exemption, such as the Save Our Homes (SOH)
amendment that limits annual increases for homestead property and portabil-
ity provisions.212 Further, the Florida Legislature has expanded some of the
tax benefits for homesteads213 and provided the general law for determining
when a change in ownership requires assessment at just value and not at the
lower SOH amount.214 In many cases, the SOH limits on assessments and
the veterans’ discounts and exemptions save much more in taxes than the
general homestead tax exemption.215

The Florida Constitution provides a homestead tax exemption for a
“person who has the legal or equitable title to real estate and maintains
thereon the permanent residence of the owner, or another legally or naturally
dependent upon the owner,”216 and the Florida Legislature has declared that a
person has “‘equitable title to real estate’” “where the person’s possessor
right in such real property is based upon an instrument granting to him or her
a beneficial interest for life.”217

211. See Fla. Stat. § 732.4015(1); Fla. Stat. § 732.401(1). Thus a devise in the will
that parallels the trust distribution of the homestead could save an invalid trust provision.
213. See, e.g., Fla. Stat. § 196.031 (entitled “Exemption of homesteads”); § 196.041
(entitled “Extent of homestead exemptions”); § 196.071 (entitled “Homestead exemptions;
claims by members of armed forces”); § 196.075 (entitled “Additional homestead exemption
for persons 65 and older”); § 196.081 (entitled “Exemption for certain permanently and totally
disabled veterans and for surviving spouses of veterans”); § 196.082 (entitled “Discounts for
disabled veterans”); § 196.091 (entitled “Exemption for disabled veterans confined to wheel-
chairs”); § 196.101 (entitled “Exemption for totally and permanently disabled persons”).
215. Compare Fla. Const. art. VII, §§ 4(e), 6(c), and Fla. Stat. §§ 193.155, 196.071–
.091, 101, with Fla. Const. art. VII, § 6(a)–(d), and Fla. Stat. § 196.031.
216. Fla. Const. art. VII, § 6(a) (emphasis added); see also Fla. Const. art. VII, § 6(d)
( authorizing counties and municipalities to provide an additional exemption up to $50,000 “to
any person who has the legal or equitable title to real estate and maintains thereon the perma-
nent residence of the owner and who has attained age sixty-five and whose household income,
as defined by general law, does not exceed twenty thousand dollars,” subject to cost-of-living
adjustments).
217. Fla. Stat. § 196.041(2). The Florida Administrative Code provides:

[t]he beneficiary of a passive or active trust has equitable title to real property if he is entitled
to the use and occupancy of such property under the terms of trust; therefore, he has sufficient
title to claim homestead exemption. . . . Homestead tax exemption may not be based upon resi-
dence of a beneficiary under a trust instrument which vests no present possessory right in such
beneficiary.
The Florida Constitution also grants a discount for a veteran “age 65 or older who is partially or totally permanently disabled,” for “homestead property the veteran owns and resides in,” with the discount based on the percentage of his or her disability, without any reference to equitable or legal title. Further, one of the legislative provisions exempting certain veterans from taxation applies for “real estate that is owned and used as a homestead by a veteran” and allows the exemption to carry over to the surviving spouse who “holds the legal or beneficial title to the homestead and permanently resides thereon.” Another provides that “real estate used and owned as a homestead by an ex-servicemember ... with a service-connected total disability ... requiring specially adapted housing and required to use a wheelchair for his or her transportation is exempt from taxation” and allows the exemption to pass to the surviving spouse if the spouses owned the homestead “as an estate by the entirety.” Thus, a transfer in trust of homestead property may jeopardize a disabled veteran’s homestead tax exemption or discount, and may affect the rights of certain surviving spouses. Further,
changes in ownership may result in the assessed value of the homestead increasing to just value.221 The Save Our Homes Amendment (SOH) and the Portability Amendment save taxes when the homestead is assessed based on the value when purchased—or when the amendment became effective—plus a maximum percentage increase, rather than the just value when greater.222 The benefit of the SOH amendment can be lost when there is a change in ownership,223 although the purpose of the Portability Amendment is to transfer some of that benefit to a new homestead.224 The Florida Legislature has promulgated laws with respect to what constitutes a change of ownership, which may include “transfer of legal title or beneficial title in equity,” and provides which changes in ownership will not trigger reassessment of the homestead’s value for tax purposes.225 Generally, transfers between legal and equitable title are allowed when the same person is entitled to the exemption before and after the transfer, and transfers between spouses during life or on death are allowed as well as some transfers by operation of law on death.226

221. See Fla. Stat. § 193.155(3).
226. Fla. Stat. § 193.155(3). Reassessment at just value is not required if a change of ownership does not occur. A change of ownership does not occur when the homestead is transferred upon the owner’s death to his or her surviving spouse. Fla. Stat. § 193.155(3)(b) (“There is no change of ownership if... [t]he transfer is between husband and wife, including a transfer to a surviving spouse.”). See Fla. Const. art. X, § 4(c) (allowing an owner to devise to his or her spouse if there is no surviving minor child). A change of ownership also does not occur if the homestead passes to the surviving spouse or descendants, or both, by operation of law when the owner is prohibited from devising the homestead or failed to devise it as permitted by law. Fla. Stat. § 193.155(3)(c) (“There is no change of ownership if... [t]he transfer occurs by operation of law under [section] 732.4015.”). Florida Statutes section 732.4015(1) prohibits devise as provided by the Florida Constitution when “the owner is survived by a spouse or a minor child or minor children [with the limited exception that] the homestead may be devised to the owner’s spouse if there is no minor child or minor children.” When the owner is survived by a spouse or minor child, and the homestead cannot be devised or is not devised to the spouse when permitted by law, it passes by operation of law, with a life estate to the surviving spouse and a vested remainder to the descendants, or if both do not survive, the homestead will pass to either surviving spouse or the descendants. Fla. Stat. §§ 732.102–103, .401(1), .4015. There is a proposal to make the operation of law exception a constitutional one when the spouse, child, or grandchild inherits the homestead and makes it his or her own homestead and a proposal to limit the exception so that it applies only when the homestead passes by operation of law to the surviving spouse or a minor child or children. See Florida Senate Joint Resolution 112 for a proposed amendment to Article VII, section 4 of the Florida Constitution, and Florida Senate Bill 1884 for a proposed amendment to section 193.155 of the Florida Statutes. Fla. SJR 112 (2010); Fla. SB 1884 (2010).
Because of these benefits, particularly the SOH amendment and portability provisions, and the exemptions and discounts for disabled veterans and their surviving spouses, ownership of homestead is very important. Not all transfers in trust will qualify for these benefits. Before homestead property is to be transferred to a revocable trust, these laws should be reviewed to determine whether the transfer will affect the exemption, discount, or other benefits.

Although homestead property may be transferred to the trustee of a revocable trust, it may be better for the settlor to own the homestead outright in order to preserve the full benefit of the creditor and tax exemptions, during lifetime and upon death, and to take advantage of the probate process to determine protected homestead status. 227 In addition, transfers of real property may create title insurance issues that can be avoided by maintaining outright ownership until death.

b. **Tangible Personal Property, Including Exempt Property**

Tangible personal property may be held in trust, but it may not be the type of asset that adapts to ownership by a trustee for the use of beneficiaries, even if the settlor is the sole trustee and sole beneficiary during lifetime. From a practical perspective, it may be difficult to separate the legal and equitable ownership of the property and impose the obligations of legal ownership on a trustee in any meaningful way when the settlor or the beneficiary has the physical possession and use of the property. Further, it is unclear whether the transfer to the trust will have any positive benefits.

An individual may own tangible personal property that he or she wants to give to different people when he or she dies, without having to list them in a will and without having to make a codicil in order to change the list to add or remove items or change beneficiaries. Florida law would allow the testator to own and use jewelry or other items or collections of tangible personal property and to keep a list of the persons to receive them when the testator dies. 228

The Florida Probate Code allows an individual to keep a separate written statement that disposes of items of tangible personal property without complying with the formalities required for a will, provided the testator’s will refers to a written statement or list, the writing is signed by the testator and describes “the items and the devisees with reasonable certainty,” and the

property is not used in a trade or business. The list does not need to be in existence when the will is made, nor must it be incorporated by reference, and the testator can change the list after the will is made. The list need not have any independent significance—"significance apart from its effect upon the dispositions made by the will"—and it need not be witnessed like a will. If the testator kept more than one list, the most recent one prevails "to the extent of any conflict." If the testator made a list, which conflicts with the will because the will specifically devises property included in the list, the will prevails even if the list was made after the will was executed.

There is no statute for tangible personal property held in trust that is comparable to section 732.515 of the Florida Statutes, and a settlor should not rely on the probate statute in order to keep a list to dispose of tangible personal property held in trust. If the settlor transfers items of tangible personal property to the trustee or declares that the settlor is holding these assets in trust, the trust instrument should contain provisions disposing of these assets when the settlor dies, and the settlor should sign the trust instrument with the formalities required for a will. If the trust instrument refers to a list made by the settlor disposing of these assets based on the assumption that the trust can be drafted like a will, and the list is signed but not properly witnessed, the list may be treated as an invalid testamentary aspect of the trust and the assets may pass as part of the residuary disposition of the trust or by will or intestacy, rather than to the persons in the list. If the list were in existence when the trust instrument was executed, the settlor could attempt to incorporate the provisions of the list into the trust instrument; however, there is no specific incorporation by reference statute for trusts.

It would appear that a settlor who owns tangible personal property held for personal use, such as jewelry, could transfer the property to the trustee of a revocable trust, and the settlor could retain the use and enjoyment of them during lifetime as the beneficiary of the trust. Title would need to be transferred to the trustee, or if the settlor were the trustee, the settlor could declare that the settlor was holding them in trust. The trustee's normal duties

229. Id. Compare with Florida Statutes section 732.512 regarding documents incorporated by reference in a will and documents with independent significance.
230. FLA. STAT. § 732.515.
231. Id. Compare with Florida Statutes section 732.502 regarding the formalities for executing a will.
232. FLA. STAT. § 732.515.
233. Id.
234. See FLA. STAT. § 736.0403(2)(b).
235. See id.
236. See FLA. STAT. § 736.0401(1), (2).
would apply; however, they would be owed exclusively to the settlor.\textsuperscript{237} Nevertheless, it would be difficult to see how a trustee could protect the assets while they were in the physical possession of the settlor. The trust instrument could provide for the disposition of the assets upon death if the trust were duly executed like a will.\textsuperscript{238} Alternatively, the settlor could choose to own items of tangible personal property and devise them by will, or dispose of them pursuant to a list referred to in his or her will without involving the formalities of a trust or subjecting a trustee to duties that are difficult to fulfill or lack meaning in context.\textsuperscript{239} Thus, although a settlor can transfer items of tangible personal property to a trust, it is generally better for the settlor to maintain ownership and control during lifetime and dispose of them by a will or a list. In the case of tangible personal property held by the settlor for investment, rather than personal use, the settlor may choose to transfer such property to a trust if the purpose of transferring them in trust is for fiduciary investment and management of assets. Further, if the settlor has a durable power of attorney, the attorney-in-fact may have the power to transfer tangible personal property to the trustee in the event the settlor becomes unable to manage his or her financial affairs.

If a settlor owns tangible personal property that could be exempt property when that person dies, the settlor may want to own these assets and not transfer them in trust to retain the potential exemption. Exempt property includes up to $20,000 in net value of “[h]ousehold furniture, furnishings, and appliances in the decedent’s usual place of abode . . . as of the date of death.”\textsuperscript{240} It also includes “two motor vehicles,” each of which does not weigh more than 15,000 pounds, “held in the decedent’s name and regularly used by the decedent or members of the decedent’s immediate family.”\textsuperscript{241} Also, there is no dollar limitation on automobiles as there is for furniture.\textsuperscript{242} The exemption applies if the decedent is survived by a spouse, or, if there is no surviving spouse, then to the decedent’s surviving children.\textsuperscript{243} The surviving spouse or children can claim the property as exempt if it is devised to them, or if it is not specifically devised to someone else,\textsuperscript{244} provided they

\begin{itemize}
\item \textsuperscript{237} \textsc{Fla. Stat.} \textsection{} 736.0603(1).
\item \textsuperscript{238} \textsc{Fla. Stat.} \textsection{} 736.0403(2)(b).
\item \textsuperscript{239} See \textsc{Fla. Stat.} \textsection{} 732.515.
\item \textsuperscript{240} \textsc{Fla. Stat.} \textsection{} 732.402(2)(a).
\item \textsuperscript{241} \textsc{Fla. Stat.} \textsection{} 732.402(2)(b). A motor vehicle is defined as “[a]ny self-propelled vehicle not operated upon rails or guideway, but not including any bicycle, motorized scooter, electric personal assistive mobility device, or moped.” \textsc{Fla. Stat.} \textsection{} 316.003(21).
\item \textsuperscript{242} \textsc{Fla. Stat.} \textsection{} 732.402(2)(a), (b).
\item \textsuperscript{243} \textsc{Fla. Stat.} \textsection{} 732.402(1).
\item \textsuperscript{244} \textsc{Fla. Stat.} \textsection{} 732.402(5). Technically, the property could be demonstratively devised to or away from the spouse or children. \textit{Id.} Demonstrative devises are rarely used, but
\end{itemize}
file a timely petition for determination of exempt property. The exempt property is exempt from all claims against the estate, except for debts secured by a “perfected security interest” on the property. Transferring these assets, such as furniture and furnishings, to a revocable trust could result in the loss of the exemption when the settlor dies. This is because the trustee of a revocable trust has an obligation to contribute trust assets to the personal representative in the event the residuary estate is insufficient. An exception exempts certain trust assets from this obligation, and that exception is for “property held or received by a trust to the extent that the property would not have been subject to claims against the decedent’s estate if it had been paid directly to a trust created under the decedent’s will or other than to the decedent’s estate.” This exception applies to life insurance paid to the trustee of a revocable trust because the life insurance proceeds would have been exempt if they had been paid to the trustees of a testamentary trust, to the beneficiaries of the revocable trust, or to a beneficiary other than the decedent’s estate. It does not appear to apply to property that would be exempt under section 732.402 of the Florida Statutes. Further, there is a probate procedure for determining the items and values of exempt property and ordering the personal representative to surrender the exempt property to the entitled spouse or children. Thus, it is beneficial to preserve this potential exemption and utilize the probate process to claim the exemption and to determine what property is exempt and who is entitled to it, rather than to transfer the property to a trust and risk the loss of the exemption and the probate process.

3. Written and Oral Revocable Trusts—Formalities and Burden of Proof

In order for a revocable trust or some of its provisions to be valid, certain formalities must be met. Which formalities apply depends on the perhaps a devise of $20,000 of furniture to be selected by the spouse or children, first from the testator’s furniture owned at death and then to be purchased by the personal representative using general estate assets would qualify. See Fla. Stat. § 732.402(2)(a), (5).
246. Fla. Stat. § 732.402(5); see Fla. Stat. § 731.201(4) (stating that the general definition of claims includes funeral expenses but excludes expenses of administration and estate taxes).
249. See Fla. Stat. § 222.13(1); Fla. Stat. § 733.808(4).
252. Fla. Stat. § 736.0402.
provisions of the trust and the trust assets. If the trust contains an interest in real estate in Florida, or certain provisions effective after the settlor's death, the trust must comply with certain statutory requirements. If the trust does not revert to the settlor's estate when the settlor dies, and instead contains provisions for the disposition of those assets on or after the settlor's death, those provisions—the testamentary aspects of the trust—must be executed with the formalities required for a will. If a settlor desires to create a trust of personal property during lifetime, with title to the assets reverting back to the settlor at death, and thus passing through the settlor's estate, the settlor can create the trust orally.

In general, a revocable trust should be executed to comply with the strictest statutory requirements—being in writing and signed by the settlor in the presence of two witnesses, who sign in the presence of the settlor and each other—in order to validate it for purposes of holding real estate in trust and to validate the provisions of the trust effective after the testator's death. Further, it should be notarized to facilitate recording, if desired, although it is not required to be notarized or recorded. Although exceptions permit oral trusts of personality during the settlor's lifetime and permit reversionary interests payable to the settlor's estate on death to be created without a writing executed like a will, such trusts are rarely used. Oral trusts, when allowed, are problematic because the terms of the trust may be incomplete or difficult to remember or prove and clear and convincing evidence may not be available to establish the oral terms. Thus, revocable trusts should be in writing, signed by the settlor in the presence of at least two witnesses who sign in the presence of the settlor and each other, the settlor's signature should be notarized, and the trustee also should sign. There is no statutory

254. See Fla. Stat. § 689.05; Fla. Stat. § 736.0403(2)(a)–(b).
257. See Fla. Stat. §§ 689.05, 736.0403(2)(a).
258. See Fla. Stat. § 736.0403(2)(b). With respect to real estate, usually the conveyance, by deed, is separate from the trust provisions in the trust instrument. See Fla. Stat. § 689.01. In the unusual case where the deed and trust provisions are in the same document, the document would also need to be signed like a deed in accordance with sections 689.06 and 689.01 of the Florida Statutes.
259. See id.; Rosen v. Rosen, 167 So. 2d 70 (Fla. 3d Dist. Ct. App. 1964). Had the trust in Rosen been a revocable trust created under the FTC, the provisions after the settlor's death would not have been valid because they are testamentary aspects that require a writing executed with the formalities for a will. See Fla. Stat. § 736.0403(2)(b).
260. See Fla. Stat. §§ 732.502, .504. If the settlor is unable to sign, the settlor can direct another to sign for the settlor in the settlor's presence, and the settlor can acknowledge the signing in the presence of the witnesses. Fla. Stat. §§ 732.502(1)(a)2, (1)(b)2b. If the trust
self-proof affidavit for a revocable trust and no statutory provisions requiring proof of the due execution of a trust as there are for wills; although some attorneys attach an affidavit to a revocable trust that is adapted from the statutory self-proof form for wills. 261 Alternatively, other laws may apply with respect to the required formalities for trusts executed outside of Florida or by non-Florida domiciliaries. 262

When the settlor funds the revocable trust by transferring assets to the trustee during the settlor’s lifetime, the settlor also must comply with the formalities required to effectuate those transfers. For example, when transferring funds from a checking account, a check can be written payable to the trustee of the revocable trust. When transferring real property, a deed would be required and should be recorded; although recording is not required for the validity of the conveyance. When transferring certificates of deposits, the financial institution would provide the documents necessary to transfer the accounts. When transferring treasury obligations owned by the settlor, the Department of Treasury prescribes the forms and the procedures for transferring such obligations. When transferring stocks or bonds, a written assignment may be required, and in some cases, the original stock certificate or bond must be sent to the transfer agent along with the assignment. When transferring an account, such as a brokerage account—that holds securities in the name of a nominee—the brokerage firm can provide the forms necessary to change ownership of the account, and the transfer of that account would transfer ownership to the assets held in that account, which could include a number of different properties, including: cash, stock, bonds, certificates of deposit, and treasury obligations. When designating the trustee as the beneficiary of a life insurance policy, the insurance company or agent can provide the necessary forms required to be filed with the company, along with sample or appropriate language acceptable to the insurance company.

When the settlor is the sole trustee, the settlor may transfer ownership of the assets to be held in trust by transferring those assets to the settlor as trustee of the revocable trust. Alternatively, the settlor can accomplish this by declaration, declaring that he or she “holds identifiable property as trustee.” 264

In some cases, the settlor may choose to be the sole trustee and the sole beneficiary during the settlor’s lifetime. Although this type of revocable

263. Fla. Stat. § 689.06; see also Fla. Stat. § 689.01.
trust is a valid trust, during the settlor’s lifetime, it is a trust in form more than substance, with the settlor owing fiduciary duties only to himself or herself. Nevertheless, it is a trust, and it is important for the settlor to respect the form of the trust and comply with the formalities required for a trust, so that the trust will be effective when the settlor dies.

C. **Trustee and Beneficiaries of Revocable Trust**

In order for a settlor to create a revocable trust, the general requirements that there be a trustee with duties, that the trust have definite beneficiaries, and that the sole trustee must not be the sole beneficiary of the trust apply. Although these general requirements apply, they may not be as meaningful during the settlor’s lifetime if the settlor is the sole trustee and sole beneficiary during that time.

1. **Trustee of Revocable Trust with Duties to Perform**

In order to create a trust, such as a revocable trust, the trust must have a trustee and that trustee must have duties; however, while the trust is revocable, “the duties of the trustee are owed exclusively to the settlor.” If the requirements necessary to create a trust, including the requirement of having a trustee with duties, are met, the trust will not be invalid because the settlor possesses the power to: 1) “revoke, amend, alter, or modify the trust in whole or in part;” 2) “remove the trustee or trustees and appoint a successor trustee or trustees;” or 3) “control the trustee or trustees in the administration of the trust.” These powers would be powers exercisable by the settlor in the settlor’s individual capacity rather than in any fiduciary capacity.

If someone other than the settlor is the trustee, then the requirement that the trustee have duties is significant; however, the significance of these duties is qualified by the law that provides these duties “are owed exclusively to the settlor,” while the trust is revocable. One of the usual consequences of the trustee having a duty is that the breach of the duty exposes the trustee to liability to the beneficiaries, and the beneficiaries have standing to apply to the court for relief. By contrast, in a revocable trust, the breach of a duty exposes the trustee to liability to the settlor instead, so that the settlor

265. **FLA. STAT.** § 736.0402(1)(c)–(e).
266. *See FLA. STAT.* § 736.0402(1)(d).
267. **FLA. STAT.** § 736.0603(1).
268. **FLA. STAT.** § 689.075(1)(a), (d), (e).
269. *See FLA. STAT.* § 736.0603(1).
270. *See FLA. STAT.* §§ 736.1001(1), (2), .1002.
would have standing in court. Further, the settlor would have the power to amend or revoke the trust, which would include the power to remove the trustee and appoint another trustee.

In the context of a revocable trust, what duties must the trustee have to the settlor when the trustee is not the settlor? Are these the same duties that a trustee of any trust must have in order to create a trust and must these duties be active, enforceable duties as envisioned by the FTC’s legislative history—to prevent passive trusts and to require the trustee to “have enforceable duties to perform?” It would seem that the settlor of a revocable trust should expressly impose duties on a trustee—in addition to those imposed by statute, such as the duty of loyalty—but that those duties imposed by the settlor should be subject to the powers retained by the settlor. For example, if the trust instrument provided that the trustee would distribute all income and principal to the settlor, as and when directed by the settlor, then the trustee would have the duty to comply with the settlor’s direction.

The Florida Statutes provide that if the trust meets the requirements necessary to create a trust, which would include the requirement of having a trustee with duties, the trust will not be invalid “because the settlor is, at the time of the execution of the instrument, or thereafter becomes, the sole trustee.” If a settlor creates a revocable trust, with the settlor as the sole trustee and the sole beneficiary during the settlor’s lifetime, then the requirement that the trustee have duties should only apply to require a trustee with duties after the settlor’s death—or when the settlor ceases to serve as the sole trustee or the trust ceases to be revocable. The legislative history for this requirement for the creation of a trust under the FTC notes that “the requirement that the trustee’s duties be enforceable means that the same person may not be the sole trustee and sole beneficiary of the trust;” however this rationale does not apply while a trust is revocable by the settlor because during that time the trustee’s duties are enforceable by the settlor not the beneficiaries of the trust.

One general rule for trusts is that a trust will not fail for lack of a trustee. The settlor of a revocable trust can expressly retain the power to fill

271. See Fla. Stat. § 736.0604(1).
272. See Fla. Stat. § 736.0602(1).
273. See supra note 97 and accompanying text and discussion supra Part III.C.1.
274. Fla. Stat. § 689.075(1)(g).
275. CS for SB 1170 Staff Analysis, supra note 92, at 14 n.124 (citing Fla. Stat. § 736.0402(1)(e); accord Willey v. W.J. Hoggson Corp., 106 So. 408, 412 (Fla. 1925)).
276. See Fla. Stat. § 736.0603(1).
277. See supra note 74 and accompanying text.
any vacancy.278 Even if the power is not expressly retained, the settlor’s penumbral power to amend or revoke would encompass the power to amend the trust to appoint a new trustee to fill a vacancy. If no person is “named or designated pursuant to the terms of the trust to act as successor trustee,” then the FTC provides that the vacancy will be filled by a person selected by the “unanimous agreement of the qualified beneficiaries,” but if they do not appoint one, then by the court.279 The term “qualified beneficiary” includes present beneficiaries, such as the settlor, but it also can include some future beneficiaries.280 It would make sense that while the trust is revocable that the settlor be treated as the only qualified beneficiary, particularly since the trustee only owes duties to the settlor during that time. The general rules in the FTC for filling a trust vacancy should be qualified when applied to a revocable trust so that the vacancy is filled by the settlor unless the settlor lacks the capacity to make that appointment. If the legislature amends the law, the legislature also can address whether an attorney-in-fact could make the appointment or, if there is a guardian of the settlor’s property, whether the appointment should be made by the guardian with the court’s permission under the guardian statutes or by the circuit court under the FTC.

2. Definite Beneficiary of Revocable Trust or Charitable Purpose Requirement

A private trust must have a definite beneficiary or beneficiaries that can be ascertained when the trust is created or in the future, with future interests vesting or failing within the applicable period under the rule against perpetuities.281 Alternatively, the trust must be a charitable trust with a charitable purpose.282 If the revocable trust is otherwise valid, the trust will not be invalid because: (a) “the settlor has retained the right to receive all or part of the income of the trust during her or his life or for any part thereof;” (b) the settlor possesses “the power to appoint by deed or will the persons and organizations to whom the income shall be paid or the principal distrib-

278. See Fla. Stat. § 689.075(1)(d); see also id. § 736.0704(3)(a).
280. See Fla. Stat. § 736.0103(14)(a)–(c).
281. Fla. Stat. § 736.0402(1)(c), (2); see also Fla. Stat. § 689.225(2), (4) (containing statement of Florida’s statutory rule against perpetuities, with provisions for judicial reforma-
tion).
282. Fla. Stat. § 736.0402(1)(c)1. Two other types of trusts may be created without a definite beneficiary: a pet or animal trust under section 736.0408 of the Florida Statutes and a noncharitable purpose trust under section 736.0409 of the Florida Statutes. Fla. Stat. § 736.0402(1)(c)2–3.
The settlor may be a beneficiary of the trust and often is the sole beneficiary of a revocable trust during the settlor’s lifetime. The settlor could provide that the trust assets will be paid to the settlor’s estate upon death—a “pour-up” trust; however, this is rarely done. Instead, the settlor usually provides for the trust assets to be distributed outright when the settlor dies or for the assets to continue to be held in trust for various beneficiaries. When the trust provides for outright distributions when the settlor dies, these provisions are comparable to the devises the settlor would make in a will if the settlor owned the property in his or her own name. When the trust continues after the settlor’s death, these provisions are comparable to the provisions that would be contained in a testamentary trust. Designating the settlor and the settlor’s estate or other beneficiaries after the settlor’s death as beneficiaries of the trust would satisfy the requirement that the trust have definite beneficiaries.

With respect to the contingent future interests in the revocable trusts, the settlor’s retention of the right to amend or revoke the trust prevents any remainder interests from vesting while the trust is revocable. Further, the period for the rule against perpetuities would begin to run on the settlor’s death—or when the settlor relinquishes the right to revoke or the trust otherwise becomes irrevocable. If the trust provides for outright distributions when the settlor dies, there will not be any perpetuities problem because the trust interests will vest when the settlor dies. If the trust continues after the settlor’s death, then these trust provisions would need to comply with the Florida rule against perpetuities. All of the settlor’s children and grandchildren living when the settlor dies would be lives-in-being, and the trust could provide for distributions to them at any ages, or could provide for the trust to continue after their deaths without a problem with the rule. For interests for beneficiaries born after the settlor’s death—such as after born grandchildren—the trust could provide for distributions until age twenty-one, and could provide for their interests to vest at age twenty-one in order to satisfy the rule against perpetuities. Alternatively, the trust could use a term of up

283. FLA. STAT. § 689.075(1)(b), (c), (f).
284. See FLA. STAT. § 736.0402(1)(c).
285. See generally FLA. STAT. § 689.225.
286. See generally FLA. STAT. § 689.225(2).
287. See FLA. STAT. § 689.225(2)(a)1.
to either ninety or 360 years after the settlor’s death, with vesting required at the termination of that period. 288

3. Settlor as Sole Beneficiary and Trustee of Revocable Trust During Lifetime

In order to create a valid trust, the settlor must not be the sole trustee and the sole beneficiary. 289 This rule applies to a revocable trust, and the settlor may serve as the sole trustee of a revocable trust. 290 If the settlor is a beneficiary of a revocable trust, there must be at least one other trustee or at least one other beneficiary with a present or future interest in the trust for the valid creation of the trust. 291 In determining whether a trust has a sole beneficiary, present as well as future beneficiaries count. In determining whether a trust has a sole trustee, only the trustee then serving is counted. The fact that there are successor trustees nominated to serve if a trustee is unable or unwilling to serve does not prevent the present trustee from being the sole trustee.

For purposes of this rule, there are two polar situations to consider: 1) when the settlor is the sole trustee of the trust, and 2) when the settlor is the sole beneficiary of the trust. In between these two are trusts where the settlor is a beneficiary, but not the sole beneficiary, and trusts where the settlor is not a trustee or is a co-trustee and thus not the sole trustee.

If the settlor wants to serve as the sole trustee, the trust would be required to have at least one beneficiary other than the settlor. This beneficiary could be designated to receive the trust after the settlor dies and that beneficiary’s interest could be contingent on the beneficiary surviving the settlor and subject to the settlor’s power to change the beneficiary by amending or revoking the trust. 292 This trust would allow the settlor to be the sole trustee

288. Fla. Stat. § 689.225(2)(a),(2)(f). The decision to use a term of the ninety or 360 years depends in part on whether the settlor wants the beneficiaries to be able to modify the trust without approval of the court or wants the court to be able to modify the trust against the settlor’s expressed intent based on what is or is not in the best interests of the beneficiaries. See Fla. Stat. §§ 736.04115, .0412. Further, if the settlor attempts to use a savings clause based on the later of the twenty-one year rule or the ninety or 360 year rule, the twenty-one year rule will apply. See Fla. Stat. § 689.225(2)(c)1–2.


290. See Fla. Stat. § 689.075(1)(g) (authorizing the settlor to serve as the sole trustee).

291. See supra note 100 and accompanying text.

292. If that beneficiary’s interest is contingent on surviving the settlor, the settlor should add another contingent beneficiary in order to avoid a potential reversion to the settlor’s estate if the first contingent beneficiary fails to survive the settlor.
and sole beneficiary during the settlor’s lifetime but not the sole beneficiary during the entire period of the trust.

If the settlor wants to be the sole beneficiary of the trust, with the settlor’s estate receiving any remaining assets when the settlor dies,—a “pour-up” trust—the settlor cannot be the sole trustee. In that case, the settlor would need to appoint another person—whether an individual or a corporation—to serve as the sole trustee or to serve as a trustee along with the settlor as a co-trustee. Thus, the settlor would be the sole beneficiary and could be a co-trustee but could not be the sole trustee.

Revocable trusts rarely are created with a sole beneficiary during the entire period of the trust. They usually have some contingent beneficiaries. Thus, a settlor could create a revocable trust with the settlor being the sole trustee and sole beneficiary during the settlor’s lifetime, with contingent beneficiaries receiving the trust property upon the settlor’s death. The primary purpose of this type of trust would be to provide for disposition of the assets upon the settlor’s death through the trust rather than a will. Or the settlor could serve as a co-trustee, in which event the settlor would be neither the sole trustee nor the sole beneficiary. The settlor might choose to serve with a co-trustee to give the co-trustee the opportunity to become acquainted with the settlor’s affairs during the settlor’s lifetime and so that the co-trustee would be able to serve alone in the event of the settlor’s incapacity or death—or with a new co-trustee.

In the unusual case where the settlor creates a pour-up revocable trust for the sole benefit of the settlor, with the assets passing as part of the settlor’s probate estate, the primary purpose of the trust would be to appoint a trustee to administer the assets during the settlor’s lifetime. More commonly, if a settlor creates a trust for fiduciary administration of assets during his or her lifetime or in the event of incapacity, the settlor also wants to provide for the distribution of those assets upon death by the provisions of the trust rather than by will. Thus, pour-up trusts are rarely used.

It would not make sense for a settlor to create a trust where the settlor was the sole trustee, if the settlor intended for distributions to be made only to the settlor or the settlor’s estate. Although it is possible that a settlor could create a trust and at a later date become the sole beneficiary of the trust, this possibility could be avoided by providing for contingent beneficiaries of the trust in the event that none of the beneficiaries of the trust survive the settlor and the termination of the trust. These contingent beneficiaries could be the persons who would be the settlor’s heirs if the settlor died intestate at that time. Having a catch-all provision would avoid the possibility of the settlor being the sole trustee and sole beneficiary and, thus, avoid the settlor becoming the sole owner by merger.
IV. Important Provisions of a Revocable Trust

When designing a revocable trust it is important to consider: 1) the provisions that will be effective during the settlor's lifetime; and 2) the provisions that will be effective after the settlor's death. These provisions include administrative and dispositive provisions. During the settlor's lifetime, the trust may contain special provisions that are effective if the settlor becomes incapacitated. In addition, the trust may contain provisions applicable during the administration of the settlor's estate, regarding payment to the estate for the estate's obligations and administration expenses, and the apportionment and payment of any estate taxes. Further, the trust may provide for outright distributions after the settlor's death or may provide for the trust to continue after the settlor's death. It is important to consider how the provisions of the trust interrelate with the provisions of the will and the laws and rules governing probate, as well as other documents and laws, such as a durable power of attorney and the laws of guardianship.

A. Right to Revoke or Amend

An inter vivos trust created on or after July 1, 2007 may be revoked or amended unless "the terms of [the] trust expressly provide that the trust is irrevocable." This rule applies to written trust instruments as well as oral trusts. Under the FTC rule, both the right to revoke and the right to amend are implied unless the trust expressly provides that the trust is irrevocable. By contrast, a trust created before then was irrevocable unless the right to revoke was expressly retained, and if the right to revoke was expressly retained, it should also have included the right to amend. Notwithstanding

293. See Fla. Stat. § 736.05053(2). The trust cannot change the trustee's obligation under the Florida Probate Code and the FTC "to pay expenses and obligations of the settlor's estate." Fla. Stat. § 736.0105(2)(m); see also Fla. Stat. §§ 733.607(2), .707(3), .805 (regarding this obligation). The will and trust, however, may contain other provisions that relate to this obligation and the abatement of devises and trust distributions. See, e.g., Fla. Stat. §§ 733.805(1), 736.05053(2).
296. See Fla. Stat. § 736.0602(1).
297. See CS for SB 1170 Staff Analysis, supra note 92, at 25.
298. See, e.g., Preston v. City Nat'l Bank of Miami, 294 So. 2d 11, 14 (Fla. 3d Dist. Ct. App. 1974) ("The terms of a trust may be modified if the settlor and all the beneficiaries consent. Having the power to terminate, they obviously have the power to create a new trust or to modify or change the old. In Florida, this principle has long been recognized."). See also CS for SB 1170 Staff Analysis, supra note 92, at 26–27. If the right to revoke did not
this change in the default rule, the right to revoke and the right to amend should be expressly stated in the trust instrument. The legislative history for the FTC states: “The new rule assumes that most well drafted trust instruments explicitly say whether they are revocable and when a trust instrument does not clarify this, the omission was likely accidental.” A comment to the UTC notes that the “[Uniform Trust] Code presumes revocability when the instrument is silent because the instrument was likely drafted by a non-professional, who intended the trust as a will substitute.”

The settlor may choose to provide the manner for revocation or amendment, such as by delivery of a written document to the trustee. If the settlor specifies the manner of revocation or amendment in the trust instrument or in the terms of an oral trust, that manner is exclusive; however, the FTC only requires substantial compliance with the method so provided. If the settlor does not provide a method, then the trust can be revoked or amended by the settlor in a “later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust” or by “[a]ny other method manifesting clear and convincing evidence of the settlor’s intent.”

To be cautious and to provide clear evidence of intent, the amendment or revocation of the testamentary aspects of a trust should be in writing, executed like a will in Florida, and the settlor should include directions regarding the delivery of the trust assets—to the settlor or to others specified by the settlor. If a joint trust is created, such as by a husband and wife, the trust should address the right of revocation and amendment during the joint lives of the settlors, as well as after the death of either settlor. In a joint trust, generally each settlor has the power to unilaterally revoke the trust but only include the right to amend, the settlor could revoke the trust and then create a new one to accomplish the desired amendment.

299. CS for SB 1170 Staff Analysis, supra note 92, at 25–26. The legislative history also notes: “If the assumptions underlying the revocable by default rule are wrong in a particular case, it is easier to make a revocable trust irrevocable than it would be to reform an irrevocable trust into a revocable one.” Id. at 26 n.210.

300. UNIF. TRUST CODE § 602 cmt.

301. See FLA. STAT. § 736.0602(3)(a).

302. Id.

303. FLA. STAT. § 736.0602(3)(b)1–2. Florida departs from the UTC in this regard. See UNIF. TRUST CODE § 602(c)(2). The FTC allows the settlor to use alternate methods “if the terms of the trust do not provide a method,” while the UTC allows the settlor to use alternate methods “if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive.” FLA. STAT. § 736.0602(3)(b); UNIF. TRUST CODE § 602(c)(2) (emphasis added).

304. See infra text accompanying notes 327–34.

305. See FLA. STAT. § 736.0602(4).
with respect to "the portion of the trust property attributable to that settlor’s contribution," and if all of the settlors do not join in the revocation, the trustee has an obligation to notify the other settlors of the partial revocation.\textsuperscript{306}

The comments to the UTC note:

Revocation of a trust differs fundamentally from revocation of a will. Revocation of a will, because a will is not effective until death, cannot affect an existing fiduciary relationship. With a trust, however, because a revocation will terminate an already existing fiduciary relationship, there is a need to protect a trustee who might act without knowledge that the trust has been revoked. There is also a need to protect trustees against the risk that they will misperceive the settlor’s intent and mistakenly assume that an informal document or communication constitutes a revocation when that was not in fact the settlor’s intent. To protect trustees against these risks, drafters habitually insert provisions providing that a revocable trust may be revoked only by delivery to the trustee of a formal revoking document.\textsuperscript{307}

While a trust cannot be created without funding, i.e. without a res, Florida law separates the revocation of a trust from its “unfunding,” providing that “[u]pon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.”\textsuperscript{308} Thus, technically a trust can be revoked even though assets are still titled in the name of the trustee. From a planning standpoint, when deciding to revoke a trust, the settlor should consider the reason for the revocation and the settlor’s intent with respect to the trust assets. The settlor might want the assets returned to the settlor’s name and control and subject to disposition by will, or the settlor might want to make inter vivos gifts of the assets. The settlor can prepare the necessary documents to effectuate the revocation and direct the trustee with respect to the trust assets at the same time. In addition, when a settlor revokes a trust, the settlor should also amend his or her will, if it contains a devise that pours over to the trust, in order to avoid intestacy or partial intestacy.\textsuperscript{309}

\textsuperscript{306} FLA. STAT. § 736.0602(2)(b). Presumably these rights may be changed by the trust instrument. See, e.g., id. § 736.0602(1). There is a special rule for community property, whereby either spouse may revoke “acting alone,” but both spouses must join in an amendment for it to be effective. FLA. STAT. § 736.0602(2)(a).

\textsuperscript{307} UNIF. TRUST CODE § 602 cmt. (amended 2005).

\textsuperscript{308} See FLA. STAT. § 736.0602(4).

\textsuperscript{309} See FLA. STAT. §§ 732.101(1), .513(4); see also infra note 332 and accompanying text.
The comments to the UTC address the settlor’s incapacity, noting: “The fact that the settlor becomes incapacitated does not convert a revocable trust into an irrevocable trust. The trust remains revocable until the settlor’s death or the power of revocation is released.” 310 The settlor may want to consider whether the settlor would want an agent or guardian to have the power to revoke the trust, to amend the trust during the settlor’s lifetime, or to amend its testamentary aspects. The FTC notes that a “settlor’s powers with respect to revocation, amendment, or distribution of trust property” can be exercised by a guardian of property, only as provided by the guardianship statute, and by an attorney-in-fact, only as authorized by the durable power of attorney statute. 311 A plenary guardian of property and certain limited guardians may “[c]reate or amend revocable trusts or create irrevocable trusts of property of the ward’s estate which may extend beyond the disability or life of the ward in connection with estate, gift, income, or other tax planning or in connection with estate planning,” but only with court approval; however, the statute does not provide for the revocation of the trust. 312 An attorney-in-fact may not “[e]xecute or revoke any will or codicil for the principal” and may not “[c]reate, amend, modify, or revoke any document or other disposition effective at the principal’s death or transfer assets to an existing trust created by the principal unless expressly authorized by the power of attorney.” 313 Thus, if a revocable trust created by the settlor is a “document or other disposition effective at the principal’s death,” the durable power of attorney statute provides that a principal may expressly authorize an attorney-in-fact to amend, modify or revoke it. Does this mean that a guardian or agent can amend or revoke a revocable trust when the settlor lacks testamentary capacity, or, that a guardian or agent may change testamentary aspects without complying “with the formalities required for the execution of a will?” 314

310. See UNIF. TRUST CODE § 103 cmt.; see also FLA. STAT. § 736.0602(3)(b)1.
311. FLA. STAT. § 736.0602(5), (6).
312. FLA. STAT. § 744.441(19). Regarding inter vivos trusts, Florida Statutes section 744.441(19) applies to plenary guardians and to “a limited guardian of the property within the powers granted by the order appointing the guardian or an approved annual or amended guardianship report.” Regarding wills, a guardian cannot make a will for a ward and can only execute a codicil for a ward in order to obtain the maximum charitable deduction for a split interest trust created by the principal under his or her will. FLA. STAT. § 744.441(18). Regarding gifts, the right “to make any gift or disposition of property” may be removed from the ward and delegated to the guardian, who with court approval may “[m]ake gifts of the ward’s property to members of the ward’s family in estate and income tax planning procedures.” FLA. STAT. §§ 744.3215(3)(d), .441(17).
313. FLA. STAT. § 709.08(7)(b)4–5.
314. See FLA. STAT. §§ 736.0403(2)(b), .0601.
It is not known how often these powers are exercised by an attorney-in-fact, or by a guardian, with a court’s approval, without any objection being raised by family members or beneficiaries. There are a few Florida appellate decisions that have discussed a guardian’s powers, with the court’s approval, to make a gift to family members, to create or amend a trust, to designate a beneficiary of a retirement account, and the guardian’s limited power to execute a codicil to reform a split interest trust for tax purposes. One case specifically prevented a guardian from creating a trust with beneficiaries that were different from the beneficiaries under the ward’s estate planning documents when she was adjudicated incompetent.

The right to devise property is one of an owner’s basic property rights “to acquire, possess, and protect property,” which include the rights to devise and dispose of property; however, those rights are subject to legislative regulation that is reasonable and otherwise constitutional. If an attorney-in-fact or guardian is precluded from making a will, he or she should not be permitted to create a trust that contains testamentary aspects or to amend the testamentary aspects of an existing trust, even if the amendment would...
conform the testamentary aspects to the dispositive provisions of an existing will. Extending this prohibition to trusts with testamentary aspects is consistent with other extension of will law to such trusts, including the requirement that a settlor of a revocable trust have the capacity to make a will and that the testamentary aspects be executed with the formalities required for the execution of a will. If a settlor has testamentary capacity—even though he or she has a guardian, property, or an attorney-in-fact—the settlor should amend or revoke the trust by signing or directing another to sign for him or her; and if the settlor lacks capacity, neither the guardian nor the attorney-in-fact should amend or revoke the testamentary aspects. If the settlor is unable to manage his or her financial affairs, or has a guardian of property and needs assets from the trust for the settlor’s benefit, then the attorney-in-fact or guardian should have the authority to act for the settlor to make sure the trust assets are used for the settlor’s benefit and, if necessary, to exercise the settlor’s power to withdraw trust property or revoke all or a portion of the trust for this purpose—but not for the purpose or with the effect of changing who will receive the assets when the settlor dies.

Florida law allows a will to be revoked by an act of revocation performed by the testator or by another at the testator’s direction and in the testator’s presence, if the testator intended to revoke the will. This would include a will that devises real property. Acts of revocation include “burning, tearing, canceling, defacing, obliterating, or destroying” the will or codicil “with the intent, and for the purpose, of revocation.” Further, will law provides a presumption of revocation when the original will cannot be found and also provides a process for proving the contents of a lost will that was not revoked but cannot be found. These provisions for wills raise questions concerning the permissible methods for revoking a revocable trust

318. See Fla. Stat. § 736.0403(2)(b) for the definition of testamentary aspects.
321. See Fla. Stat. § 744.441(1), (2), (11), (19); Sherry v. Klevansky (In re Guardianship of Sherry), 668 So. 2d 659 (Fla. 4th Dist Ct. App. 1996). Others might argue that since a guardian is permitted to make a gift to a member “of the ward’s family in estate and income tax planning procedures,” with court approval, the guardian should be allowed to execute or amend a will or a revocable trust to make transfers upon death to family members for the same reasons. See Fla. Stat. § 744.441(17).
323. Id.
324. See Upson v. Estate of Carville, 369 So. 2d 113, 114 (Fla. 1st Dist. Ct. App. 1979) (citing In re Washington’s Estate, 56 So. 2d 545, 545 (Fla. 1952)). See also Wider v. Wider (In re Wider’s Estate), 62 So. 2d 422, 425 (Fla. 1952) (Futch, J., dissenting).
and whether a presumption of revocation should apply if a revocable trust cannot be found when the settlor dies.

With respect to revocation, the intent of the drafters of the UTC was to allow, but not encourage, revocation by act. The FTC defers to the settlor to express a method of revocation in the trust and then provides alternate methods if the trust is silent; however, the FTC qualifies this by making all these provisions "[s]ubject to [section] 736.0403(2)" of the Florida Statutes. Specifically, section 736.0602(3) provides "[s]ubject to [section] 736.0403(2), the settlor may revoke or amend a revocable trust [b]y substantial compliance with a method provided in the terms of the trust" and when "the terms of the trust do not provide a method," by certain provisions of the settlor's will or by "[a]ny other method manifesting clear and convincing evidence of the settlor's intent." Section 736.0403(2) provides that: 1) "[n]o trust or confidence of or in any messuages, lands, tenements, or hereditaments shall arise or result unless the trust complies with the provisions of s. 689.05;" and 2) "[t]he testamentary aspects of a revocable trust, executed by a settlor who is a domiciliary of this state at the time of execution, are invalid unless the trust instrument is executed by the settlor with the formalities required for the execution of a will in this state." This raises the question as to how the right to revoke or amend a trust is subject to the provisions of section 736.0403(2), which pertain to the formalities required for a trust in land to "arise" or for the testamentary aspects of a revocable trust to be valid. Further, the Florida Probate Code provides that, with respect to a pour-over devise to an inter vivos trust, the "entire revocation of the trust by an instrument in writing before the testator's death shall invalidate the devise or bequest." The Florida Probate Code does not address other methods of revocation for a revocable trust with testamentary aspects. It would be helpful if sections 736.0403 and 736.0606 of the FTC and section 732.513 of


While revocation of a trust will ordinarily continue to be accomplished by signing and delivering a written document to the trustee, other methods, such as a physical act or an oral statement coupled with a withdrawal of the property, might also demonstrate the necessary intent. These less formal methods, because they provide less reliable indicia of intent, will often be insufficient, however. The method specified in the terms of the trust is a reliable safe harbor and should be followed whenever possible.

Id.

327. Fla. Stat. § 736.0602(3).


the Florida Probate Code were clarified with respect to the formalities required for amendment and revocation, particularly with respect to whether a revocable trust with land or testamentary aspects may be revoked without a writing, by act, oral communication or other means and, if so, the effect of such revocation on a pour-over devise.

B. Provisions for Settlor

For a revocable trust, the settlor will retain the right to revoke and may retain other rights. These rights include the right to revoke a portion of the trust, to amend the trust, to add more assets to the trust, or to withdraw assets from the trust. In addition, the settlor may retain other powers in a nonfiduciary capacity, such as the power to appoint or remove trustees, the power to control the trustee’s administration of the trust, or the power to direct distributions.

The settlor should consider the provisions of the trust that will apply in the event the settlor personally loses the capacity to exercise the power of revocation. If the settlor is a trustee, the settlor should include provisions regarding succession of trustees and who will serve as trustee if the settlor loses the capacity to serve, as well as provisions for the distribution of income and principal, such as for the benefit of the settlor during the settlor’s incapacity. Further, the settlor may want to consider the use of a durable power of attorney, granting the attorney-in-fact the power to transfer assets from the settlor’s name to the trust, as well as whether to designate a preneed guardian in the event of the settlor’s incapacity. In addition, the settlor should consider whether an attorney-in-fact should have the power to amend or revoke the trust and what statutory powers a guardian might have in the

333. The execution of an amendment to a revocable trust also should require the formalities necessary to make a codicil to a will, which are the same as the requirements to make a will. See Fla. Stat. §§ 732.502, 736.0403(2)(b). Section 736.0103(20) of the Florida Statutes defines the term "trust instrument" to include an amendment. Section 736.0403 of the Florida Statutes refers to the testamentary aspects of a trust, which include provisions in the original or amended trust instrument; however, the language of section 736.0403 of the Florida Statutes is not as clear with respect to amendments as section 736.0601 of the Florida Statutes, which addresses "[t]he capacity required to create, amend, revoke, or add property to a revocable trust."

335. See, e.g., Fla. Stat. § 689.075.
336. Fla. Stat. § 689.075(1)(a), (c).
337. Fla. Stat. § 689.075(b), (d), (e).
338. See, e.g., Fla. Stat. §§ 709.08, 744.3045.
event the trust is not intended or viewed as a complete, viable alternative to a guardianship.\footnote{339} Some revocable trusts allow the settlor to direct that gifts be made from the trust.\footnote{340} Occasionally, a revocable trust also grants the trustee the power to make distributions during the settlor’s lifetime to beneficiaries other than the settlor.

C. Provisions During Probate of Settlor’s Estate

Many clients have heard that revocable trusts can be used to avoid probate. In general, the probate process involves: 1) finding and collecting the assets owned by the decedent—marshalling the assets; 2) determining and paying the claims against the estate—the claims process—and any estate taxes, as well as paying the expenses of administering the estate; and 3) determining the beneficiaries of the estate and distributing the assets to the beneficiaries.

Technically, assets in a revocable trust are not subject to probate in that they do not pass by will or intestacy, and they are not included in the inventory of the probate estate.\footnote{341} However, assets in a revocable trust may be required to be paid to the personal representative of the settlor’s probate estate to pay the claims and expenses of administering the settlor’s probate estate.\footnote{342} Further, assets in the revocable trust may be required to pay estate taxes under state or federal law.\footnote{343} In addition, the trustee is required to file a Notice of Trust with the court, providing certain information about the trust and the settlor; however, failure to file the notice does not relieve the trustee of its financial obligation to the estate.\footnote{344} Thus, some of the process and obligations associated with probate impact the revocable trust and who will ultimately receive the trust assets. In addition, the probate process affects when trust distributions can be made, and the trustee should not distribute assets from the revocable trust until the probate is completed or the trustee is clear of liability for the estate’s obligations, administration expenses, and taxes.

Creating a revocable trust involves the funding of a trust—determining which assets are to be transferred to the revocable trust during the settlor’s

\footnotetext{339}{See Fla. Stat. § 736.0602(5)–(6). See also Fla. Stat. §§ 744.441, .444.}
\footnotetext{340}{For years in which there is a federal estate tax, see I.R.C. §§ 2036(a)(2), 2035(e).}
\footnotetext{341}{See, e.g., Fla. Stat. §§ 731.201(14), 733.604(1), .607(1).}
\footnotetext{342}{Fla. Stat. §§ 733.607(2), .707(3), 736.05053(1).}
\footnotetext{343}{For years in which there is a Florida or federal estate tax, see Fla. Stat. § 733.817(5)(b), (c), (d).}
\footnotetext{344}{Fla. Stat. § 736.05055(1), (2), (7).}
lifetime and effectuating those transfers during the settlor’s lifetime. This process is similar to one of the first steps of probate—marshalling the probate assets. Thus, creating a revocable trust accelerates this process, requiring the settlor to “marshall” the assets to be transferred to the trust and to comply with the formalities required to transfer the assets. This process requires the time and effort of the settlor, as well as time expended by the settlor’s attorney to make these transfers. The settlor can, however, participate in the process and reduce the attorney’s time needed in this process. Transferring assets to a trust during lifetime avoids the need for these assets to be collected by the personal representative and inventoried as a probate asset; however, it requires the settlor and the trustee to do similar acts under trust law. The settlor must transfer the assets during his or her lifetime to the trustee, and the trustee, upon the settlor’s death, must account to the beneficiaries of the trust with respect to these assets.

The creation of a revocable trust does not avoid the need for probate for purposes of the claims process. The claims process provides a nonclaim period after which claims will be barred—generally three months after a notice to creditors is filed or thirty days after actual notice to a creditor is given, whichever is later—with a maximum two year period of limitation. If there is no probate, the nonclaim period does not begin to run, but the two year period of limitation applies. Thus, probate may limit the exposure of the trustee and accelerate the time period for distribution of the trust assets. Further, the Florida Probate Code and the FTC provide rules whereby the trustee is required to contribute trust assets to the probate estate if the residuary estate is insufficient to pay the estate’s claims and expenses. In addition, the Florida Probate Code and the FTC contain provisions for the abatement of devises as well as the “abatement” of trust distributions to pay these amounts. In general, the provisions of the will and trust are treated as one document for this purpose so that a specific devise of property, under the will and a provision in the trust for a distribution of a specific asset, would be the last to be sold to pay for the estate’s claims and expenses. The Florida

345. See Fla. Stat. § 736.0401(1), (2).
351. See Fla. Stat. §§ 733.607(2), .707(3), .805, 736.05053. In addition, the trust may have expenses for administering the trust. Fla. Stat. § 736.05053(4)
353. See id.
Probate Code should be amended to clarify whether the residuary estate must be exhausted before contributions from the trust are required, or whether the residuary estate and the residuary dispositions are considered as one residuary for purposes of abatement and contribution. Further, after the settlor’s death, the trust assets will either be required to be: 1) distributed outright to the trust beneficiaries; 2) held in trust for the trust beneficiaries; or 3) paid to the settlor’s estate and distributed by the settlor’s will (or intestacy). If the assets are to be distributed outright, then the trust is a substitute for outright devises in the will. If the assets are to be held in trust after the settlor’s death, then the trust is a substitute for a testamentary trust. If the assets are to be paid to the settlor’s estate, then the trust is not a substitute for any provisions of a will. Thus, a revocable trust can be used to avoid some of the probate process; however, to the extent it does, it generally substitutes a trust process for the probate process.

354. See Fla. Stat. §§ 733.607(2), .805(4); Fla. Stat. 736.05053(2)(a). Does the right of contribution under section 733.607(2) apply only if the probate residuary estate is insufficient, or does section 733.805 apply first to treat the residuary estate and the residue of the trust as one? This would be important if the residuary beneficiaries of the will and trust are different—i.e., the residuary does not pour over into the trust. There is a disconnect between the trustee’s obligation to contribute, which is conditioned on the insufficiency of the probate residuary estate, and the order of abatement, which is determined as if the will and trust were one common document. Consider the example where the probate residuary estate is $400,000, the trust residue is $600,000, and the expenses of administration and claims are $200,000. Under sections 733.606(2) and 733.707(3) of the Florida Statutes, the probate residuary estate is sufficient to pay the $200,000; thus, the trustee has no obligation to pay probate expenses and obligations; however, under section 733.805(4) of the Florida Statutes, the will and trust are to be treated as one document, with the devises and trust distributions abating in the statutory order in sections 733.805 and 736.05053 of the Florida Statutes. If the will and trust have different beneficiaries, the probate residuary would abate to pay $80,000 (40% of the $200,000) and the trust residue would abate to pay $120,000 (60% of the $200,000). The trustee should be obligated to contribute to the estate the abated portion of the trust residue; however, that obligation only arises if the residuary of the probate estate is insufficient. This issue also could be important if (1) the residuary estate pours over into the trust, (2) the probate residuary estate is not liquid but the trust residue is liquid, and (3) the trustee is not required to contribute the liquid assets because the probate residuary is sufficient. Thus, the trustee’s obligation to contribute should be tied to the abatement rules rather than conditioned on the insufficiency of the probate residuary. Another issue is whether the will and trust should be considered one document for other purposes, such as for satisfying general devises and general trust distributions from general probate and trust assets.

If the settlor dies in a year in which there is a federal estate tax, then the trust assets will be included in the settlor’s gross estate for federal estate tax purposes.\textsuperscript{355} Thus, a revocable trust will not avoid the federal estate tax; however, a revocable trust can be used to minimize or eliminate estate taxes in the same way that a will can be used. For example, a revocable trust can provide for distributions to or for a spouse, or for distributions to a charity or for a charitable purpose, and qualify for the marital or charitable deduction.\textsuperscript{356} Similarly, a revocable trust can contain provisions that take advantage of the unified credit—the applicable exclusion amount—and reduce estate taxes when the second spouse dies.\textsuperscript{357} If the settlor dies in a year in which there is no federal estate tax but the carryover basis rules apply, assets held in a revocable trust could qualify for the $1,300,000 basis increase.\textsuperscript{358} Further a revocable trust could be drafted to qualify for the additional $3,000,000 spousal property basis increase.\textsuperscript{359}

The Florida Probate Code and the FTC contain provisions for the reasonable compensation of the attorneys, with respect to the administration of the estate and the revocable trust, with the attorney’s fees for the trust being seventy-five percent of the attorney’s fees for the estate.\textsuperscript{360} Thus, a revocable trust can be used to try to limit the estate’s attorney’s fees; however, whether this results in a savings depends in part on the attorney’s fees and costs to create and fund the revocable trust and whether the estate or trust has additional fees that are considered reasonable for “extraordinary services.”\textsuperscript{361} In addition, the fees of the personal representative as well as the fees of the trustee need to be considered to see if there is an overall savings. Also, there may be intangibles to consider, including whether the settlor will be burdened by the formalities of trust ownership.

D. Provisions for Distribution of Assets after Settlor’s Death

When drafting the provisions for distribution of the trust assets after the settlor’s death, the drafter needs to consider the default rules applicable to wills and whether there are similar default provisions for a trust. For example, if the will provides for a devise of a specific asset when the settlor dies,
there are will statutes that address ademption and nonademption of the devise as well as a provision for whether the devise is to be subject to any liability secured by the devised assets. The FTC contains comparable provisions for only some of these issues as exemplified in Appendix A. Further, if a will contained a general devise, there is a will statute addressing ademption by satisfaction and whether the devise will be reduced by gifts made during lifetime. By contrast, the FTC does not contain a provision regarding satisfaction. The FTC contains a new provision authorizing judicial reformation for mistakes of fact or law to conform a trust to the settlor’s intent. By contrast, an ambiguous provision of a will may be judicially construed or a will may be revoked by mistake in the execution; however, a will will not be reformed to correct mistakes or effectuate intent. When drafting trust provisions similar to will provisions, care must be taken to provide for these situations and not to assume that the same will default rules apply to all trust distributions.

V. CONCLUSION

Revocable trusts are a special type of inter vivos trust under Florida law that are appropriate for some clients and some assets. They can be used to marshall an individual’s assets during lifetime, to provide for the contingency of incapacity during lifetime, to preserve some privacy, and to provide for the disposition of assets on death. Revocable trusts can be used to complement a will and to provide parallel administration upon death. A revocable trust can be used as one of the estate planning documents for a client, but it is not a panacea for all clients or a substitute for probate. It should be used in conjunction with a will and can be used with other estate planning documents, such as a durable power of attorney and advanced directives. A revocable trust can be used to streamline some of the aspects of probate and as part of a plan to minimize or eliminate estate taxes or take advantage of income tax basis increases. A revocable trust should be personalized for each client and should not be used for every client or for all assets.

362. See, e.g., FLA. STAT. §§ 732.605–.606; FLA. STAT. § 733.803.
363. See, e.g., FLA. STAT. § 732.609. If a will contains a general devise, the testator and settlor should provide whether the trustee will be required to use trust assets to pay the general devises to the extent the general probate assets are insufficient.
364. See FLA. STAT. § 736.1107.
365. FLA. STAT. § 736.0415. See also FLA. STAT. § 689.225(4) (judicial reformation under statutory rule against perpetuities); id. § 736.0413 (application of cy pres doctrine for charitable trusts).
366. See FLA. STAT. § 732.5165.
APPENDIX A

Comparison of Selected Wills and Trust Statutes

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<td>FLA. STAT. § 732.5165</td>
<td>FLA. STAT. § 736.0406</td>
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<td>FLA. STAT. § 733.103(2)</td>
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<td>Undue Influence; Burden of Proof; Presumption</td>
<td>FLA. STAT. § 733.107</td>
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<td>FLA. STAT. § 90.301</td>
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<tr>
<td>Vesting; Future Interests</td>
<td>FLA. STAT. § 732.514</td>
<td>FLA. STAT. § 736.1106(2)</td>
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