Trusts and Estates

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I. INTRODUCTION AND SCOPE

This topic was last surveyed in 1993. Cases and statutory changes addressed in the current survey generally cover the period from 1994 through the first half of 1996.

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To a substantial degree, the topics covered in the prior article are still the “hot topics” of today. These include attorneys’ fees, claims, trusts, guardianships, joint bank accounts, and elective share. Two added hot topics are jurisdiction and power of attorney. A topic which has “cooled,” and which has become unusually quiet in the reported cases and in the legislature, is homestead. This last topic has been addressed in other articles written or contributed to by this author and will not be covered here. Contrary to the format in the prior article, coverage of legislation will be integrated in the topical discussion with the case law, and is briefly summarized here.

In 1994, there were no changes at all to the probate statutes, and only minor changes to the guardianship and advance directive statutes. However, the 1995 legislature was very active in the trusts and estates area adopting chapter 95-401, of the Laws of Florida. This omnibus bill, sponsored by the Real Property and Trust Law Section of The Florida Bar, addressed probate and trust administration fees and commissions, revised trust claim procedures, including the repeal of significant trust claim legislation which had been adopted as a part of chapter 93-257, imposed execution requirements on express trusts, significantly revised the power of attorney statute, and defined trustee’s and personal representative’s powers and duties relative to environmentally contaminated property. An unusual provision which sounds like “special case” legislation now requires the spouse of a ward to consent to dissolution before the court can grant special authority to a guardian to bring or maintain an action for dissolution.

In the 1996 legislative session, there were virtually no statutory changes relating to trusts or estates statutes, although important legislation in several relevant areas was introduced. House Bill 2157, which provided for a significant overhaul of the elective share statutes and incorporated a modified augmented estate concept, failed to pass. It is expected to be reintroduced in the next session.

There were minor changes to chapter 765, having to do with advance directives, which allow a person to designate a separate surrogate to consent to mental health treatment, and if no separate surrogate is designated, the designation of a general surrogate is assumed to include this authority.

There were also some changes to chapter 744 regarding guardianships. The amendment provides a definition for a professional guardian as a person who has been compensated for service as guardian for more than two wards who were not near relatives. A professional guardian petitioning for appointment must reveal that guardian’s professional status.

A ward may be relocated to an adjacent county without court approval, but even temporary relocation to any other state or other county must be immediately reported by the guardian to the court. The class of persons who may serve on an examining committee has been enlarged. Also, the fees of the examining committee are to “be paid by the guardian from the property of the ward, or if the ward is indigent, by the county.” Previously, the fees were paid from the general fund of the county. A guardian of the property may elect to file annual accountings on a fiscal year basis, unless the court otherwise orders. This election must be made by the filing of a notice of intention within thirty days after issuance of letters. A broad class of defined persons are authorized to bring a proceeding for removal of a guardian, if notice was not given to them of the original appointment. Authorized persons are relatives who could qualify as a nonresident guardian and persons with statutory preference in initial appointment. This, practically, must result in broader service of notice of the initial guardianship appointment proceedings. Finally, a securities dealer, such as Merrill Lynch, may now serve as a depository for a guardian in the same manner as a bank or other financial institution. Otherwise, 1996 was a very quiet year for relevant legislation.

5. Ch. 96-354, § 1, 1996 Fla. Laws 2032, 2033 (to be codified at Fla. Stat. § 744.102(15)).
6. Id.
7. This class includes a graduate gerontologist, and any “other person who by knowledge, skill, experience, training, or education, may in the court’s discretion, advise the court in the form of an expert opinion.” Id. § 7, 1996 Fla. Laws at 2034–35 (to be codified at Fla Stat. § 744.331(3)(a)). However, the statute now eliminates lay members and requires that all three members be qualified persons.
8. Id. § 7, 1996 Fla. Laws at 2035 (to be codified at Fla. Stat. 744.331(7)(b)).
9. This statutory amendment seems to contemplate that the person will be adjudicated incapacitated. What happens if the person is not adjudicated and no guardian is appointed, then what is the source of payment of the examining committee’s fees?
10. See comment on “interested persons” and cases cited under the main title, Guardianships, infra part VI Guardianships.
11. See Ch. 96-354, §§ 1, 4, 7, 8, 9, 10, 13, 1996 Fla. Laws 2032, 2033-37.
II. JURISDICTION

Lawyers and trial judges are becoming more jurisdictionally aware. Previously, the practice was if you could send a formal notice by registered mail return receipt requested, then jurisdiction was not a problem because probate or trust administration was an in rem proceeding and the court already had jurisdiction over the rem. However, the modern view is “first test jurisdiction.” This was the author’s central theme in the articles, Homestead Made Easy Parts 3 and 3A. These articles suggest that jurisdiction or notice may be deficient in many determinations of homestead status.

In personam jurisdiction based on the long arm statute, typically thought to be the concern of the commercial litigator or the negligence lawyer, has become a real concern to the fiduciary litigator. Two cases found lack of personal jurisdiction over nonresident trustees based on allegations under the long arm statute.

In Lampe v. Hoyne, a complaint against a successor trustee for breach of trust, unjust enrichment and declaratory relief alleged jurisdiction over the defendant stating that she conducted substantial and not isolated activity within Florida. The defendant by special appearance, challenged jurisdiction over her individually and as trustee, and refuted the jurisdictional allegations of the complaint which alleged only minimum contacts with Florida. No traverse was filed by the plaintiff and the appellate court reversed the trial court holding that there was no jurisdiction over the trustee.

In Beaubien v. Cambridge Consolidated, Ltd., the complaint alleged that the trustee, acting through an agent, mishandled the trust and failed to account to the beneficiary. The trustee, Cambridge Consolidated, Ltd., was

13. Id.
17. Id. at 425.
18. Id. at 426.
19. Id.
20. 652 So. 2d 936 (Fla. 5th Dist. Ct. App. 1995).
21. Id. at 937.
a dissolved Cayman Islands corporation. The proper procedure to acquire personal jurisdiction under the long arm statute is to plead jurisdiction in the language of the statute. A motion to dismiss only tests the legal sufficiency of the allegations as pled. In order to test the court's jurisdiction, or to refute the contention of minimum contacts, the defendant must file affidavits in support of his position. Once this is done, the plaintiff has the burden of proof, by affidavit or deposition, of the basis upon which jurisdiction may be obtained. Here, the court remanded the matter to the trial court for an evidentiary hearing on the Florida activities of Cambridge.

The lack of Florida business activity, however, did not deter the Fourth District Court of Appeal from finding in Rogers & Wells v. Winston that in personam jurisdiction existed over a New York law firm when it ordered a possible refund of excess attorneys' fees paid to that firm for work performed, mainly in New York, for a Florida estate. In Rogers & Wells v. Winston, the fourth district held even though "virtually all of the services . . . [largely federal tax return preparation and tax planning] were performed in New York" and the "fees . . . [were] paid by the trustees out of assets in a New York marital trust [from decedent's predeceased husband]" and not by the Florida estate, nonetheless, since the firm was employed to perform services by a Florida estate it "should have foreseen that it would be haled into a Florida court in the event of litigation over the services performed for the estate." Since it was employed to perform services for a Florida estate, this opinion, and the service on which the court's jurisdiction is based, apparently did not involve the long-arm statute. Nowhere was that statute cited in this opinion. Service was made on the law firm by mailed notice under Rule 5.041(b) of the Florida Probate Code.

The sense of the opinion is that the Florida court has inherent in personam jurisdiction over non-residents employed by and furnishing services to a Florida estate even absent compliance with, or allegations based upon, the long-arm statute. Under prior application of due process considerations, in rem jurisdiction could be obtained over one claiming an interest

22. Id. at 939.
23. Id.
24. Id. at 940–41.
25. 662 So. 2d 1303 (Fla 4th Dist. Ct. App. 1995), review denied, 675 So. 2d 929 (Fla. 1996). Please note that the author represented one of the parties in this litigation which may color the objectivity with which this case is analyzed.
26. Id. at 1304.
27. Id. at 1303–04.
28. Id. at 1304.
in the res through mailed notice, however this was not applicable. In personam jurisdiction could only be obtained through compliance with the long-arm statute, through an unrestricted appearance, by requesting affirmative relief in a proceeding, or by personal service of a summons within the State of Florida. However, none of these methods were applicable here.

The fourth district reached a contrary result, however, in *Manufacturers National Bank of Detroit v. Moons*, wherein the court held that a mailed notice in a guardianship proceeding to an out of state trustee for the ward was insufficient to gain jurisdiction over the out of state trustee to order payment of attorneys’ fees of the guardian’s attorney in other non-related proceedings from trust assets.

Finally, in *Laushway v. Onofrio*, a removed personal representative was ordered to account for property transferred to him prior to death, by the decedent. The defendant contended that the court lacked jurisdiction over him. Since the trial court clearly had in personam jurisdiction over the defendant when he was removed as personal representative after having been found guilty of procuring the last will by undue influence, that jurisdiction continued to permit the present order.

### III. Attorneys’ Fees

Is the probate and trust attorneys’ fee trauma over? Has the birth concluded or are we still in labor? Is the baby healthy or genetically flawed? In the prior iteration of this article, Ms. Donohue recorded the first and second phase of the metamorphosis of this topic and this article will record, hopefully, the final phase.

To recap, prior to 1976 there was no statutory provision relating to how the fee of the attorneys was to be determined, other than that a personal

29. 659 So. 2d 474 (Fla. 4th Dist. Ct. App. 1995).
30. *Id.* at 475.

"[F]ormal notice" used to obtain service in probate and in guardianship matters was not sufficient in trust related proceedings to confer on the court jurisdiction over the trustee; rather, pursuant to section 737.201, *Florida Statutes*, proceedings related to trusts were governed by the *Rules of Civil Procedure of Florida*. The latter, of course, prescribe summons or other process issued by or under authority of the court and served as provided by law.

*Id.*

32. *Id.* at 1136.
33. *Id.*
representative was allowed necessary expenses including attorneys’ fees paid in the settlement of the estate.\textsuperscript{34} The 1976 Florida Probate Code provided for a “reasonable fee” to be paid to the personal representative, the attorney and other agents employed by the personal representative.\textsuperscript{35} Like many other states, the statute also grafted the ethical concepts which are used to identify a “reasonable” fee into the statute.\textsuperscript{36} However, these concepts did not adapt particularly well to the determination of an attorney’s fee for probate administration\textsuperscript{37} and over the sixteen years since this statute was adopted, there were at least two amendments made in the hopes of achieving a better fit.

With the 1976 statutory change, the actual practice of setting the fee remained generally unchanged. Nearly universally, probate attorneys’ fees were set as a percentage of the value of the estate, as were the fees paid to corporate personal representatives. Over time, market forces, and supply and demand, overtook the probate bar and demands by some consumers resulted in some attorneys changing the \textit{method} used to determine the fee to be charged. In many cases, lawyers and firms, generally the larger firms, determined and charged their attorneys’ fees for probate matters based on an hourly charge, with little or no consideration to the value of the assets under administration.\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{34} FLA. STAT. § 734.01 (1973).
\item \textsuperscript{35} Id. § 733.617 (1975).
\item \textsuperscript{37} The “reasonable fee” and “ethical” concepts were little help in determining fees for fiduciaries or their agents, although these fees were also controlled by the same statute and the same considerations applied.
\item \textsuperscript{38} It is understandable that estate beneficiaries generally wish to hire lawyers at the smallest possible fee. In very large estates, the beneficiaries would want to have the fee determined on an hourly charge, while in very small estates, the beneficiaries would prefer the fee be calculated based on a percentage. For purposes of this discussion, assume two example estates. The first estate has an inventory value of $40,000 and the second, a value of $4,000,000. If both estates required approximately the same amount of professional time to administer (assume 50 hours), and a reasonable rate is considered to be $150 per hour for the smaller estate and $300 for the larger estate, the fee would be $15,000 for the larger estate and the fee for the smaller estate would be $7,500.

As a percentage of the value of the assets, that translates to 18.75\% in the smaller estate and .375\% in the larger. The beneficiaries in the larger estate are pleased. If the fee is percentage-based (assuming the scale in the 1995 statute), the fee in the smaller estate is $1,500, while the fee in the larger estate is $95,000. The applicable percentage then is 3.75\% for the smaller estate and 2.375\% for the larger estate. The beneficiaries in the smaller estate are pleased.
\end{itemize}
This was the fee environment in place when *Florida Patient's Compensation Fund v. Rowe* and *Standard Guaranty Insurance Co. v. Quanstrom* (neither were probate fee cases) were decided and which defined the "lodestar" method of fee determination. These cases stood for the proposition that the controlling ethical considerations, taken as a whole, applied to determine a reasonable fee, to be paid by one who was not the lawyer's client (the loosing party in these two cases), required imposition of an hourly-based charge. The opinions in *Rowe* and *Quanstrom* were written by Justice Ben Overton, who then also wrote the opinion, *In re Estate of Platt*, which applied the *Rowe* and *Quanstrom* reasoning specifically to fee determination in probate administration. The *Platt* rule established that, in the absence of an enforceable agreement, if the fee for the attorney for the personal representative and the fee for the personal representative is to be set by the court, it may not be set based solely on a percentage of the value of the assets. This is so in spite of the language of the controlling statute, which provides that the court shall consider "one or more" of the statutory factors in setting a reasonable fee and which provides that one of the statutory factors is "[t]he nature and value of the assets of the estate, [and] the amount of income earned by the estate."* Pl**att** was far ranging in laying down rules for the determination of fees in probate administration matters and included a number of additional rules, which are more fully reviewed in Ms. Donohue's case analysis in the prior survey article and also in this author's article in *Practice Under Florida Probate Code*. However, the "central holding" of *Platt* was that neither the attorney's fee nor the personal representative's fee could be determined

While it is true that larger estates generally require the expenditure of more time, this is not always the case; and in any instance, the relationship is not linear. In some instances, more professional time is expended on a smaller estate than a larger estate. Of course, it goes without saying that the lawyer's liability is always much greater in the larger estate.

39. 472 So. 2d 1145 (Fla. 1985).
40. 555 So. 2d 828 (Fla. 1990).
41. *Id.* at 830–35 (discussing the origin and calculation of attorneys' fees under the "Lodestar" method); *Rowe*, 472 So. 2d at 1150–52.
42. *See Quanstrom*, 555 So. 2d at 835; *Rowe*, 472 So. 2d at 1150.
43. 586 So. 2d 328 (Fla. 1991).
44. *Id.* at 333.
45. *Id.* at 336–37.
46. *Id.* at 332 (citing FLA. STAT. § 733.617 (1975)).
47. *Id.* at 332–33 (citing FLA. STAT. § 733.617 (1989)).
based solely on a percentage of the value of the estate. The opinion went on to require the attorney’s portion of the fee to be set as an hourly-based charge, but failed to provide any guidance with regard to how the personal representative’s fee should be set.

It was within this environment that the Real Property Probate and Trust Law (“RPPTL”) section of The Florida Bar determined that the Platt opinion was too narrow and, while it might work well for the insurance defense bar or plumbers, fees determined under Platt would not consistently or fairly compensate the probate bar for legal services performed in probate administration. This was particularly true in administration of large taxable estates where the responsibility assumed by the lawyer, but not necessarily the time expended, was significant.

Since the RPPTL section perceived that reasonable compensation properly involved two factors, time reasonably expended (effort) and responsibility assumed (liability), if an hourly rate was the only allowable compensation method, where responsibility was significant, it could only be properly compensated if the number of hours expended was also large. Lawyers observed that generally, responsibility (liability) attached upon acceptance of the representation and did not increase or decrease regardless of the effort (hours) required to perform the services. Therefore, if the responsibility was great because of the nature of the administration and the value of the assets, but the administration could be accomplished in a small number of hours, responsibility was under compensated if it was a factor included in the hourly rate. By contrast, if responsibility was comparatively small and built into the hourly rate, but the problems experienced were very time consuming, responsibility was overcompensated. This was true even if the hourly rate paid was adjusted because, in practice, it was not sufficiently elastic to adjust for factors which it was not best suited to compensate.

The RPPTL section chairman appointed a committee to study the problems of compensation which were raised by the Platt decision and to recommend solutions. This committee was know as the Belcher Committee after its chairman.

The Belcher Committee proposed a radical and untested formula for probate attorney compensation which had never been tried either by statute, rule, or in practice, in any other jurisdiction. The formula was designed to compensate attorneys for probate administration by separately compensating

49. Platt, 586 So. 2d at 336–37.
50. The author served as a member of that Committee.
effort and responsibility. The committee drafted an entirely new statute incorporating this concept.

The goal of the Committee was to return compensation levels to approximately those that existed in actual practice prior to 1991 when Platt changed the rules; it was not the intention of the committee to increase fees paid to lawyers in probate administration. To accomplish the goal of fairness to the lawyer and to the client while still retaining historical compensation levels, and also adopting an entire new method of compensation, the committee members called on their many years of experience in probate administration and setting fees and devised a formula intended to accomplish the desired result. That formula provided for a bifurcated fee, a one percent charge against the probate assets, including income earned during administration, to compensate responsibility (liability was most directly related to the value of estate assets) plus an adjusted hourly-based fee to compensate effort.

So as not to “double-dip,” the hourly rate to compensate effort should be reduced under the lawyer’s general office hourly rate because responsibility assumed, normally a factor in the hourly rate, was being compensated separately. By this formula, if effort (time) was high in relation to responsibility (measured by the size of the estate), then responsibility would not be overcompensated as it would if it was included as a part of an hourly charge. If responsibility (liability) was high in relation to effort required (time), then responsibility would be fairly compensated. The formula was self-adjusting for estates which did not fit a “cookie cutter” composition.

A second new concept adopted was that the fee determined by the formula was presumptively reasonable. However, by considering a set of eight probate-specific factors identified in the statute, the presumptively reasonable fee could be adjusted upward or downward to reach a reasonable fee for the particular probate administration.

However, the “great experiment” was doomed to failure before it began. When the Belcher committee reported its recommendations to the executive counsel of the RPPTL section, in general meeting, that counsel doubled the proposed responsibility fee from the one percent of the value of the assets recommended by the Belcher committee to two percent of the value of the probate assets and tacked on a “surcharge” of an additional one percent of the value of non-probate assets over which the probate attorney had no responsibility. Thus, compensation for responsibility was increased from a
minimum of 100% to perhaps thousands of percent over that recommended by the Belcher committee.  

Upon becoming law, this new fee statute was immediately perceived by the bench and the media (as well as substantial portions of the probate bar) as resulting in excessive compensation for probate attorneys; substantially in excess of the facts which were in general usage before Platt. At the trial court level, few judges were willing to award the presumed reasonable fee and many experienced probate lawyers were quoting fees to their prospective clients which were substantially less that the presumed reasonable statutory rate. However, lawyers who were not probate specialists, or who had less experience in the field, generally quoted fees for their services at the rates presumed reasonable by the statute. Thus, the anomaly was created that the most experienced probate lawyers were quoting and charging fees at a lower rate than lawyers with less experience.

An example of the anomalous results produced by application of the statutory presumption is found in Sitomer v. First America Bank-Central. In this administration, the probate assets were valued at $104,000, but decedent had created an out-of-state corporate-trusteed revocable trust with a value of approximately $25,000,000. The only connection the large trust had with the probate administration was that it was required to be reported on the estate’s federal estate tax return which, although signed by the personal representative, was not prepared by the personal representative or his attorney. By application of the one percent “surcharge” to non-probate assets, in addition to the two percent of the value of the probate assets and 100 hours of attorney time in the probate, the presumptively reasonable fee

52. The proposed rate was so high that Senator Fred Dudley who was tapped to sponsor the section’s legislative package in the senate, refused to introduce the bill at the rates now included for responsibility. However, a different sponsor was located in the house and a bill with those rates was introduced, and was eventually adopted with no change to the rates, as House Bill 1295. This bill later became chapter 93-257 of the Laws of Florida.

A shortcoming of the proposed change which was inherent in the Belcher Committee proposal was the failure to scale the percentage compensation for responsibility back at higher levels, for example, over $5,000,000 in asset value.

53. This author was one of those who opposed the increase in the statutory rates over the levels recommended by the Belcher Committee and consistently lobbied all who would listen for a reduction in the rates set in the statute.


55. Id. at 457.

56. The attorney was also the personal representative and signed the federal estate tax return; however, any fee for serving as personal representative was affirmatively and intentionally waived.
determined by the statutory formula was $265,236.57, an amount that was more than two and one-half times greater than the value of the total of the probate estate. The trial court considered the factors in the statute and determined that $30,000 was a reasonable fee to compensate responsibility and that an hourly rate of $300 was correct for 100 hours of effort. Accordingly, the court awarded a total adjusted fee of $60,000. This award was subsequently affirmed by the Fourth District Court of Appeal.

Another case of interest which addressed the fee presumed reasonable by the 1993 statute was Florida Bar v. Garland. This was a disciplinary case in which one of the charges against the lawyer, on which the referee determined guilt, was charging a clearly excessive fee in a probate administration. Mr. Garland charged a fee of $32,956.30 on a probate estate with a gross value of $590,000. Expert testimony established a reasonable fee at $15,000 to $18,000. The fee was determined and collected under the statute prior to the 1993 amendment as interpreted by Platt. The supreme court overturned the referee’s finding of charging a clearly excessive fee under rule 4-1.5(a)(1). It said:

We agree with Garland that in light of sections 733.617 and 733.6171, Florida Statutes (1993), which provide the manner by which reasonable fees to the personal representative and attorney of an estate are to be determined, the referee’s recommendation as to this violation must be rejected. Although sections 733.617 and 733.6171 did not become [sic] effective until after the Locke estate was closed, if the fee charged in this case were charged today it likely would be considered reasonable under the new statutory provisions.

This statement of the law was a surprise to the author and others who believed that a fee could be calculated under the formula provided in the statute as presumed reasonable, and still violate the constraints of Rule 4-1.5(a) of the Rules of Professional Conduct of Florida, since one is a guideline established by the legislature under which a court may determine an attorney’s

57. 651 So. 2d 1182 (Fla. 1995).
58. Id. at 1183.
59. Id.
60. Id.
61. See id. at 1184; Platt, 586 So. 2d at 336–37.
62. Garland, 651 So. 2d at 1184.
63. Id. (footnote omitted).
fee, and the other is a professionally imposed constraint on charging and collecting a clearly excessive fee.\textsuperscript{64} However, it would appear that the final word, at least for now, has been spoken on this point.

To its credit, the leadership in the probate bar, and specifically in the RPPTL section, quickly recognized that the 1993 statute often produced an excessive fee (of course the media was running exposes on the fee-gouging probate lawyers and judges were routinely adjusting fees downward under the statutory presumed reasonable rate), and prepared legislation to remedy the situation.

Two alternative approaches to “fixing the mess” were considered. The first alternative was to retreat to the compensation levels initially proposed by the Belcher Committee (and also scaling back the applicable percentage in larger estates) and giving the bifurcated concept another try to see if it would work. The second alternative was to scrap the entire bifurcated fee concept and start over entirely.

The consensus within the RPPTL section was that the “well had been poisoned” and the bifurcated fee was (perhaps unfairly) branded as the culprit and as excessive in concept, and not merely by its operation. Therefore, those who were in a position to make the decision elected to abandon the bifurcated fee concept entirely and begin again. This is an unfortunate result, in this author’s opinion, since inherently the statutory bifurcated fee is the most reasonable approach to setting probate attorney’s fees and if the rates had not been initially set at excessive levels, might have served as a model which could have been adopted in other jurisdictions. However, this author concurred that the practical solution was to begin anew and in this case, throw the baby out with the bath water.

In order to accomplish this, the obvious starting point was with the compensation formula which had been adopted to compensate personal representatives. This formula was both simple to apply and had not created the media firestorm which the attorneys’ fee statute had. In fact, there had been little complaint regarding the compensation formula or resulting fees for personal representatives since the new statute was adopted in 1993 concurrently with the offending attorneys’ fee statute.

The other favorable aspect of that statute, in addition to its absence of controversy, was its simplicity of application. Specifically, time and hourly rates were not required to be determined. It was generally considered that the attorney for the personal representative contributed as much value to the

\textsuperscript{64} This point of view is discussed at section 15.38 of \textit{Practice Under Florida Probate Code}. \textit{See Jones & Kelley, supra} note 48, § 15.38.
probate administration as did the fiduciary, and the logical extension was that the attorney should be equally compensated with the fiduciary. There was also some case law authority which predated the adoption of the 1976 statute, for this approach.

A committee was again appointed by the chairman of the RPPTL section, comprised of the surviving members of the Belcher Committee and several others, to draft a proposal for new legislation. Using the personal representative’s compensation formula as a template, with adjustments, a significant conceptual overhaul was quickly accomplished. Actually, very little redlining was required in 733.6171; merely deleting subsection (3)(a) (compensation for responsibility) and subsection (3)(b) (compensation for effort), and copying over a sliding scale (with minor adjustment), percentage-based formula as found in 733.617(2), the statute setting compensation for the personal representative. When this had been done, since the formula compensation clearly excluded compensation for extraordinary services, it was necessary to define a representative list of those services, and that was added as new subsection (4).

Of note, and in contrast to the recent media characterization of probate lawyers as fee-gouging, the Committee believed that the sliding scale at levels over $3,000,000 in assets, may produce an excessive fee. Therefore, at that level and upward, the schedule found in the statute providing compensation for the fiduciary was cut back for attorneys’ fees by one-half percent. The Committee’s recommendation was adopted by the executive counsel, this time without the fatal tinkering to the percentages, and a sponsor offered the bill in the legislature which became chapter 95-401, section 2, and which became law on June 18, 1995.

Another revolutionary concept which was reported out of the Committee, and adopted by the executive counsel, again without change, was a statutory “presumed reasonable” attorneys’ fee for representing a trustee in the initial administration of a revocable trust as a will substitute. This

65. Although it was not considered by the Committee in drafting the statute, this previous survey, published shortly after the 1993 amendments to the statute, predicted the ultimate direction of the law on this point. As Ms. Donohue stated: “It is not clear why there is a distinction between compensation as a personal representative and for attorney fees paid on the same estate.” Donohue, supra note 1, at 361. With the 1995 change, that is now the law.
66. See, e.g., In re Lieber’s Estate, 103 So. 2d 192, 201 (Fla. 1958).
67. See FLA. STAT. § 733.617(2) (1993).
became section 4 of chapter 95-401, which was later codified at section 733.2041, of the *Florida Statutes*.\(^{69}\)

The concept which this statute recognizes is that the legal value added to the process of administration of a revocable trust as a will substitute is approximately the same value added to a probate administration of the same assets. The effort required and the responsibility assumed are approximately the same. Therefore, reasonable compensation should be approximately the same.\(^{70}\)

The specific point should be made that the trustee is not required to retain counsel for administration, contrasted with a personal representative who is so required.\(^{71}\) Also, the trustee may retain the lawyer for specific and limited purposes and, like a similar provision pertaining to probate administration, may agree to a fee different that the one the statute presumes reasonable. The substantial public interest to be served is that some certainty is created regarding fees for this type of service.

The structure of the trustee attorneys' fee statute\(^{72}\) is nearly identical to the structure of the amended probate attorneys' fee statute.\(^{73}\) The only difference of note is the inclusion in the trust statute of a laundry list of ordinary services, that list being absent in the probate statute. The reason for this difference was that it was felt that ordinary services in probate administration are generally well known, whereas revocable trust initial administration is a new concept not widely known throughout the bar. As a result, in the trust statute, both ordinary legal services as well as extraordinary legal services are identified.

The compensation rates for trust legal services are set at seventy-five percent of the rates for probate legal services, and use the same sliding scale

\(^{69}\) See Fla. Stat. § 733.2041 (1995). The Florida Bankers’ Association successfully lobbied an amendment to the bill which eliminates any presumption of a reasonable fee if the trustee or one of the trustees is a corporate fiduciary. This “bankers exception” may suffer from congenital constitutional defects.

\(^{70}\) The legal services compensated directly and logically in this statute are the same legal services which were intended to be compensated by the one percent “surcharge” added to the 1993 version of section 733.6171, except that surcharge applied to all non-probate assets (eg. life insurance proceeds, IRA roll-overs, joint bank accounts, entireties real property, homestead real property, etc.). It is true that the lawyer will expend substantial effort and assume substantial responsibility in the initial trust administration, but probably neither is the case as to the other listed non-probate assets. This direct approach to a specific situation is far superior to the “shotgun” approach of the prior statute.


\(^{73}\) See id. § 737.2041 (1995).
of value to reach a presumed reasonable fee. The reason for the reduction of twenty-five percent in the fee is that some of the work will not be required in a trust administration; for example, marshalling of the assets would not be required if the trust was previously funded.

As is the case in the probate statute, review or preparation of the federal estate tax return is a defined extraordinary legal service. For preparation, a presumed reasonable fee is one-half percent of the value of the gross estate up to ten million and one-quarter percent on the value of the excess.

An interesting but often unnoticed remedial provision was also added by chapter 95-401 which became subsections (2) through (4) of section 737.204.74 Under previous procedure, if a beneficiary wished to challenge a fee paid to the trustee, the trustee’s attorney, or any trust agent, the only alternative was to bring a civil action under the provisions of section 737.201 and serve all necessary parties with a summons or by publication. If there is a pending associated probate administration, the idea is that a probate proceeding would be a convenient forum to resolve issues of trust fees and objections to those fees. So the statutory amendment grants subject matter jurisdiction to the probate judge and provides that formal notice may be used, rather than forms of service required in a civil action. One should note in passing that there are extensive new trust attorneys’ fee provisions in section 737.2041, but there is still no statutory provision which quantifies or sets a fee for the trustee, not even a statutory requirement that the fee be a “reasonable fee.” As noted below, it is this author’s opinion that Platt will

74. Id. § 737.204(2)-(4) (1995). This section, entitled, “Proceedings for review of employment of agents and review of compensation of trustee and employees of trust—” provides in part:

(2) If the settlor’s estate is being probated, the trustee, the attorney, or any interested person may have the propriety of employment and the reasonableness of the compensation of the trustee or any person employed by the trustee determined in the probate proceeding.

(3) In any proceeding under this section the petitioner shall either:
   (a) Serve notice on all interested persons in the manner provided for service of formal notice under s. 731.301, together with a notice advising the interested person that an answer to the petition must be filed and served on petitioner within 20 days from the service of the petition or the petition may be considered ex parte, and such notice shall be sufficient for the court to acquire jurisdiction for this proceeding over the person receiving formal notice to the extent of the person’s interest in the trust; or
   (b) Obtain jurisdiction over interested persons in any other manner permitted by law.

(4) Persons given notice as provided in this section shall be bound by all orders entered on the petition.

Id.
apply to the determination of a trustee’s fee, but not (as to those matters contained in the statute) to the determination of an attorney’s fee for the trustee’s attorney.

Section 733.6171(7),75 reversed another of the holdings of Platt. That subsection provides for the award of attorneys’ fees for the attorney for the personal representative if court proceedings are required to determine attorney’s fees. This would normally be the case where no agreement could be reached on the fees, and an objection to the fees was filed. The statute was improved by the 1995 amendment which proscribed the award of fees under this provision if “the court finds the request for attorney’s fees to be substantially unreasonable.”76 This same provision and the same limitation is also found in section 737.2041 relating to trustee attorneys’ fees.77

An important concept which was included in chapter 93-257 is found in subsection (8) of section 733.6171.78 Subsection (8) provides: “This section shall apply to estates in which an order of discharge has not been entered prior to its effective date but not to those estates in which attorney’s fees have previously been determined by order of court after notice.”79

The purpose of this effective date provision was to apply the new procedure to determine reasonable attorneys’ fees to estates then in administration. Of course, this was what happened upon Platt being decided. The court did not limit its application only to estate probates commenced after the opinion issued; rather, the Platt procedures for determination of a reasonable fee applied to all estates then in probate. The intention was to achieve parity between what the court had done with Platt and what the legislature had done with chapter 93-257. This same language continues in the present statute.

However, this provision quickly came under constitutional attack in Williams College v. Bourne.80 In Williams College, the fifth district initially

75. See id. § 733.6171 (1993). This was renumbered as 733.6171(8) in the 1995 amendment.
76. Fla. Stat. § 733.6171(8) (1995). See also Williams College v. Bourne, 670 So. 2d 1118 (5th Dist. Ct. App. 1996), which was decided approximately three months before the effective date of this amendment, where the court notes: “Williams College points out that the mandatory language of this legislation leaves open the argument that fees for the personal representative’s attorney must be paid for the fee litigation even if the fee request is exorbitant and only a fraction of the claimed fees is awarded.” Id. at 1121 n.5.
78. Id. § 733.6171(8) (1993). This section has been renumbered as 733.6171(10) in the 1995 amendment.
79. Id.
80. 625 So. 2d 913 (Fla. 5th Dist. Ct. App. 1993).
reversed and remanded the trial court’s finding from May of 1991 that Williams College had agreed to a valid percentage-based fee contract with the attorney.\footnote{Id. at 914.} A petition for discharge in the estate was filed on June 29, 1990, which predated \textit{Platt} and all of the ensuing statutory changes. The only remaining item of administration was to determine the attorney’s fee. The initial fee request from the attorney for the personal representative was $125,175.54.\footnote{Williams College v. Bourne, 670 So. 2d 1118, 1119 (Fla. 5th Dist. Ct. App. 1996).}

After remand, but before further trial ensued, section 733.6171(8) was adopted which directed the court to determine the fee, absent an agreement (which the appellate court had already determined was not binding), based on the fee presumed reasonable in the new statute.\footnote{See Williams College v. Bourne, 656 So. 2d 622, 623 (Fla. 5th Dist. Ct. App. 1995).} In accordance with the statute, the trial judge made that determination and found a fee of $116,676 to be reasonable.\footnote{Id. at 623.} However, since \textit{Platt} had also been decided in the interim, the trial judge also made a determination in accord with the \textit{Platt} guidelines, in case section 733.6171(8) was constitutionally defective and \textit{Platt} controlled the determination.\footnote{Williams College, 625 So. 2d at 914 n.1.} A reasonable fee decided under the \textit{Platt} guidelines was $63,624.\footnote{Williams College, 656 So. 2d at 623 (applying \textit{In re} Estate of Platt, 586 So. 2d 328 (Fla. 1991)).}

The constitutionality of the “retroactive” effect of section 733.6171(8) was argued and the trial judge ruled on that issue. The court ruled that the portion of the statute which provides how a reasonable fee is to be determined is not a new right, but rather a modification of existing procedures.\footnote{Id. at 623.} However, the court held that section 733.6171(7), which allowed fees for the process of determining fees, was a new entitlement which did not previously exist, and found this provision to be unconstitutional to the extent it is applied retroactively. As the court stated:

\begin{quote}
An analysis of the case law suggests that a distinction should be drawn between cases where a new right or entitlement is created and cases where procedures concerning an existing right are modified. Not surprisingly, this case has both. The estate has always been obligated to pay a reasonable attorney’s fee in this case. The
\end{quote}
method of determining fees has varied but the obligation has not. The Court finds that the application of F.S. 733.6171 to determine a reasonable fee in this case is not an unconstitutional deprivation of a vested right.

. . .

On the other hand, F.S. 733.6176(7) (sic) provides for the recovery of costs and fees expended to determine compensation. These items were not recoverable under Platt and it is fundamentally unfair to impose a new obligation retroactively to this set of facts. The Court finds that the application of F.S. 733.6171(7) to impose fees previously unrecoverable to be unconstitutional. 88

Not surprisingly, this ruling was appealed. 89 The appellate court again reversed the trial judge, this time finding that the fee award was not controlled by section 733.6171(8), but rather application of the statute to determine attorneys' fees earned for services rendered before the statute becomes effective was unconstitutional and these fees must be determined in accordance with the procedures mandated by Platt (requiring the award of an hourly fee in the amount of $63,624). 90 This author disagrees with the fifth district and believes that the trial judge properly determined the constitutional issues.

The underlying law relating to the constitutionality of a statutory amendment and its application to events occurring before the amendment is that substantive changes in the law generally cannot have retroactive effect although remedial or procedural provisions may. 91 The Fifth District Court of Appeal addressed the question of whether the amendment to section 733.6171, which fixed the method to be followed to determine a reasonable fee, is procedural on the one hand, and therefore constitutional, or substantive on the other hand, and thus unconstitutional. 92

In Miami Children's Hospital v. Tamayo, 93 the court considered whether its decision in Florida Patient's Compensation Fund, Inc. v. Rowe 94 should be applied retroactively to limit attorneys' fees awardable by statute against the losing party in a medical malpractice action where the action

88. Id.
89. See Williams College v. Bourne, 656 So. 2d 622 (Fla. 5th Dist. Ct. App. 1995).
90. Id. at 623. It is interesting to note that Platt was also decided after the attorney's services had been rendered in the estate.
92. Williams College, 656 So. 2d at 623.
93. 529 So. 2d 667 (Fla. 1988).
94. 472 So. 2d 1145 (Fla. 1985).
arose prior to the *Rowe* decision. The court held “[w]e emphasize that the factors to be utilized in computing a reasonable attorney’s fee, whether established by this Court through the Code of Professional Responsibility or by case law, are procedural in nature.”

The supreme court also considered the retroactive effect of section 768.56 (in medical malpractice actions attorneys’ fee awarded to the prevailing party—the statute upon which *Rowe* was based) in cases where the cause of action accrued before the effective date of the statute.

In Florida, it is clear that in the absence of an explicit legislative expression to the contrary, a substantive law is to be construed as having prospective effect only. ... This rule mandates that statutes that interfere with vested rights will not be given retroactive effect. On the other hand, statutes which relate only to the procedure or remedy are generally held applicable to all pending cases. In *McCord v. Smith*, 43 So.2d 704 (Fla. 1949), we stated:

A retrospective provision of a legislative act is not necessarily invalid. It is so only in those cases wherein ... a new obligation or duty is created or imposed ... in connection with transactions or considerations previously had or expiated.

Under these concepts, therefore, the trial judge appears to be correct that a change in the method by which a reasonable fee is determined is only remedial and is permitted to have retroactive effect, especially where so directed by the legislature. However, the creation of a right to collect attorneys’ fees for a dispute involving the determination of fees, where that right did not previously exist, would be unconstitutional if applied to a fee determination in progress when the statute was enacted.

The next step in the continuing saga began when the attorney filed a petition for allowance of attorneys’ fees for services rendered in the proceedings to determine fees, but only for that part of the services rendered after the statute became effective. This petition was based on language in the *Williams* opinion, that “once the services by the attorney for the estate were rendered, the estate became obligated to pay a reasonable attorney fee ... based on then applicable law.” Based on that statement, the attorney

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95. *Tamayo*, 529 So. 2d at 667.
97. *Young v. Altenhaus*, 472 So. 2d 1152, 1154 (Fla. 1985).
Kelley reasoned that attorneys' fees incurred after the effective date of section 733.6171(7) incurred on the issue of determination of attorneys' fees, would be compensable. He filed a motion in the trial court to allow attorney fees for services after October 1, 1993. The trial court allowed those fees and the appeal ensued. Maintaining its consistency, the Fifth District Court of Appeal reversed the trial judge and ruled:

[T]he Williams ... panel utilized principles analogous to those found in Young and L. Ross to find that Ward had a cause of action against the estate for the value of his services from the moment he began to render them. It was at that moment when, although the ultimate fee amount would increase over the course of Ward's services, the estate's liability to compensate Ward was legally fixed, as was the legal formula by which the fees would be calculated. The subsequent enactment of a statute that provided for a new formula could not constitutionally be effective to enhance that liability.

... To the extent Ward did or did not possess the right to compensation calculated in a certain way and the right to charge his time to litigate his own compensation, these rights were inextricably bundled at the moment Ward began his representation of the estate.

If this is correct law, it is an unfortunate policy result. All estates, probate of which has commenced after October 1, 1993, and before June 18, 1995, would be locked into the bloated bifurcated compensation formula that the probate bar worked so hard to eliminate.

A concept generally overlooked by lawyers and judges who assume that later statutory amendments in the area of fees "reversed Platt" is that the Platt rules for determination of a reasonable fee continue to apply in all probate, trust, and guardianship proceedings for fees other than attorneys’ fees for representing the fiduciary in probate administration and initial trust administration and fees of the personal representative. This continued application of Platt would include, at least, determination of a reasonable fee under section 744.108 (guardianship attorneys’ fees and guardians’ fees), section 733.106(2) (attorneys’ fees awarded to a person offering a will in

100. Williams College, 670 So. 2d at 1119.
101. Id. at 1121 (referring to Young v. Altenhaus, 472 So. 2d 1152 (Fla. 1985); L. Ross, Inc. v. R.W. Roberts Constr. Co., 466 So. 2d 1096 (Fla. 5th Dist. Ct. App. (1985), approved, 481 So. 2d 484 (Fla. 1986).
good faith), section 733.106(3) (fees to an attorney who benefits an estate), section 733.609 (fees awarded in an action challenging proper exercise of a personal representative's powers), section 737.627 (fees awarded in an action challenging proper exercise of a trustee's powers), and section 737.204 (trustees' fees). An argument can be made that Platt also applies to determine fees for employees or agents of the personal representative (or the trustee); however, there is no further authority on this point, and certain applications would appear to be illogical (e.g. a fee to a real estate broker for sale of estate real property, or to an auction house for sale of a valuable collection of personalty).

Finally, with regard to the topic of probate and trust attorneys' fees, there is one additional change included in the 1995 amendment and a sampling of recent cases on the subject of attorney fees which will be addressed here.

New subsection (9) was added to section 733.6171 which requires that the amount and manner of determining compensation for the attorney must be disclosed in the final accounting unless the disclosure is waived in writing by the parties bearing the impact of the fees, and those waivers must be filed. If waived, the content of the waiver must meet certain requirements. First, the waiver must contain a statement that the party has actual knowledge of the amount and manner of determining the attorney compensation, and in addition, that the waiving party either has agreed to the compensation or that the waiving party has a right to petition the court to decrease the compensation and is waiving that right. Waivers which do not meet these requirements are ineffective.

Two cases are worthy of mention. In Berger v. Brooks a discharged attorney for a personal representative was entitled to a fee based on quantum meruit; however, the amount awarded could not exceed the total of the fee contracted for. In this case, the agreed fee was $1,000, but the attorney applied for a quantum meruit fee of $8,800. The trial court also ruled that section 733.6171 is unconstitutional without stating the basis for that
ruling. The Third District Court of Appeal reversed this portion of the trial judge's order which declared the statute unconstitutional.

In *Dew v. Nerreter*, the trial court awarded a fee to the attorney for an unsuccessful will contestant under 733.106(3). Under some limited circumstances fees under this statute have been allowed to the attorney for a nonprevailing party in estate litigation. However the services rendered in this case were of no benefit to the estate and the fee award was reversed.

### IV. CLAIMS

This topic has been active in recent case law regarding the nature of the applicable statutory provisions.

There are three possible classifications of statutory provisions purporting to bar claims:

1) a statute of repose or nonclaim;
2) a statute of limitations; and
3) a rule of judicial procedure.

There are also three different actions that may be taken regarding estate claims which are affected by the different types of statutory provisions:

1) filing the claim
   A. where the potential claimant has received notice
   B. where the potential claimant has not received notice
2) objection to the claim
3) commencement of an independent action on the claim.

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105. *Id.* at 1282.
106. *Id.*
107. 664 So. 2d 1179 (Fla. 5th Dist. Ct. App. 1995).
108. *Id.* at 1180. Section 733.106 entitled, Costs and attorney fees, provides in part:

> (3) Any attorney who has rendered services to an estate may apply for an order awarding attorney fees, and after informal notice to the personal representative and all persons bearing the impact of the payment the court shall enter its order on the petition. FLA. STAT. § 733.106(3) (1995).


Published by NSUWorks, 1996
The nature of the statute impacts the rights of the party charged to act if that action is tardy or does not occur and impacts the ability to obtain relaxation of the statutory deadline. The importance of determining the effect of the statutory provisions on the actions or inactions of parties is not well understood, as evidenced by the divergence in result in the reported cases.

A statute of nonclaim or repose is an automatic and complete bar to a claim. A late filed claim may simply be ignored and need not be stricken on motion. Defenses such as estoppel or fraud are unavailable to the claimant and the court cannot extend the time for filing the claim (unless specifically authorized by the nonclaim statute).

A statute of limitations, in contrast, must be pled and proved by the estate as an affirmative defense or it is waived. It is also subject to the defense of estoppel or fraud which may be raised by reply under Rule 1.100 of the Florida Rules of Civil Procedure.

A rule of judicial procedure is a limitation which may be relaxed or extended, even after it has expired, in the broad discretion of the judge for good cause shown. In Yerex v. Durzo, the fourth district interpreted section 733.705(4) as a rule of judicial procedure rather than a statute of nonclaim and the court allowed a late filing of an independent action, after objection to the claim. In this case, the widow’s claim was contingent upon the personal representative suing her, which event had not occurred. Since the filing of an independent action on the claim was premature, the trial court granted an extension of time to file.

A difference of opinion exists regarding the classifications of sections 733.702 and 733.710 as either statutes of nonclaim or statutes of limitation. What is surprising is the number of reported opinions from the various courts of appeal which have totally ignored a statement in the supreme court majority opinion in Spohr v. Berryman that “[w]hile known as a statute of

111. See Fla. Stat. § 733.702(3) (1995). This section provides: “an extension [of time to file a claim] may be granted only upon grounds of fraud, estoppel, or insufficient notice of the claims period.” Id.
113. 651 So. 2d 220 (Fla. 4th Dist. Ct. App. 1995).
114. Id. at 221.
115. Id.
116. Id.
117. 589 So. 2d 225 (Fla. 1991).
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nonclaim, it [733.702] is nevertheless a statute of limitations."\(^{118}\) Prior writing by this author\(^{119}\) has also concluded that section 733.702 is a statute of nonclaim, although a contrary view is expressed by another author in the same treatise.\(^{120}\) The reason Justice Grime's statement in \textit{Spohr} seems to be so uniformly ignored is because it is probably wrong; and, in any case, it is clearly dicta which is not binding on the appellate courts.\(^{121}\)

As of this writing, the first, third, and Fourth District Courts of Appeal have held that section 733.702\(^{122}\) in its present form is a statute of nonclaim.

118. \textit{Id.} at 227 (referring to Barnett Bank of Palm Beach County v. Estate of Read, 493 So. 2d 447 (Fla. 1986)) (finding that it is a statute of nonclaim, which is uniformly to the contrary).


121. Professor David T. Smith of the University of Florida Law School, in his treatise, states, "Fla. Stat. § 733.702 now is a jurisdictional statute of nonclaim and not a statute of limitations as it was at the time of Barnett Bank v. Estate of Read." \textit{Florida Probate Code Manual} § 7.2 (Mitchie 1996).

122. Section 733.702, entitled Limitations on presentation of claims, provides:

\begin{itemize}
  \item[(1)] If not barred by s. 733.710, no claim or demand against the decedent's estate that arose before the death of the decedent, including claims of the state and any of its subdivisions, whether due or not, direct or contingent, or liquidated or unliquidated; no claim for funeral or burial expenses; no claim for personal property in the possession of the personal representative; and no claim for damages, including, but not limited to, an action founded on fraud or another wrongful act or omission of the decedent, is binding on the estate, on the personal representative, or on any beneficiary unless filed within the later of 3 months after the time of the first publication of the notice of administration or, as to any creditor required to be served with a copy of the notice of administration, 30 days after the date of service of such copy of the notice on the creditor, even though the personal representative has recognized the claim or demand by paying a part of it or interest on it or otherwise. The personal representative may settle in full any claim without the necessity of the claim being filed when the settlement has been approved by the beneficiaries adversely affected according to the priorities provided in this code and when the settlement is made within the statutory time for filing claims; or, within 3 months after the first publication of the notice of administration, he may file a proof of claim of all claims he has paid or intends to pay.

  \item[(2)] No cause of action heretofore or hereafter accruing, including, but not limited to, an action founded upon fraud or other wrongful act or omission, shall survive the death of the person against whom the claim may be made, whether an action is pending at the death of the person or not, unless the claim is filed within the time periods set forth in this part.
\end{itemize}
This line of cases began when Judge Smith writing for the First District Court of Appeal in *In re Estate of Parson* first characterized section 733.702, as amended in 1984, as a nonclaim statute. This opinion preceded *Spohr* by more than a year. Judge Smith again writing for the court in *Thames v. Jackson* reaffirmed this characterization after *Spohr*, without mentioning *Spohr*. Judge Schwartz, writing for the First District Court of Appeal in *Baptist Hospital of Miami, Inc. v. Carter* cited *Parsons* with approval, but did not mention *Spohr*. However, the *Baptist Hospital* characterization of section 733.702, as a statute of nonclaim, was dicta, since the issue before the court was the nature of section 733.710 as either a statute of nonclaim or a statute of limitations. Finally, the Fourth District Court of...
Appeal fell in line with Comerica Bank & Trust, F.S.B., v. SDI Operating Partners, L.P., and found section 733.702 to be a statute of nonclaim. It seems most likely when this issue reaches the supreme court that it will retreat from its characterization of the statue in its current version as a statute of limitations.

Regarding section 733.710, agreement is not uniform among the districts in classifying that estate, with the Fourth District Court of Appeal finding it to be a statute of non-claim and the Third District Court of Appeal finding it to be a statute of limitations.

In Baptist Hospital of Miami, Inc. v. Carter, the hospital, a known creditor of decedent, was advised by the widow that the decedent died without any assets requiring probate administration. However, the hospital filed a creditor’s caveat anyway. Very shortly after the expiration of a two year period following the decedent’s death, the widow commenced administration of the estate. The hospital was notified of the administration by the court because of the caveat, and promptly filed its claim. The personal representative/widow moved to strike the claim as being barred by section 733.710 and the trial court struck the claim.

The hospital appealed arguing that “733.710 is a statute of limitations, rather than of repose, [and therefore] fraud or misrepresentation of the type alleged here may serve to estop the estate from raising the limitations

129. Id. at 168.
130. Section 733.710 entitled Limitations on claims against estates, provides:
   (1) Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent’s estate, the personal representative (if any), nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.
   (2) This section shall not apply to a creditor who has filed a claim pursuant to s. 733.702 within 2 years after the person’s death, and whose claim has not been paid or otherwise disposed of pursuant to s. 733.705.
   (3) This section shall not affect the lien of any duly recorded mortgage or security interest or the lien of any person in possession of personal property or the right to foreclose and enforce the mortgage or lien.

FLA. STAT. § 733.710(1)–(3) (1995).
131. Baptist Hosp., 658 So. 2d at 561.
132. Id.
133. Id.
134. Id.
135. Id.
defense." The Third District Court of Appeal agreed and reversed and
remanded for a factual determination of the misrepresentation/estoppel
issue. Had section 733.710 been a statute of repose (nonclaim statute), no
defense would have been available and the claim would have been finally
barred. To illustrate a statute that operates with such finality, the opinion
pointed out that section 733.702 was such a statute of repose.

In direct and certified conflict is Comerica Bank & Trust, F.S.B. v. SDI
Operating Partners, L.P. The probate court, on motion, granted an
extension of time, beyond two years following decedent’s death in which to
file its claim. The personal representative appealed arguing that section
733.710 was a statute of repose and unequivocally erases any liability on
claims filed after the repose period. The Fourth District Court of Appeal
agreed and reversed. The effect of this determination is that none of the
equitable defenses of fraud or estoppel are available to excuse noncompli-
ance with the statute. The reasoning of the Fourth District Court of Appeal
is based on the fact that section 733.702, by its terms, is subordinate to
733.710. The court reasoned that if section 733.702 most likely is a
statute of repose (in this it agrees with the Third District Court of Appeal),
then section 733.710 which is preeminent, must also be a statute of repose,
and not a statute of limitations.

To its credit, the Fourth District Court of Appeal opinion in Comerica
Bank & Trust is the first opinion which makes note of the “throw-away” line
in Spohr v. Berryman which characterizes section 733.702 as a statute of
limitations. As gently as possible, Judge Farmer writing for the Comerica

136. Baptist Hosp., 658 So. 2d at 561.
137. Id. at 561.
138. Id. at 563.
139. Commerica Bank, 673 So. 2d at 163.
140. Id. at 164. There was no issue as to whether the claims were timely under section
733.702, since the period runs from service of notice of administration.
141. Id.
142. Id. at 163.
143. Section 733.702(1) begins: “If not barred by s. 733.710, no claim or demand against
the decedent’s estate....” Fla. Stat. § 733.702(1) (1991). Also, 733.702(5) provides:
“Nothing in this section shall extend the limitations period set forth in s. 733.710.” Id. §
733.702(5). Finally, 733.710(1) begins: “Notwithstanding any other provision of the code....”
Id. § 733.710(1). The author agrees with the Fourth District Court of Appeal regarding
preeminence of 733.710, but disagrees that it be of at least equal authority with 733.702.
Also, the balance of the opinion is an intricately constructed model of logic, which rests on a faulty
foundation. It is the author’s opinion that section 733.710 is an ordinary statute of limitations.
144. Comerica Bank, 673 So. 2d at 166 n.5.
court, points out that by the time Spohr was decided, section 733.702 had been amended from a statute of limitations to a statute of nonclaim.\textsuperscript{145}

Trying to make procedural sense of the unsettled state of the law becomes difficult for the practitioner. Recognizing widespread disagreement, this author suggests the following:

1.(a) A claimant is not barred until the passage of two years from decedent’s death for failure to timely file a claim if he was reasonably ascertainable but was not served with notice of administration. The claim may be filed at any time during the two year period and it will be determined timely. The better procedure for the claimant would be to file a motion to extend the time for filing a claim on the authority of section 733.702(3) (on the grounds of insufficient notice of the claims period)\textsuperscript{146} so as not to have the court mistakenly enter an order of discharge, without notice to the claimant, believing the claim to have been barred without further action by section 733.702(3).\textsuperscript{147} Section 733.710 is a statute of limitations, which must be pled as an affirmative defense and by case law interpretation is subject to the equitable defenses of fraud and estoppel.

1.(b) A claimant who has received notice of administration but who has not timely filed the claim is automatically barred without further action\textsuperscript{148} unless the claimant requests an extension of time to file, which may only be granted on the ground of fraud, estoppel, or insufficient notice of the claims period. 733.702(3).

2. The time for objection to a claim\textsuperscript{149} may be extended by the court before or after the thirty-day time period expires upon a showing of good cause. This is a rule of judicial procedure which may be relaxed in the broad discretion of the trial court.\textsuperscript{150}

3. An independent action must be commenced by the claimant if the claim has been objected to, within thirty-days from the date of service of the

\textsuperscript{145} Id. at 166.
\textsuperscript{146} This is probably not required for the validity of the filed claim, since the claim simply has not been barred.
\textsuperscript{148} No motion to strike the claim is required.
\textsuperscript{149} On or before four months of the first publication of the notice of administration or 30 days from the filing of the claim, whichever is later. See FLA. STAT. § 733.705(2) (1995).
\textsuperscript{150} Golden v. Atlantic Nat’l Bank of Jacksonville, 481 So. 2d 16 (Fla. 1st Dist. Ct. App. 1985), review denied, 492 So. 2d 1332 (Fla. 1986). Although the court in Golden did not construe the same portion of the present statute, it may be cited as authority for this proposition. See also FLA. STAT. § 733.705(2).
objection. This is a rule of judicial procedure which may be relaxed in the broad discretion of the trial court for good cause shown.\textsuperscript{151}

V. TRUSTS

The law of trusts has seen substantial legislative action in the past three years, especially as it relates to a trust where the settlor has reserved a power to revoke.\textsuperscript{152} Several significant legislative changes have occurred which impact trusts.

The first, setting a method to determine reasonable attorneys’ fees for the trustee’s attorney, was covered in detail above under the section on attorneys’ Fees and will not be further discussed here.

The second involves the “on to off” creditor’s procedures imposed on revocable trusts. The third creates a statute of limitations\textsuperscript{153} to mirror section 733.710 which is applicable to claims two years after the settlor’s death.\textsuperscript{154} The fourth involves new execution requirements for trusts with testamentary aspects. Finally, several trust cases were discussed above in the section on Jurisdiction.

In the 1993 survey, Ms. Donohue noted that an effect of the recent legislation “was to make trust administration more similar to probate administration.”\textsuperscript{155} In fact, the provisions adopted in chapter 93-257, relating

\textsuperscript{151.} See Fla. Stat. § 733.705(4); see also Yerex v. Durzo, 651 So. 2d 220 (Fla. 4th Dist. Ct. App. 1995).

\textsuperscript{152.} The statutory references in several places throughout the code are to “a trust described in s. 733.707(3).” That section provides:

\begin{quote}
(3) Any portion of a trust with respect to which a decedent who is the grantor has at the decedent’s death a right of revocation, as defined in paragraph (c), either alone or in conjunction with any other person, is liable for the expenses of the administration of the decedent’s estate and enforceable claims of the decedent’s creditors to the extent the decedent’s estate is insufficient to pay them as provided in § 733.607(2).
\end{quote}

\textsuperscript{153.} Or a statute of repose, depending on whether you are in the fourth district. See discussion supra p. 407.

\textsuperscript{154.} Fla. Stat. § 733.707(3)(c). The correct paragraph (c) was omitted through legislative error. Although the error was created in ch. 95-401, it was not corrected in the 1996 Legislative session.

\textsuperscript{155.} Donohue, supra note 1, at 383.
to creditors’ rights in trust assets and trustees’ liability to creditors, was the first step in a trend toward requiring probate of trusts. Ms. Donohue also noted that this would “[make] such trusts less attractive.”

Apparently her warnings did not go unheeded. Chapter 95-401 began reversing that process. The philosophy behind this was that if the public desired a probate of the estate, that was now available through the use of a will as a testamentary document. Why should we labor to build a parallel system to probate trusts when the existing will probate system has evolved and been refined over many years and is well suited to its purpose. In fact, it was the intention of many people to avoid probate which motivated the use of the living trust as a testamentary vehicle. It was unfair and unreasonable to force the living trust into a probate process.

However, it was also unfair and unreasonable to allow persons to avoid their just debts, either during lifetime or upon death, by using a revocable trust as a testamentary alternative to a will. Therefore, the statutory duty of the trustee to be responsible ultimately to see to the payment of just debts of the decedent was retained, but in a revised format.

Specifically, the 1993 version of section 737.3056, “[t]rustee’s duty to pay expenses and obligations of settlor’s estate,” was repealed, as was the 1993 version of section 737.3057, entitled “[t]rustee’s duty to notice creditors,” by chapter 95-401, sections 41 and 42, respectively, effective October 1, 1995. Adopted by chapter 95-401, section 737.3054, entitled “[t]rustee’s duty to pay expenses and obligations of settlor’s estate,” replaced the prior statute so the trustee’s duty and liability to creditors of the decedent remains in the statute.

Some have described it as a legislative oversight that the trustee’s duty to pay creditors (and expenses of administration of the settlor’s estate) under the conditions described in the statute continues, but no provision for the trustee to bar creditor’s claims remains. This is an accurate analysis of the present state of the law, however, it was accomplished intentionally rather than by oversight. If the legislature was to keep the faith with those who assumed that their revocable trust would avoid probate, and intended it to be so, it needed to remove the “probate vestige,” the creditor’s publication and claim filing procedure from the trust law, which it did. That should not, however, shelter the trustee or the trust assets from just debts of the decedent, unless those debts are paid by, or extinguished through, a probate estate.

156. Id.
157. FLA. STAT. § 737.3054 (1995). See also id. § 733.707(3).
So what is the present state of the law? In the absence of a concurrent probate proceeding, the trustee is well advised to determine and pay the settlor's just debts from the trust assets. If there are disputed claims, dissident beneficiaries, challenges to the trust validity by omitted heirs, or other adversarial matters to which procedural solutions are not provided in the trust statutes, then a concurrent probate administration of the estate is the solution. Assuming none of these items are present, an “informal administration” of the trust alone is required.

The alternative would be to erect a complex procedural structure in the trust law, identical to that in probate, to resolve these issues for trusts. This cannot be what is desired by the public.

A practical problem which exists because of the implementation of this “informal trust administration” concept is that the designated trustee may have no authority to pay claims directly to the claimants. The statute does not authorize the trustee to make direct payments of creditors. That authority, if it exists, could only come from the governing instrument, the trust. Certainly 99.9% of the trust documents presently in place do not allow the trustee that authority. What results is that the payments are either made with the formal or informal consents of all beneficiaries, or a concurrent probate is initiated. The former solution should prevail in most of the trust administrations where the plan benefits only a surviving spouse, or the spouse and children. In the latter instance, the procedures of the statute158 will operate to provide the structure to accomplish the desired result, that being payment of the settlor's just debts. The trustee is now defined as an interested person in the probate administration159 and would, therefore, have the right to petition for administration.160

A part of the new concept of a trust’s responsibility for payment of the just debts of the decedent, is the necessity that the trust and the trustee become known to the creditors or to the personal representative. This is accomplished by requiring the trustee to file a notice of trust with the clerk.161

158. See generally id. § 737.3054.
159. Id. § 731.201(21).
160. Id. § 733.202(1).

(1) Upon the death of a settlor of a trust described in s. 733.707(3), the trustee must file a notice of trust with the court of the county of the settlor’s domicile and the court having jurisdiction of the settlor’s estate.
That notice is indexed by the clerk in the manner of a caveat if no probate proceeding is then pending, or is filed in the probate file with a copy sent by the clerk to the personal representative if such a proceeding is then pending.

The structure of this procedure provided by statute is that the personal representative (who is aware of the trust and the trustee by virtue of the notice of trust which was filed and served as required in 737.308(4)) will certify in writing to the trustee the estate's shortfall after the residuary of the probate estate (or in case of intestacy, all assets other than statutory entitlements, such as family allowance) has been consumed. Note that preresiduary devises and statutory entitlements are protected. The trustee, after reserving sufficient sums to pay the expenses of trust administration, including fees of the trustee and the trustee's attorney, remits amounts sufficient to fund the personal representative's certification. A settlor in the trust document may provide for the manner in which the remittitur is apportioned within the trust among the various interests, but absent specification in the trust document, the statute creates the schedule of apportionment.

Most lawyers have assumed that the concurrent probate administration, with its published notice of administration and required service on known or reasonably ascertainable creditors, will also bar the rights of creditors in the trust assets and extinguish the liability of the trustee for payment (before the two year statute of limitations expires); however, some have questioned this

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(2) The notice of trust must contain the name of the settlor, the settlor's date of death, the title of the trust, if any, the date of the trust, and the name and address of the trustee.

(3) If the settlor's probate proceeding has been commenced, the clerk must notify the trustee in writing of the date of the commencement of the probate proceeding and the file number.

(4) The clerk shall file and index the notice of trust in the same manner as a caveat, unless there exists a probate proceeding for the settlor's estate in which case the notice of trust must be filed in the probate proceeding and the clerk shall send a copy to the personal representative.

(5) In any proceeding affecting the expenses of the administration of the estate, or any claims described in s. 733.702(1), the trustee of a trust described in s. 733.707(3) is an interested person in the administration of the grantor's estate.

(6) Any proceeding affecting the expenses of the administration of the estate or any claims described in s. 733.702(1) prior to the trustee filing a notice of trust are binding upon the trustee.

(7) The trustee's failure to file the notice of trust does not affect the trustee's obligation to pay expenses of administration and enforceable claims as provided in s. 733.607(2).

**FLA. STAT. § 737.308 (1995).**

162. **Id. § 733.607(2) (1995).**
result. The operative statute\textsuperscript{163} provides: "no claim or demand against the decedent's estate . . . is binding on the personal representative, or on any beneficiary unless filed within the later of 3 months after the time of the first publication of the notice of administration."\textsuperscript{164}

An amendment to this statute is being considered by the probate law committee of the RPPTL section to add specific reference to the trust, trustee, and trust beneficiaries in this section.

Another significant legislative change which must be considered by the practitioner in drafting living trusts is chapter 95-401, specifically section 11, which later became section 737.111.\textsuperscript{165} This statute reversed the holding in \textit{Zuckerman v. Alter}\textsuperscript{166} to the effect that a trust of personal property (specifically stocks and a bank account), which included post-death dispositions, did not require witnesses as a condition of validity.\textsuperscript{167} Under the terms of the new statute, the testamentary aspects of an express trust, as defined in section 731.201(33), are invalid unless the trust is executed with the formalities required by section 732.502\textsuperscript{168} for execution of a will. The compel-

\begin{itemize}
\item \textbf{163.} \textit{Id.} § 733.702 (1995).
\item \textbf{164.} \textit{Id.} (emphasis added).
\item \textbf{165.} Section 737.111 of the \textit{Florida Statutes} is entitled "Execution requirements for express trusts" and provides:
\begin{enumerate}
\item The testamentary aspects of a trust defined in s. 731.201(33), are invalid unless the trust is executed with the formalities required for the execution of a will.
\item The testamentary aspects of a trust created by a nonresident are not invalid because the trust does not meet the requirements of this section, if the trust is valid under the laws of the state or country where the settlor was at the time of execution.
\item The testamentary aspects of an amendment to a trust are invalid unless the amendment is executed with the same formalities as a will.
\item For the purposes of this section, the term "testamentary aspects" means those provisions of the trust that dispose of the trust property on the death of the settlor other than to the settlor's estate.
\end{enumerate}
\item \textbf{166.} 615 So. 2d 661 (Fla. 1993). \textit{See Donohue, supra} note 1, at 376 (providing additional discussion on this case).
\item \textbf{167.} Trusts of real property have always required execution with the formalities of a deed, requiring two witnesses, as a condition to validity. \textit{FLA. STAT.} §§ 689.01, .05, .06 (1995). However, the formalities required for execution of deed differ from the formalities required for execution of a will, even though both require two witnesses.
\item \textbf{168.} \textit{See} section 732.502 which provides that every will must be in writing and executed as follows:
\begin{enumerate}
\item (a) Testator's signature.—
\begin{enumerate}
\item The testator must sign the will at the end; or
\end{enumerate}
\end{enumerate}
ling question, especially as it relates to self-trusteed trusts, is why should one be able to make a deathtime disposition of property by a trust, without witnesses present and subscribing, while that same disposition, if done by will, would require present and subscribing witnesses. Witnesses should be required in both or neither. The consensus is that the dignity and formality added to the event, together with the potential for later eye witness testimony, mandates the presence of witnesses. Because of the definitional breadth in section 731.201(33), all of the popular forms of split interest trusts and the qualified personal residence trust are caught within the scope of this execution requirement.

The drafting oversight is that existing trusts were not excluded from the operation of this section. While revocable or amendable trusts may cure the problem with an amendment or revocation, the real problem lies in existing trusts which are neither revocable or amendable. The argument may be made by testate or residuary beneficiaries of the decedent’s probate estate, that application of the statute to existing qualified charitable remainder trusts, or pooled income funds created in the trust form, invalidate the post death disposition provisions. Moreover, these trust assets are properly assets

2. The testator’s name must be subscribed at the end of the will by some other person in the testator’s presence and by his direction.
   (b) Witnesses.—The testator’s:
   1. Signing, or
   2. Acknowledgment:
      a. That he has previously signed the will, or
      b. That another person has subscribed the testator’s name to it, must be in the presence of at least two attesting witnesses.
   (c) Witnesses’ signatures.—The attesting witnesses must sign the will in the presence of the testator and in the presence of each other.
   (2) Any will, other than a holographic or nuncupative will, executed by a nonresident of Florida, either before or after this law takes effect, is valid as a will in this state if valid under the laws of the state or country where the testator was at the time of execution. A will in the testator’s handwriting that has been executed in accordance with subsection (1) shall not be considered a holographic will.
   (3) No particular form of words is necessary to the validity of a will if it is executed with the formalities required by law.
   (4) A codicil shall be executed with the same formalities as a will.


169. Section 731.201(33) provides that, “[t]rust” means an express trust, private or charitable, with additions to it, wherever and however created. It also includes a trust created or determined by a judgment or decree under which the trust is to be administered in the manner of an express trust.” FLA. STAT. § 731.201(33) (1995).

170. To the extent of any testamentary aspects.

171. Or perhaps by the IRS.
subject to the residuary clause of the grantor/settlor's will, or to be inherited by beneficiaries of the intestate grantor/settlor. Assuming, however, these trusts are of the nature of contracts, then retroactive application of this statute is constitutionally defective as impairing the right to contract. This deficiency was recognized after the passage of chapter 95-401, however, since no legislation of any consequence in the trusts and estates area passed during the 1996 Legislative session, this oversight was not corrected.

Chapter 95-401 added several new trust administration aspects which create a power in the trustee to hold new additions to the trust as a separate trust, or incorporate them into the trust, and also creates a right to sever an existing trust. These powers are granted principally to avoid tax consequences involving the generation skipping tax. In the first instance, if a devise is made to an existing exempt generation skipping trust, whether one which is grandfathered as exempt, or one which was created as exempt, by keeping the new assets separate, a taint of the existing trust will be avoided. In the second instance, this will allow a fiduciary, absent documentary authority, to divide a trust which might have an inclusion ratio of greater than zero and less than one into two identical trusts, one having an inclusion ratio of zero and the other of one. This will facilitate administration and will affect taxable distributions and taxable terminations.

VI. GUARDIANSHIPS

With a court order, a guardian may exercise certain defined powers regarding trusts held by the ward in a fiduciary capacity. In In re Guardian-

174. Id.
175. Id §§ 2612, 2621.
176. See FLA. STAT. § 744.441 (1995). This section entitled Powers of guardian upon court approval provides:

(1) After obtaining approval of the court pursuant to a petition for authorization to act, a plenary guardian of the property, or a limited guardian of the property within the powers granted by the order appointing the guardian or an approved annual or amended guardianship report, may:

(2) Execute, exercise, or release any powers as trustee, personal representative, custodian for minors, conservator, or donee of any power of appointment or other power that the ward might have lawfully exercised, consummated, or exe-
ship of Muller,177 the guardian who was the decedent’s son, wanted to remove the serving trustee of the decedent’s preexisting revocable trust on the grounds of conflict of interest. There was pending litigation between the guardian on behalf of the ward and the person who was serving as trustee of the trust. The equities were clearly with the guardian, but the trial judge “with reluctance” denied the petition finding that the statutes relied upon by the movants did not contain the authority to remove a trustee.178

The Fourth District Court of Appeal in a per curiam opinion from a panel of senior judges construed the language of section 744.441(2) providing “or other power” to include the power a ward reserved to amend his own trust. This construction ignores the well established rule of statutory and document construction, ejusdem generis, which provides that a general reference following a specific list is to be construed as limited by the types of items in the specific list.179 In this instance, all the powers referred to are powers held in a fiduciary capacity.180 That rule of construction would require the reference to “other power” to be interpreted as, “other fiduciary power.” In this instance, the reserved power of the ward was a personal power as grantor, to amend his trust. It is curious that if there was an actual present conflict of interest between the trustee and the ward, that the circuit court, in a proceeding brought under section 737.201(1)(a), which gives the court specific power to “[a]ppoint or remove a trustee,”181 would not have done so.

Another Fourth District Court of Appeal case decided one year later also addresses section 744.441.182 In In re Guardianship of Sherry,183 the court would not permit a circuit judge to allow a guardian to create a trust for the ward so as to change the ultimate beneficiary of the ward’s estate because it would not result in any tax savings.184 As the court stated, there is no reason to negate the general principal that a guardian cannot exercise a

cuted if not incapacitated, if the best interest of the ward requires such execution, exercise, or release.

....

(19) Create revocable or 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.

Id. § 744.441(1), (2), (19).

177. 650 So. 2d 698 (Fla. 4th Dist. Ct. App. 1995).
178. Id. at 699.
179. See generally Metropolis Publishing Co. v. Lee, 170 So. 442 (Fla. 1936).
180. Except the reference to a power of appointment, which is a personal power.
182. See FLA. STAT. § 744.441(19).
184. Id. at 660.
purely personal right of the ward.\textsuperscript{185} In this case, the ward, Ruth, and her husband, George, were the co-grantors of a joint revocable trust. That trust provided for disposition of its assets on the death of both grantors to Harold and his wife, George's son and daughter-in-law. At the time of the guardianship adjudication, Ruth and George were in dissolution proceedings. The guardianship court approved an agreement between the guardian and George (who was the trustee of the trust) to distribute one-half of the family assets by means of a distributions of the corpus of the trust to Ruth's guardian. Harold and his wife did not approve the agreement.

Ruth's guardian received the distribution of assets, but Ruth's existing will poured her assets on death back into the trust. The guardian petitioned to create a new trust for Ruth into which the funds would be placed, which provided testamentary disposition to Ruth's friends. George objected and the court held:

the trial court erred in approving Appellee's petition to create a trust that would change the ultimate beneficiary of Ruth's estate from Harold and his wife to Fields, as it is clear that doing so had nothing to do with either tax or estate planning, as authorized under the statute. No benefits will accrue to the estate as a result of the guardian's substituting his judgment of what the ward would do now if she were not incapacitated.\textsuperscript{186}

There is another interesting line of cases which limits fees that are charged and collected by close family members for guardianship services. In one such case, a mother became a guardian for her daughter and was the recipient of a medical malpractice settlement of $2.85 million on behalf of her daughter.\textsuperscript{187} An estrangement later developed between the mother and her now adult daughter, which resulted in removal of the mother as guardian and restoration of some of the rights of the ward. As a part of her removal, the mother/guardian applied for the award of guardian's fees. The court in \textit{In re Guardianship of Neher} held:

a daughter is not entitled to compensation as a guardian of the person of her mother for doing what a daughter does. \textit{In re Read v. Kenefick}, 555 So.2d 869 (Fla. 2d DCA 1989). There is also no reason that a mother should be entitled to compensation for doing

\textsuperscript{185. Id.}
\textsuperscript{186. Id.}
\textsuperscript{187. In re Guardianship of Neher, 659 So. 2d 1294 (Fla. 2d Dist. Ct. App. 1995).}
what a mother does. In this case, however, not all of Sharon Neher's actions were actions that are normally done by a mother, and she should have received compensation for those services that were not. This ruling constitutes a holding that Sharon Neher performed some compensable services for the guardianship. Sharon Neher established a guardianship for her daughter, filed annual accountings, performed other services that were beyond the duties of a mother, and successfully thwarted an attempt to terminate the guardianship. Therefore, she should be compensated for some services.\(^{188}\)

Another interesting case, which follows a developing line of authority is *Wright v. Department of Health and Rehabilitative Services*.\(^{189}\) Ms. Wright, a professional guardian, was removed from all guardianships on a finding of probable cause by the Department of Health and Rehabilitative Services ("HRS") that "she had exploited her wards by improper management of funds."\(^{190}\) The statute requires that the guardian "file with the court a true, complete, and final report of [her] guardianship within twenty days after [her] removal."\(^{191}\) Ms. Wright refused to do so claiming her fifth amendment privilege against self-incrimination. The court held her in contempt for refusal to comply with its order and ordered her incarcerated until compliance.\(^{192}\) The Fourth District Court of Appeal made an extensive review of the law from other states, and federal jurisdictions, and concluded that by accepting her fiduciary position, with its requirement to account, that Ms. Wright waived her future right not to incriminate herself by fulfilling those incumbent duties.\(^{193}\)

The issue of standing in a guardianship matter is one not well defined in the statutes. Persons who allege that they are "relatives and beneficiaries under the ward's will" and who were taking care of the ward before she was declared incapacitated are interested persons under Rule 5.700(a) of the *Florida Probate Rules*, and have standing to object to a final accounting and petition for discharge of the guardian of a deceased ward.\(^{194}\)

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188. Id. at 1297.
189. 668 So. 2d 661 (Fla. 4th Dist. Ct. App. 1996).
190. Id. at 662.
192. Id. at 662.
193. Id. at 662-63.
If they do not have a sufficient interest to question how her funds were spent, there is probably no one who does, and we do not think that should be the case. As Judge Sharp observed in SunBank and Trust Co. v. Jones, "[c]ourts must scrupulously oversee the handling of the affairs of incompetent persons under their jurisdiction and err on the side of over-supervising rather than indifference." 195

Judge Glickstein’s dissent follows McGinnis v. Kanevsky holding to the contrary. 196

Finally, in Lawyers Surety Corp. v. Saltz, a surcharge action, the court found that the burden of proof of improper expenditures was with the plaintiff and that the plaintiff had failed to meet that burden. 197 The guardian had paid $3,000 per month to the ward’s wife for eight months for the care of the ward. The allowance was deposited by the ward’s wife into a joint account from which her personal expenses were also paid. The guardian did not require or obtain any accounting from the wife for the expenditures. The court found that the plaintiff failed to carry the burden of proof to show that the guardianship had been damaged by this admittedly improper disbursement by the guardian. 198

VII. ELECTIVE SHARE

In 1994, the Third District Court of Appeal decided an important elective share case entitled, Friedberg v. SunBank/Miami, N.A. 199 The widow petitioned to take an elective share against the assets of a revocable intervivos trust created by the decedent two years prior to death. The marriage was a thirty-eight year marriage. The total value of the estate exceeded $7,000,000 of which all but about $250,000 was funded in the decedent’s revocable trust at the time of his death. The trust provided for the majority of the estate to pass outright to charity, with a small portion to remain in trust in order to generate income for the widow during her lifetime. The opinion suggests that the trust was created and intended “to diminish or eliminate a surviving

195. Id. at 188 (quoting SunBank & Trust Co. v. Jones, 645 So. 2d 1008, 1017 (Fla. 5th Dist. Ct. App. 1994)).
196. Id. (Glickstein, J., dissenting) (following McGinnis v. Kanesky, 564 So. 2d 1141 (Fla. 3d Dist. Ct. App. 1990)).
197. 658 So. 2d 1152 (Fla. 2nd Dist. Ct. App. 1995).
198. Id. at 1152-53.
199. 648 So. 2d 204 (Fla. 3d Dist. Ct. App. 1994).
spouse’s statutory elective share.” The opinion noted that the legislature had considered and rejected adoption of the “augmented estate” concept in the Uniform Probate Code, which includes in the elective share right the value of assets not subject to probate, but over which the decedent exercised ownership or control; in this case the value of the revocable trust would have been included under that provision of the Uniform Probate Code.

The court was troubled by this result and indicated:

[w]e must point out, however, that we are troubled by this result. This case involves a long term, intact marriage. We find it strange that a divorced spouse is entitled under section 61.075, Florida Statutes, to reach assets held in a revocable, inter vivos trust, but a loving, devoted spouse is not . . . . Indeed, the amicus brief stated that a citizen has “a constitutional right to be a mean-spirited, no good curmudgeon” and that there are no “statutory impediments to developing an estate plan that cuts out the spouse.” Although we believe this to be a manifestly unfair result and poor public policy, we recognize that we are not the appropriate forum to correct the same. We encourage the legislature to revisit the issue.

The admonition in the opinion for the legislature to revisit the issue was prophetic because, while the court was deciding this issue, a special committee of the RPPTL section was drafting proposed legislation which would reverse the Friedberg result by adoption of a hybrid version of the augmented estate concept. A motivating factor for this revision was a different situation similar to Friedberg, whereby, a well know trusts and estates lawyer who died in 1993 created and funded a revocable living trust before his death to deprive his widow in a very long term marriage of any interest in his estate. Under the proposed legislation, Mrs. Friedberg would have had an entitlement to forty

200. Id. at 205 (citation omitted).
201. Id. at 206.
202. The current version of the augmented estate in the Uniform Probate Code includes not only the decedent’s probate and nonprobate estate in the calculation, but also includes the surviving spouse’s net personal estate (including certain nonprobate transfers to others and reduced by "enforceable claims" against the surviving spouse) in the calculation, first “grossing up” all the family property, then considering the wife’s net personal assets as being first funded in satisfaction of the elective share. U.P.C. § 2-207. If there remains a deficiency, then assets of the decedent’s estate are used to satisfy the “short fall.” In the Florida modification, the surviving spouse’s assets (and obligations) are neither counted in the original pool, nor in the funding formula. This was a concession to simplicity at the expense of perfect equity.
percent of the value of the assets of the revocable living trust, with a partial
credit for the value of the income trust created for her.

In reality, the elective share is a right only available to spouses of
decedents who do not have good legal advice on the ease with which it may
be avoided. If there is a public policy in this state to prevent total disinheri-
tance of a spouse, the law should be amended so it accomplish its intended
result; if not, it should be repealed.

After several years of intensive work, the special elective share com-
mittee\textsuperscript{203} reported proposed legislation to the executive counsel, which
approved the recommendation and this was introduced in the 1996 Legisla-
ture as House Bill 2157. This bill was not reported out of the committee on
either the house or the senate side and did not receive action during 1996. It
will be reintroduced again in 1997.

\textbf{VIII. JOINT BANK ACCOUNTS}

The topic of joint and survivorship bank accounts has remained active in
the case law since the last survey, and remains both unsettled, conflicting, and
confusing.

A difficult concept is the effect of creation of a joint account with right
of survivorship as it relates to creation of an immediate ownership in the
funds deposited by the non-depositing joint tenant. This arises in the context
of the effect on a non-withdrawing joint tenant’s rights when another joint
tenant withdraws the proceeds in the account. The Third District Court of
Appeal has held that, absent clear and convincing evidence to the contrary,
creation of a joint tenancy with rights of survivorship presumed the immedi-
ate creation of ownership rights by present gift in the non-contributing
tenant(s), and that interest survives withdrawal by another tenant.\textsuperscript{204} This
view is based on cases which found the immediate creation of an interest in
the joint tenant, so as to avoid difficulty with the failure to comply with the
statute of wills. The theory was that the statute of wills required that
testamentary dispositions of property only occur if the instrument complied
with the requirements for execution of a will. Bank signature cards, al-
though providing for survivorship, did not comply. Therefore, before
appropriate changes to the statutes, the only way courts could validate the
survivorship provisions in signature cards was to find that a gift of the

\textsuperscript{203} The author served as a member of this Committee.
\textsuperscript{204} De Soto v. Guardianship of De Soto, 664 So. 2d 66 (Fla. 3d Dist. Ct. App. 1995);
account occurred at its creation. Some of the old cases discussed the fact that the surviving joint tenant was in possession of the passbook, evidencing the “donor’s” intent to make a present gift.\textsuperscript{205} That fiction is unnecessary under the present statutory provisions\textsuperscript{206} and the old cases which found the legal fiction of a present gift in order to validate the survivorship rights are no longer required.\textsuperscript{207} However, they are still being cited, and in the Third District Court of Appeal, are still good law.

However, in \textit{Katz v. Katz}\textsuperscript{208}, where the contributing joint tenant withdrew the funds from the joint account and purchased securities in his own name, the Fourth District Court of Appeal rejected the argument of his surviving spouse that, following his death, the securities belonged to her since the funds used to purchase the securities had been joint funds.\textsuperscript{209} In the third district, the funds would have resulted in an immediate gift to the non-contributing spouse, and she would have been entitled to at least one-half of the securities, since it was presumably her funds (by gift) which were used to purchase that one-half. The better reasoned view is that there is no immediate gift upon deposit and that the interest of the non-contributing joint tenant or tenants is only created by the survivorship provisions of the account and only comes into possession after the death of the contributing tenant.

There is also some case law suggesting that such accounts may be owned by the entireties, if the joint tenants are also husband and wife.\textsuperscript{210} This concept is sometimes applied to bank accounts to shelter them from lifetime third party creditor claims of one tenant. However, the concept is native to real property interests and does not fit well when applied to personal property ownership. Since an entireties interest cannot be severed without the consent of both spouses, one characteristic of such a bank account is that neither spouse can withdraw funds from the account without the consent of the other. In practice, this would require two signatures on each check or withdrawal order.

\textsuperscript{205} See generally \textit{Spark v. Canny}, 88 So. 2d 307 (Fla. 1956); \textit{Chase Federal Sav. & Loan Ass’n v. Sullivan}, 127 So. 2d 112 (Fla. 1960).

\textsuperscript{206} See ch. 92-303, § 48, 1992 Fla. Laws 2739, 2788 (creating FLA. STAT. § 655.79 (Supp. 1992) (effective July 3, 1992)).

\textsuperscript{207} See \textit{In re Estate of Combee}, 601 So. 2d 1165 (Fla. 1992); \textit{In re Guardianship of Medley}, 573 So. 2d 892 (Fla. 2d Dist. Ct. App. 1990), \textit{cause dismissed}, 629 So. 2d 134 (Fla. 1993).

\textsuperscript{208} 666 So. 2d 1025 (Fla 4th Dist. Ct. App.), \textit{review denied}, 675 So. 2d 927 (Fla. 1996).

\textsuperscript{209} Id. at 1027.

\textsuperscript{210} \textit{Sitomer v. Orlan} 660 So. 2d 141 (Fla 4th Dist. Ct. App. 1995).
IX. DURABLE POWER OF ATTORNEY

1995 was an important legislative year for powers of attorney. Section 17 of chapter 95-401 substantially reworded section 709.08, entitled "Durable power of attorney." This was another piece of important legislation which had been drafted by a special committee of the RPPTL section, and which had previously been introduced, but failed to pass.

Among the changes brought by this amendment was to allow "a financial institution as defined in chapter 655, with trust powers, having a place of business in this state and authorized to conduct trust business in this state" to serve as an attorney in fact. If a petition to adjudicate incapacity of the principal is filed, notice of the petition must be served on each known attorney in fact. This is because adjudication will suspend the power of attorney unless the guardianship court orders otherwise.

One of the most important aspects of the new statute is the authority of third parties to rely on the power of attorney until notice of revocation is received. The principal must hold each third party harmless from any loss or liability suffered as a result of actions taken at the direction of the attorney in fact. It also authorizes the third party to require the attorney in fact to execute and deliver an affidavit stating that the principal is not deceased, a petition to determine incapacity is not pending, that the principal has not been adjudicated incapacitated, and has not revoked the power. A statutory form of the affidavit is provided.

However, what makes the law work, is a provision which allows for assessment of attorneys' fees against any third party who unreasonably refuses the directions of an attorney in fact pursuant to the power. It had been a very common practice for banks and stock brokers to decline to accept instructions of an attorney in fact pursuant to a durable power of attorney. In practice, that now appears to be the exception rather than the rule so long as the power of attorney is executed after October 1, 1995 and pursuant to the amended statute. In fact, although prior powers continue to be valid, to gain the protection and expanded scope of the new law, the power must be executed after October 1, 1995.

Another provision of the new law which should give pause to prospective attorneys in fact, is that the attorney is charged as a fiduciary who must observe the standards of care applicable to trustees. Also, the attorney in fact is liable to interested persons if the power is exercised improperly. The

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212. The author served as a member of this committee.
prevailing party in an action under this provision is entitled to award of attorneys' fees. In the case of multiple attorneys in fact, each is required to attempt to prevent a breach of the fiduciary obligations by the other or others.

X. CONCLUSION

It is not only the tax laws which are continuously in a state of change that need to be of concern to the trusts and estates lawyer, it is the changes in substantive state law and applicable state procedure. An up-to-date lawyer is as important to the practice in this substantive area as an up-to-date judge.