Probate and Trust Law

Mary Sue Donahue*
Probate and Trust Law: 1993 Survey of Florida Law

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I. ATTORNEY’S FEES

During the last two years, attorney fees issues have arisen in both the
public arena and the probate courts. One could see the dramatic change in

* Mary Sue Donohue is a solo practitioner in Boca Raton, Florida, concentrating in
estate planning, wills, trusts, probate and trust administration, guardianships, taxation, and real
estate law. She obtained her J.D. in 1975 from the University of South Dakota, and her B.A.
in 1972 from Boston University. Ms. Donohue is Chairman of the Probate Practice
Committee, and is a Director of the Boca Raton Estate Planning Council. Ms. Donohue co-
authored a portion of the book, “Basic Practice Under the Florida Probate Code,” published
by The Florida Bar. She is a frequent lecturer at seminars and continuing education
programs on estate planning and administration, and guardianship law, and has written
numerous articles on these subjects.

The author wishes to thank the following members of her staff for help in the
preparation of this article: Connie, Lisa, and Ellen. The author also wishes to thank George
Weinstein, Esq., David T. Hewett, Esq., and Sandy Lowe for their assistance.
attitude of the courts in the significant case of Florida Patient's Compensation Fund v. Rowe\textsuperscript{1} followed with more explication by Standard Guaranty Insurance Co. v. Quanstrom.\textsuperscript{2} The majority opinions in both cases determined that a reasonable fee for any lawyer, for nearly any service, is the reasonable number of hours multiplied by a reasonable hourly rate, called a lodestar method.\textsuperscript{3} Further, both Rowe and Standard Guaranty make it clear that testimony regarding fees must be taken and must cover specific areas, such as reasonable hourly rates and reasonable number of hours.\textsuperscript{4} A bald affidavit that may have sufficed in the past is no longer enough.\textsuperscript{5}

In Rowe, the factual situation centered on payments of attorney fees to attorneys representing claimants against the state-established Compensation Fund, which came from public funds.\textsuperscript{6} In Standard Guaranty, the case dealt with reasonable attorney fees when set by a court using a lodestar method.\textsuperscript{7} It is in the decision of Standard Guaranty that the Florida Supreme Court set the stage to review fee arrangements in probate matters when it referred to situations wherein there was already an assurance of collecting fees,\textsuperscript{8} and the attorneys involved would not be taking a risk of nonpayment. It was this lack of risk that separated probate and other similarly situated cases from the litigation risk that justified not only a reasonable hourly rate times a reasonable number of hours, but also a multiplier.

The Florida Probate Code outlines the criteria to be used in determining reasonable attorney fees.\textsuperscript{9} It is strikingly similar to the guidelines set forth in the lawyer's Rules of Professional Conduct.\textsuperscript{10} The statute is geared to the payment of attorney fees due the attorney for being the personal representative of the estate. It covers neither individual beneficiaries nor creditors paying their attorneys nor how that would be determined since the funds would not ordinarily be payable from the estate.\textsuperscript{11} Further, the

\textsuperscript{1} 472 So. 2d 1145 (Fla. 1985).
\textsuperscript{2} 555 So. 2d 828 (Fla. 1990).
\textsuperscript{3} Standard Guaranty, 555 So. 2d at 835; Rowe, 472 So. 2d at 1151.
\textsuperscript{4} Standard Guaranty, 555 So. 2d at 834; Rowe, 472 So. 2d at 1150.
\textsuperscript{5} See Rowe, 472 So. 2d at 1150.
\textsuperscript{6} Rowe, 472 So. 2d at 1145.
\textsuperscript{7} Standard Guaranty, 555 So. 2d at 829.
\textsuperscript{8} Id. at 835.
\textsuperscript{9} See generally ch. 93-257, § 10, 1993 Fla. Laws 2500.
\textsuperscript{10} See FLA. BAR R. PROF. CONDUCT 4-1.5(b) (1991).
\textsuperscript{11} See ch. 93-257, § 10, 1993 Fla. Laws 2500, 2507 (amending FLA. STAT. § 733.617 (1991)).
statute did not specify the importance to be placed on each of the criteria in its earlier versions. Traditionally, in the probate area, attorneys for the personal representative of an estate were paid on the basis of a percentage of the value of the estate. This may have made up for work done over the years for the family for which no charge would have been made.

A. The Platt Case

Then came the NCNB Trust Department, which took the position that taking three percent of a seven million dollar estate, for which they already served as guardian of the property and marshalled the assets, was eminently reasonable. In In re Estate of Platt,12 the Florida Supreme Court revised the way attorney fee disputes may be resolved in probate cases. There are actually two Platt decisions: one issued in April, 1991 ("Platt I")13 and the other issued in October, 1991 ("Platt II").14 The second was only a revision of the first.

At the time of Lester Platt’s death, the residuary beneficiaries of Mr. Platt’s estate declined to sign a contract sent to them by NCNB in which the bank stated that they intended to take a three percent fee. A proposed fee letter was also sent to the beneficiaries by the attorney for the estate, George Patterson, who also served as co-personal representative of the estate. Instead, the residual beneficiaries, who would bear the burden of the fees, requested both the bank and the attorney to maintain time records. The attorney complied with the request while the bank did not even attempt to do so.15 As disclosed in the appellate court opinion, there was a major evidentiary hearing involving several recognized expert witnesses. They testified as to reasonableness of the hourly rate for the attorney, his/her reputation, the custom in the community for charging, and presumably the other criteria to be used in properly determining attorney fees in a disputed probate case.16

The Florida Supreme Court in Platt held the following: (1) in a dispute, attorney fees for the attorney for the personal representative shall be determined by multiplying a reasonable number of hours by a reasonable

12. 586 So. 2d 328 (Fla. 1991) (quashing and superseding the supreme court’s first opinion of In re Estate of Platt, 16 Fla. L. Weekly S237 (Fla. Apr. 4, 1991)).
13. 16 Fla. L. Weekly S237 (Fla. Apr. 4, 1991) [hereinafter Platt I].
15. Id. at 330.
16. Id. at 329-30.
hourly rate and may not be determined by a percentage of the estate assets; 17 (2) the time and effort it takes for an attorney to recover his/her fees is not to be paid from the estate; 18 and (3) unless agreed to by the customer, time and effort are to be the only considerations in determining the proper fees to be paid a corporate fiduciary serving as personal representative 19 and such fees are not to be based on a percentage. 20 The Supreme Court of Florida reversed the decision of the circuit court in awarding fees to the attorney and the bank based on a percentage of the estate, and directed the circuit court to take evidence and make a new determination of proper fees in light of their new means of awarding fees. 21

Subsequent to Platt II and its progeny, several cases have been decided that explicate Platt II or parts thereof. For example, in Carman v. Gilbert, 22 the Second District Court of Appeal sent the issue of attorney fees back to the circuit court for further proceedings in a will contest, stating that the lodestar principles in Rowe had not been followed. 23

B. New Statutes for Attorney and Personal Representative Fees

In a decided effort to replace the holding of Platt II as the law that applies to probate cases in Florida, the Florida Legislature passed House Bill 1295 in the 1993 Legislature. 24 Many parts of this particular legislation are covered elsewhere, but the portions relating to attorney fees and personal representative fees will be addressed here. 25 Section 733.617 of the Florida Statutes, governing compensation of personal representatives, has been amended, 26 and section 733.6171, a new section governing the compensation of attorneys for personal representatives, has been added 27 to the Florida Probate Code. A provision is also explicitly made for payment of

17. Id.
18. Id. at 336.
19. Platt II, 586 So. 2d at 337.
20. Id. at 336.
21. Id. at 337.
23. Id. at 704-05.
25. See infra text accompanying notes 204-216.
27. Id. § 4, 1993 Fla. Laws at 2503 (to be codified at FLA. STAT. § 733.6171).
fees from the assets of a revocable trust,28 even though such assets have not heretofore been considered subject to probate administration after In re Estate of Katz.29

Further, the Florida Legislature has returned to the past by statutorily setting fees for the compensation of personal representatives in case of a dispute.30 Such fees, called commissions, are to be based on a percentage of the value of the estate subject to probate administration.31 It is a graduated scale with three percent due for estates valued up to one million dollars, two and one-half percent due for estates valued between one million and five million dollars, two percent for estates valued between five million and ten million dollars, and one-and one-half percent for estates valued over ten million dollars. Additional fees are allowable in a dispute for certain extra efforts that may be involved, such as running the decedent’s business, sale of real or personal property, or litigation involved in the estate.

Two particular reasons for additional compensation may spawn litigation and definitely raise questions that are not resolved by the plain meaning of the statute. Section 733.617(3)(c) of the Florida Statutes allows extra commission for “[i]nvolve in proceedings for the adjustment or payment of any taxes.”32 In nearly every estate there will be a final federal income tax return (Form 1040) due and, in some estates, there will be more than one due.33 In many estates, where income is generated, an estate income tax return (Form 1041) is required.34 Occasionally, when real estate tax assessments are determined during the course of administering an estate, the personal representative is involved in determining the most beneficial assessment to the estate and in adjusting the amount of tax due.35 Considering the language in this statute, the question arises as to whether the mere filing of a return constitutes an “involvement in proceedings” that would justify payment of commissions in addition to the percentage.

28. See id.
29. 528 So. 2d 422 (Fla. 4th Dist. Ct. App. 1988).
32. Id. (amending Fla. Stat. § 733.617 (1991), to be codified at Fla. Stat. § 733.617(3)(c)).
34. Id. (Obligation to File Tax Returns and Notices For Decedent and Estate).
35. Id.
Nevertheless, despite all of the particular reasons the Florida Legislature has enunciated in section 733.617(3), the statute gives no basis for determining how much in additional fees should be paid. Is there an extra percentage, or would a court need to follow the directives of Platt II, Standard Guaranty, and Rowe? Is not the genuine involvement in revising a value for real estate within the estate context a better example of what would justify additional commissions?

In some estates where the gross value of all the assets exceeds $600,000, a federal estate tax return is due nine months after the decedent’s date of death. The return is extensive, usually requiring a great deal of explicit and accurate details, answers to numerous questions regarding many tax and estate decisions that affect the estate, the taxes paid, and the beneficiaries’ interests. Frequently, voluminous attachments are required with this return, which already contains thirty-three pages itself.\textsuperscript{36} While it is an absolute requirement in larger estates, the question remains as to whether this also would be considered “involvement in proceedings for the adjustment or payment of any taxes.” Frequently, there are situations in which a surviving spouse receives enough of the assets such that the combination of the marital deduction (no tax) and the unified credit amount ($600,000) result in no tax actually due, even though a Form 706 return is certainly due.

The other subsection, to be codified at section 733.617(3)(e), appears to be designed to allow courts to allow extra fees for situations not covered by the statute but which clearly exceed the customary efforts required of a personal representative.\textsuperscript{37} The personal representative’s regular duties—marshalling the assets, protecting and securing the decedent’s assets, determining and notifying creditors of their right to make claims against the estate, paying proper claims timely, distributing assets to the beneficiaries, filing any required tax returns, preparing an accounting, and closing the estate—all must be handled efficiently and expeditiously.\textsuperscript{38} However, many questions like the following still remain: Do “special services” cover taking care of a decedent’s cat or dog? If included in the standard fee, what period of care is covered? Do “special services” cover cleaning a decedent’s home or packing pictures for delivery to numerous beneficiaries? Do they cover collecting rents on several out of state properties that are not subject

\textsuperscript{36} Id.

\textsuperscript{37} Ch. 93-257, § 10, 1993 Fla. Laws 2500, 2507 (amending Fla. Stat. § 733.617 (1991), to be codified at Fla. Stat. § 733.617(3)(e)).

to probate? Do they involve the time and effort involved in exhuming a body that was buried before the decedent’s wishes were known in the will? Either the courts or the Legislature will be defining “special services” for us.

The Legislature recognized that some estates more than others can support more than one personal representative.39 The new legislation outlines the allocations to be made when there is more than one personal representative and if the estate is valued at less than $100,000. In particular, unless the estate is valued at less than $100,000, two personal representatives may each take a full commission. However, if the estate is valued at more than $100,000 and there are more than two personal representatives, then all of the personal representatives share in the fees to which two representatives would be entitled. In this situation, the personal representative holding the property or assets of the decedent and having primary responsibility for their administration is entitled to receive a full commission. The remaining personal representatives are entitled to a proportionate share of the second commission. For estates valued at less than $100,000 with multiple personal representatives, the one full commission normally allowed to a sole personal representative must be apportioned among the several personal representatives in proportion to their efforts.40

What is not covered in House Bill 1295 is the compensation, if any, to be paid to the trustee of a revocable living trust, and the compensation, if any, to a personal representative for responsibility of transferring assets not technically within the probate estate. It is not clear why there is a distinction between compensation as a personal representative41 and for attorney fees paid on the same estate.42

Additionally, according to current case and statutory law, an attorney may be compensated twice.43 First, he/she may be compensated for his/her work as a personal representative.44 Second, he/she may also be compensated for any legal services he/she may provide as the attorney for another

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39. Ch. 93-257, § 10, 1993 Fla. Laws 2500, 2508 (amending FLA. STAT. § 733.617 (1991), to be codified at FLA. STAT. § 733.617(5)).
40. Id.
41. Id. 2507 (amending FLA. STAT. § 733.617 (1991)).
42. See id. § 4, 1993 Fla. Laws at 2503 (to be codified at FLA. STAT. § 733.6171(2)).
43. See Platt II, 586 So. 2d at 331-32.
44. Id.
personal representative.45 This view was acknowledged as the law of Florida in *Platt*.46

The particular provisions of House Bill 1295 concerning the effective date of the statutes pertaining to attorney fees are unusual. The new statute, instead of applying to situations based on a decedent’s date of death, as is common in changes in probate law, “appl[ies] to estates in which an order of discharge has not been entered prior to its effective date [October 1, 1993] . . . .”47

The other major fee section of the new legislation is the new statute, to be numbered in the engrossed legislation as Florida Statutes, section 733.-6171,48 which explicitly outlines the compensation to be paid to an attorney for the personal representative which is presumed to be reasonable. The compensation package uses a combination of a percentage of the value of the estate with an hourly rate. It was encouraged in part by probate attorney Rohan Kelley and reflects the fact that there were fairness problems with both the full percentage and with the reasonable hourly rate multiplied by reasonable number of hours.49 Attorneys are still undeniably permitted and encouraged to enter into contracts with clients for payment of fees.50 Contracts signed by both the personal representative and any residuary beneficiaries are the strongest since both have something to say about attorney fees.51 The new statute sets forth a schedule for payment of fees from the estate to the attorney and no separate order is required.52 When there is a dispute about fees, the trial courts in resolving such disputes are directed to use as their criteria two percent of the estate inventory value and income earned during administration plus one percent of the balance of the gross estate when a federal estate tax return is due. This percentage appears to explicitly recognize that there is additional work on someone’s part when a federal estate tax return is due.53 In addition to the percentage, an attorney is allowed a reasonable hourly rate both for the attorney

45. *Id.*
46. *Id.* at 328.
47. Ch. 93-257, § 4, 1993 Fla. Laws 2500, 2505 (to be codified at Fla. Stat. § 733.6171(8)).
49. *Platt II*, 586 So. 2d at 333.
50. Ch. 93-257, § 4, 1993 Fla. Laws 2500, 2505 (to be codified at Fla. Stat. § 733.6171(6)).
51. *Id.* at 2503 (to be codified at Fla. Stat. § 733.6171(2)).
52. *Id.* (to be codified at Fla. Stat. § 733.6171(3)).
53. *Id.* (to be codified at Fla. Stat. § 733.6171(3)(a)).
and for others working for the attorney with special education, training, or experience. The language was certainly intended to cover paralegals but it covers more, such as investment advisors hired by an attorney.

While this two-part formula is certainly intended to be a guideline, the court may increase or decrease the sum paid and has specific additional criteria to use in increasing or decreasing such fees. These additional criteria, unlike the previous statute discussed in Platt I, appear to be specifically designed for the probate arena and not for civil litigation. Section 733.6171(4)(h) of the Florida Statutes provides one of the most interesting criteria: “any delay in payment of the compensation after the services were furnished.” The message here is that slow-paying estates may not make their lawyers their bankers.

In another departure from the holding of Platt II, the Florida Legislature in section 733.6171(7) of the Florida Statutes explicitly allows that the litigation over attorney fees involving the personal representative’s attorney does not mean the attorney must lose money in trying to collect his/her fee. Instead, trial court proceedings to determine compensation are part of the estate administration process and the court decides from what part of the estate such litigation costs should be paid. This appears to be a fairer solution to the growth in litigation over fees; attorneys do not automatically lose money if there is a contest about fees, and clients are not encouraged to litigate fee issues to reduce fees which have been agreed to previously.

Some questions are raised by the language of the new statute. The word “inventory” is not defined in the definition section of the Florida Probate Code, section 731.201, as a probate inventory. The word “inventory” must be defined in order to determine the “balance” noted in section 733.6171(3)(a) of the Florida Statutes. Some skeptics may argue that the provision that allows the attorney to receive a percentage of the income during the estate administration encourages prolonging of the estate process. Furthermore, the provision on contracts between attorneys and decedents in section 733.6171(6) leaves the issue unresolved whether such contracts are

54. Id. (to be codified at FLA. STAT. § 733.6171(3)(b)).
55. Ch. 93-257, § 4, 1993 Fla. Laws 2500, 2504 (to be codified at FLA. STAT. § 733.6171(4)).
56. Id. (to be codified at FLA. STAT. § 733.6171(4)(h)).
57. Id. (to be codified at FLA. STAT. § 733.6171(7)).
58. See id.
59. Id. (to be codified at FLA. STAT. § 733.6171(3)(a)).
binding on estates when the residual beneficiaries, those who bear the burden of the fees, are not parties. 60

Again, the effective date of this section is October 1, 1993, and applies not to estates for decedents who have died as of that date, but to probates still open or in which attorney fees have not been determined. 61

C. Other Attorney Fees Issues

The cases on attorney fees most often center around the fees to be paid to the attorney acting for the estate and, in particular, the personal representative thereof. However, the Fifth District Court of Appeal in Dourado v. Chousa 62 dealt with the obligation of the personal representative and beneficiary to make up the difference in attorney fees due if there is a deficiency.

II. HOMESTEAD AND EXEMPT PROPERTY

The concept of homestead under Florida law continues to be an enigma to lawyers and non-lawyers alike. While most lay persons think of homestead only as a $25,000 exemption from real estate taxes, Florida courts continue to wrestle with the concept of homestead as it relates both to the descent and distribution of property and to creditors' claims on decedents' property. Even though the change to the Florida Constitution was effective in 1984, recent years have also yielded a plethora of litigation spawned by homestead issues.

Two recent cases involve the descent of homestead property where the surviving spouse had validly waived his homestead rights. In Sun First National Bank Polk County v. Fry, 63 the decedent was survived by a spouse and six adult lineal descendants. The decedent’s will had devised the homestead property to a testamentary trust rather than to the spouse or lineal descendants. Although the lineal descendants contended that the Florida Constitution and Florida Statutes as to homestead were violated by the decedent’s improper devise, the court held that since the surviving spouse...

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60. Ch. 93-257, § 4, 1993 Fla. Laws 2500, 2505 (to be codified at FLA. STAT. § 733.6171 (6)).
61. Id. (to be codified at FLA. STAT. § 733.6171(8)).
had waived homestead and there were no minor children, the property could be freely devised even if there were adult children.\textsuperscript{64}

Shortly thereafter, the Florida Supreme Court, in \textit{Hartwell v. Blasingame},\textsuperscript{65} came to the same conclusion where an adult child sought to be the heir to property that the decedent had devised to her former husband, the surviving spouse having previously waived his homestead rights in a prenuptial agreement. The court held the spouse’s waiver to be binding;\textsuperscript{66} the spouse was deemed to have predeceased the decedent. Since there was no minor child, there was no constitutional restriction on the devise of the property by the decedent. The court cited its previous decision in \textit{City National Bank v. Tescher}\textsuperscript{67} as corroborating authority.\textsuperscript{68}

Even though a surviving spouse is entitled to at least a life estate in homestead property, in \textit{Breausche v. Prough}\textsuperscript{69} the surviving wife received more. The surviving wife claimed that she was misled by her husband into believing that their home was jointly owned and that she would receive the entire interest upon his death. She claimed that in reliance thereon she had contributed funds to the construction of the home and payments on the mortgage and had relinquished certain rights she had in other real estate. The court ruled that the surviving spouse could seek to impose a constructive trust on the homestead if she could produce admissible evidence in the trial court to prove her claim.\textsuperscript{70} Such evidence could include an affidavit by a disinterested party as to direct knowledge of the decedent’s prior statements to his wife, which could overcome evidence otherwise barred by the Dead Man’s Statute.\textsuperscript{71}

Creditors continue to attempt to assert claims and to force the sale of homestead property that passed from the debtor-decedent to devisees. Two cases involved whether the Florida constitutional protection from forced sale of homestead property inured to the benefit of devisees who were heirs of the decedent. In a decision favoring the rights of heirs, a district court in \textit{Bartelt v. Bartelt}\textsuperscript{72} held that the protected “class designated ‘heirs’ does not exclude those who, but for the decedent’s foresight in executing a will,

\begin{itemize}
\item \textsuperscript{64} Id. at 870.
\item \textsuperscript{65} 584 So. 2d 6 (Fla. 1991).
\item \textsuperscript{66} Id.
\item \textsuperscript{67} 578 So. 2d 701 (Fla. 1991).
\item \textsuperscript{68} \textit{Hartwell}, 584 So. 2d at 6.
\item \textsuperscript{69} 592 So. 2d 1211 (Fla. 2d Dist. Ct. App. 1992).
\item \textsuperscript{70} Id.
\item \textsuperscript{71} Id.
\item \textsuperscript{72} 579 So. 2d 282 (Fla. 3d Dist. Ct. App. 1991).
\end{itemize}
would have taken by the laws of intestate succession.”

While article X, section 4 of the Florida Constitution designates the exempt class of persons as the surviving spouse or heirs of the owner, “it does not mandate the technique by which the qualified person must receive title.”

To hold otherwise, said the court, would discourage the making of wills and encourage the passing of property by the less desirable process of intestacy.

To the same effect was the holding in *HCA Gulf Coast Hospital v. Downing.* There the court determined the heir possessed an equitable or beneficial interest in real property through a spendthrift trust established by the decedent. The court stated that the heir could assert the homestead exemption from forced sale as though the property had passed directly from the decedent to the heir by devise or by intestacy. The homestead exemption, said the court, is to be construed liberally to accomplish its design to secure a homeowner protection from creditors and financial misfortune, and a court should go beyond mere technicalities in effectuating the intent of a decedent as expressed in a will or trust. The court cautioned, however, that in this case it might have decided otherwise if the trustee had exercised more than a supervisory interest in the homestead as the holder of legal title.

On the other hand, an heir to homestead property is not protected against certain creditors of the decedent. Where the decedent’s friend had lived with the decedent and claimed that she had provided funds used to purchase and improve the homestead property, she fit into the exception under article X, section 4 of the Florida Constitution. In *Burns v. Cobb,* the court held that her claim for equitable ownership in the property, if valid, would defeat the claims of the decedent’s heirs who took with notice of her possession of the property and her claim thereto. Furthermore, the court declared that she would have a defense to the heirs’ ejectment action (even if they had a future possessory interest) “if that equitable ownership interest is established as a legal title interest and includes a present possessory right.” While upholding her right to pursue a counterclaim

73. *Id.* at 284.
74. *Id.*; see FLA. CONST. art. X, § 4.
75. 594 So. 2d 774 (Fla. 1st Dist. Ct. App. 1991).
76. *Id.* at 776.
77. *Id.*
78. *Id.*
79. 589 So. 2d 413 (Fla. 5th Dist. Ct. App. 1991).
80. *Id.*
81. *Id.* at 416.
to the heirs' ejectment action, however, the court held that she could not challenge this action in the probate court.\textsuperscript{82} The friend petitioned to reopen the estate and contest the heirs' action in petitioning the probate court for determination of homestead and closing the estate. Since the petition to determine homestead did not constitute the opening and closing of a probate estate administration and she did not seek as a creditor or other interested person to open the administration of the estate, she could not move forward in that arena.\textsuperscript{83}

Where homestead property passes to minor children, it is not subject to claims of creditors because it is protected by article X, section 4 of the Florida Constitution. In \textit{In re Estate of Tudhope},\textsuperscript{84} the real property involved was encumbered by a mortgage, payments on which the children were unable to meet.\textsuperscript{85} As a consequence, the personal representative of the decedent's estate was authorized to sell the property by court order. Claims were filed by decedent's creditors in the probate proceeding (other than the mortgagee), and the issue was whether the sale proceeds could be reached by those creditors.\textsuperscript{86} The court held that since the property was devised to heirs and the will did not direct that the property be sold, the homestead estate was vested in the minor children prior to its sale.\textsuperscript{87} Therefore, the proceeds were still characterized as homestead and thus not subject to creditors. The court distinguished \textit{In re Estate of Price},\textsuperscript{88} in which the will had directed that the homestead be sold and the proceeds divided among the adult children, thus causing the proceeds to lose their homestead character and be subject to creditors' claims.\textsuperscript{89}

Finally, in a recent case, the Fourth District Court of Appeal was faced with an issue of first impression on the homestead exemption. In \textit{Hubert v. Hubert},\textsuperscript{90} the court was called upon to decide whether an heir's remainder interest in his deceased father's homestead was exempt from the decedent's estate creditors, where the property was subject to the life estate of a non-heir.\textsuperscript{91} The court relied on both the Florida Constitution and \textit{Bartelt} to declare that the homestead exemption inures to the interest of the son-heir

\begin{itemize}
  \item \textsuperscript{82} \textit{Id.}
  \item \textsuperscript{83} \textit{Id.} at 415.
  \item \textsuperscript{84} 595 So. 2d 312 (Fla. 2d Dist. Ct. App. 1992).
  \item \textsuperscript{85} \textit{Id.}
  \item \textsuperscript{86} \textit{Id.} at 313.
  \item \textsuperscript{87} \textit{Id.}
  \item \textsuperscript{88} 513 So. 2d 767 (Fla. 1st Dist. Ct. App. 1987).
  \item \textsuperscript{89} \textit{Tudhope}, 595 So. 2d at 313.
  \item \textsuperscript{90} 622 So. 2d 1049 (Fla. 4th Dist. Ct. App. 1993).
  \item \textsuperscript{91} \textit{Id.} at 1049.
\end{itemize}
acquired either by devise or by intestate succession. Even though the son had no current possessory interest in the property and the decedent’s homestead exemption would not inure to the non-heir’s life estate, it did inure to the heir’s remainder interest. The court was impressed with the heir’s arguments that since the vested remainder interest of a lineal descendant is protected by the homestead exemption in situations where the lineal descendant’s vested remainder comes from an intestate estate of a decedent who leaves a surviving spouse and a lineal descendant, or where the decedent devised a life estate in his homestead to his wife with a remainder to a lineal descendant, it should be protected in this case. The court cited with favor the *HCA Gulf Coast Hospital* statement that the homestead provision is to be construed liberally to effect its purpose, and stated that the resolution in the instant case “is consistent with carrying out the interest of the testator and the public policy of our homestead exemption.”

The court distinguished the cases which held that an heir’s future interest was not exempt from the heir’s creditors, since in those situations the heir was not in possession and thus could not claim that the future interest was exempt as the heir’s homestead.

The court was also called upon to define the term “automobile” under section 732.402(2)(b), the exempt property statute. If automobiles are “held in the decedent’s name and regularly used by decedent or members of the decedent’s immediate family as their personal automobiles,” they pass to the surviving spouse and are exempt from all claims against the estate (except for perfected security interests). *In re Estate of Corbin* involved a motor home and a travel trailer. In *Corbin*, the court looked to the “regularly used” portion of the statute rather than focusing on what is an automobile. The court imposed this as a requirement and finding such evidence lacking, decided against the spouse. The full definition of an automobile, therefore, remains in doubt and may not always be necessary to resolve cases.

92. *Id.* at 1050 (citing the FLA. CONST. art. 7, § 4(b); *Bartelt*, 579 So. 2d 282 (Fla. 3d Dist. Ct. App. 1991)).
93. FLA. STAT. § 732.401(1) (1991). Both the spouse’s life estate and the vested remainder would be protected as homestead. The same result would follow from a devise in that form.
94. *Hubert*, 622 So. 2d at 1050 (citing *HCA Gulf Coast Hosp.*, 594 So. 2d at 774).
95. *Id.*
98. *Id.* at 129.
III. CLAIMS

Claims against estates which have substantially shorter time frames than civil litigation still warrant appellate attention. Additionally, the Supreme Court case of *Tulsa Professional Collection Services, Inc. v. Pope* and local statutes following *Pope* create more opportunities for appellate cases.

Section 733.702 of the Florida Statutes provides that the following are not binding on the estate, the personal representative, or on any beneficiary unless such a claim is filed within three months after the time of the first publication of the Notice of Administration: a claim or demand against a decedent's estate that arose before the death of the decedent; a claim for funeral or burial expenses; a claim for personal property in the possession of the personal representative; a claim for damages, including, but not limited to, an action founded on fraud or another wrongful act or omission of the decedent. As to any creditor required to be served with a copy of the Notice of Administration, the above stated claims are not binding unless the claim is filed thirty days after the date of service of such a copy of the notice on the creditor. This is the statute adopted by the Florida Legislature in response to the *Pope* case.

*Spohr v. Berryman* held that Florida Statutes section 733.702 is a statute of limitation, even though it is known as a statute of non-claim. The requirement in section 733.702 that a claim be filed within three months was not satisfied by filing a lawsuit within the non-claim period. Thus, probate procedures must be followed.

Section 733.702(3) of the Florida Statutes permits a circuit court to extend the time period during which a claim may be filed. Thus, cases frequently arise when the time within which to file a claim is enlarged. In *In re Estate of Myerson*, the court, in a per curiam decision, held that it was not an abuse of discretion for the trial court to extend the time for filing a probate claim. However, the trial court did err "in enjoining the disposition of any estate assets, without conducting a hearing on a request for temporary injunction and requiring the appellee to prove up her

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100. FLA. STAT. § 733.701(1) (1991).
101. 589 So. 2d 225 (Fla. 1991).
102. Id. at 227.
103. Id. at 227-28.
106. Id. at 533.
entitlement to injunctive relief.  

*Sireci v. Deal* dealt with extending the time to file an independent action after objection to the claim is filed. On September 4, 1989, Roger McClelland, an attorney, filed a Petition for Appointment for a Curator in the Estate of Donald M. Sparks. On September 15, 1989, Deal filed a caveat by creditor in the estate, which was treated as a claim against the estate. McClelland became curator and filed a Notice of Administration and an Objection to Deal's claim and notified Deal. Eventually, a formal estate was filed October 16, 1990, and Thomas J. Sireci, Jr. was appointed personal representative on November 30, 1990. On May 2, 1991, the personal representative filed a petition to bar Deal's claim. On August 26, 1991, the personal representative received an objection to the petition to bar the claim. The probate court denied the personal representative's petition to bar the claim and gave Deal ten days to amend his claim; however, the personal representative appealed from this order.

The appellate court upheld the trial court's ruling. In doing so, the court reasoned that the probate judge has broad discretion in determining when good cause exists to grant an extension for filing an independent action. The court further stated that it could only override the probate court's discretion if there is no factual basis for the probate court's conclusion. In this case, there was such a factual basis. During the trial court hearing, Deal's attorney presented several reasons why the independent action had not been filed. For example, Deal's long-time attorney from Pennsylvania testified that he believed the personal representative was representing Deal as a creditor and that the personal representative would therefore advise him of any formalities to make the claim valid. Furthermore, the Pennsylvania attorney testified he thought the petition to bar the claim was intended to place the matter in abeyance until a settlement could be reached among all the heirs.

Section 733.212(4)(a) of the Florida Statutes requires a personal representative to promptly make a diligent search to determine the names

107. *Id.* at 533-34.
108. 603 So. 2d 35 (Fla. 3d Dist. Ct. App 1993).
109. *Id.* at 35-36.
110. *Id.*
111. *Id.* at 36.
112. *Id.*
113. *Serici,* 603 So. 2d at 36.
114. *Id.*
115. *Id.*
and addresses of creditors of the decedent who are reasonably ascertainable and to serve on those creditors a copy of the Notice of Administration within three months after the first publication of the Notice. Personal representatives usually need to review previously filed tax returns and checkbook registers.

The determination of ascertainable creditors has been the subject of several suits. Jones v. SunBank of Miami concerns the sale of a gas station approximately four years prior to a decedent's death. The appellate court affirmed the trial court's decision. At trial, the claimant contended she should have received a Notice of Administration because she was a known or reasonably ascertainable creditor. The decedent had died August 15, 1989. Notice of Administration was published August 29, 1989 and the claims period expired November 29, 1989. The claimant, the gas station purchaser, filed suit against the decedent's estate March 15, 1990, seeking damages for breach of contract and fraud for alleged environmental contamination to the premises. The trial court determined the claim was filed untimely and, as a result, the burden shifted to the claimant to seek an order enlarging time to file the claim. After a full evidentiary hearing, the trial court ruled that the claimant was not a known or reasonably ascertainable creditor who was entitled to receive a Notice of Administration. The appellate court noted that the trial court should have stricken the claim as untimely when there was no motion for enlargement of time to file.

In this instance, the trial court also rejected the claimant's argument that gas stations often cause environmental damage, which, as a result, gives rise to a need to give actual notice to the purchaser upon decedent/seller's death. Finally, the trial court concluded that it:

does not interpret [Tulsa Professional Collection Services, Inc. v.] Pope to require that a personal representative determine the identities of persons or entities with whom a decedent had business dealings or other transactions during a given number of years prior to death and to serve a Notice of Administration upon each one merely because such person might possibly have some uncommunicated dissatisfaction with a matter.

118. Id. at 101.
119. Id. at 100-01.
120. Id. at 101.
121. Id. at 102.
122. Jones, 609 So. 2d at 101.
As to those persons, notice by publication is sufficient to afford due process.\(^{123}\)

To the relief of many practitioners, there is a limit to the efforts that need to be made.

In *Burgis v. Burgis*,\(^ {124}\) Lynn Burgis, the former wife of the decedent, filed a petition to require payment of her claim for past due alimony. The personal representative, who was the decedent's second wife, was alleged to have knowledge of Lynn's status as a creditor and of her claim for unpaid alimony.\(^ {125}\) The Second District Court of Appeal held that due process required actual notice pursuant to *Tulsa Professional Collection Services, Inc. v. Pope*, and noted that Lynn's petition appeared to specifically meet the criteria of Florida Probate Rule 5.495, which was in effect at the time the Petition was filed.\(^ {126}\)

The appellate court reversed the trial court's order which denied the petition because Lynn had previously filed an independent action which had been dismissed.\(^ {127}\) The court noted that the issue to be determined was merely whether Lynn should be able to explain her status and the reason she untimely filed her claim.\(^ {128}\) It did not rule upon the validity of Lynn's claim, which was not before the court.\(^ {129}\)

Further, the court also noted that Florida Probate Rule 5.495 was deleted effective October 1, 1991 because of the enactment of section 733.702 of the Florida Statutes.\(^ {130}\) As amended, the statute provides for an extension of time in which a claim may be filed upon grounds of fraud, estoppel, or insufficient notice of the claims period.\(^ {131}\)

### IV. PROCEDURAL ASPECTS OF WILLS

Florida's laws on the signing of wills have been on the books for many years. Certainly it is a far more settled area of the law than the law of

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123. *Id.* at 102-03.
125. *Id.* at 595.
126. *Id.*
127. *Id.* at 596.
128. *Id.*
129. *Burgis*, 611 So. 2d at 596.
130. *Id.; see* FLA. STAT. § 733.702 (1991).

http://nsuworks.nova.edu/nlr/vol18/iss1/9
trusts; however, the procedural aspects of execution and proving of wills continue to engender controversy.

In *Simpson v. Williamson*,\(^{132}\) the testator had signed the self-proving affidavit but nowhere else on the will did his signature appear. In addition, a witness submitted an affidavit that one of the two witnesses to the will had not signed in the presence of both the testator and the other witness. The attorney who drafted the will, on the other hand, filed an affidavit that the testator, both witnesses, and he as the notary, all signed in the presence of each other.\(^{133}\) The court, in holding that the lower court improperly granted summary judgment, stated that the testator had validly executed the will.\(^{134}\) The court also stated that the attorney’s signature on the self-proving affidavit could be used as another witness to validate the will since the determining factor is not where the witness’s signature appears but, rather, whether the signature was affixed under circumstances to indicate the person is an attesting and subscribing witness.\(^{135}\) In the end, the court favored saving the will.\(^{136}\)

What if a validly executed will is lost and an unsigned carbon copy is introduced into probate? Florida rules seem to indicate that it is not an uncontested event to have the copy of the will admitted; rather, it is automatically adversarial. In *Kero v. Di Legge*,\(^{137}\) the copy of the will was not signed by the decedent and only one of the two subscribing witnesses was available to testify as to the authenticity and execution of the will. The court held that this was a “correct” copy within the meaning of section 733.207(3) of the Florida Statutes, which requires the testimony of only one witness to prove “due execution.”\(^{138}\) The court reasoned that the necessary signatures are not required because the purpose of a correct copy is not to prove execution but rather the contents of the original will.\(^{139}\)

Two recently decided cases involve a testator’s attempt to revoke a will or a codicil. In *In re Estate of Dickson*,\(^{140}\) the court was called upon to decide whether the decedent’s intention to revoke was accompanied by the requisite physical act of revocation. The decedent had written on the self-

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133. *Id.* at 545.
134. *Id.* at 547.
135. *Id.* at 546.
136. *Id.*
137. 591 So. 2d 675 (Fla. 4th Dist. Ct. App. 1992).
138. *Id.* at 677.
139. *Id.*
140. 590 So. 2d 471 (Fla. 3d Dist. Ct. App. 1991).
proof affidavit, which was the final page of the will: "March 16, 1987 I MYSELF DECLARE THIS WILL NULL AND VOID OF SOUND MIND" followed by his signature, and had written and circled the word "void" over the raised notarial seal. In finding this a sufficient physical act, the court stated that Florida Statutes section 732.506 did not require any specific degree of physical destruction, obliteration, or cancellation to accompany clear evidence of intent. The court also found that the self-proof affidavit had been incorporated into the will; thus, the physical act constituted a revocation of the entire will.

In re Estate of Tolin involved the following question, which was certified to the Florida Supreme Court as one of great importance:

MAY A CODICIL TO A WILL BE REVOKED BY DESTROYING A PHOTOGRAPHIC COPY IF THE TESTATOR BELIEVED THAT BY SUCH ACT HE WAS DESTROYING THE ORIGINAL AND THE TESTATOR INTENDED TO REVOKE THE CODICIL?

The court answered this question in the negative, stating that section 732.506 of the Florida Statutes requires that the document destroyed by a physical act must be the original document. However, because the intent of the testator to revoke the codicil was undisputed, the court imposed the equitable remedy of a constructive trust to prevent the unjust enrichment of the codicil's devisee as a result of the testator's mistake. The court also noted the importance of distinguishing an original document from a copy, and advised attorneys who prepare documents such as wills and codicils to consider specifically designating which documents are copies, since modern technology makes it difficult to distinguish them. Un-
doubtedly this case has changed procedures for signing wills in many law offices.

In their interpretation of ambiguous provisions in wills, Florida courts attempt to ascertain the intent of the testator. This intent is gleaned from the context of the will and from parol evidence of the draftsman. In *In re Estate of Walker*, the decedent's will left "all of my personal property" (as well as all real property) to named beneficiaries, but also contained a residuary clause devising the remaining property to a church. At issue was whether the term "personal property" should be interpreted to mean only tangible personal property; in this case, the intangible personal property would pass to the residual beneficiary. The court withdrew its prior decision in favor of a new opinion which upheld the admission of oral testimony by the will draftsman. The draftsman testified that the testator had intended to limit the nonresiduary devise to tangible personal property, thereby giving effect to the residuary clause which would otherwise have been insignificant. The interpretation made a difference to the Presbyterian Church, the residuary beneficiary and to the malpractice carrier for the draftsman. The court rejected the contention that the testimony of the draftsman, who was also the personal representative violated the Dead Man's Statute, since in this case the personal representative, would not gain or lose from either interpretation of the will.

Even in the absence of parol evidence, Florida courts will liberally construe the wording in a will to carry out the testator's intent. In *In re Estate of Reese*, the trustees sought permission from the court to divide the trust created under decedent's will into a generation-skipping-transfer-exempt trust and a nonexempt trust with the same dispositive provisions as the single trust. The decedent's will directed the trustees "to reduce to the lowest possible amount the federal estate tax payable by reason of my death and any federal generation-skipping tax on any transfer with respect to which I am the deemed transferor . . . ". The court found the decedent's expressed intent to be unequivocal and held that the trust could be so

150. Id.
151. Id. at 625.
152. Id.
154. Walker, 609 So. 2d at 625-26.
156. Id. at 158.
divided as a matter of construction rather than by reformation of the will.157

V. TRUSTS

Although the law on various aspects of wills is well-settled and explicitly stated in statutes, this is not the case with the other popular estate planning tool—the revocable living trust. Probably the most surprising decision involving living trusts in Florida was handed down by the Florida Supreme Court in 1993 in the case of Zuckerman v. Alter.158 The question certified from the lower court was:

WHETHER PARAGRAPH 689.075(1)(g), FLORIDA STATUTES (1989), CREATE A SINGLE TEST, OR TWO ALTERNATIVE TESTS, FOR THE VALIDITY OF AN INTER VIVOS TRUST EXECUTED ON OR AFTER JULY 1, 1969, WHERE THE SETTLOR IS THE SOLE TRUSTEE?159

The statute provides that an otherwise valid trust is not invalidated or an attempted testamentary disposition thwarted

because the settlor is, at the time of execution of the instrument, or thereafter becomes, sole trustee; provided that at the time the trust instrument is executed it is either valid under the laws of the jurisdiction in which it is executed or it is executed in accordance with the formalities for the execution of wills required in such jurisdiction.160

In affirming the lower court's decision, the Florida Supreme Court held that the statute created two alternative tests and satisfaction of either test sustains the validity of the trust.161 It had previously been thought by most Florida attorneys that a self-declaration of trust executed in Florida must conform to the Florida Statute of Wills. Such trusts, said the court, may be created by writing or parol, or partially in each, provided that the words used are sufficient to create a trust, which make a trust "otherwise

157. Id.
158. 615 So. 2d 661 (Fla. 1993).
159. Id. at 662.
161. Zuckerman, 615 So. 2d at 663.
valid." Furthermore, the trust does not have to be executed with the formalities for the execution of wills (i.e., witnesses, notary, etc.). 162

In another case interpreting a trust, *NCNB National Bank of Florida v. Shanaberger*, 163 the Second District Court of Appeal questioned language granting the trustee sole discretion to invade the principal for a beneficiary's "care, maintenance, support, and medical attention." Before invading the principal to satisfy a demand for nursing home and related medical expenses for the trust beneficiary, the trustee had requested information about other sources of income available to the beneficiary. The trust instrument provided no criteria for making the necessary determination to invade the principal other than for the trust purpose. The court stated that its only function was to determine whether the trustee had abused its discretion by its request for information of outside sources of income. 164 The court held that there was no abuse of discretion and that even an unlimited invasion power is subject to accountability to remaindermen for an improper, an arbitrary, or a capricious exercise of discretion. 165

VI. GUARDIANSHIPS

Even though court statistics reveal an increase in guardianships and Florida has a recognized growing senior population, few guardianship cases end up in the appellate courts. Selection of an appropriate guardian is obviously a matter of great concern and was addressed in *Tagliabue v. Fraser*. 166 The *Tagliabue* court held that appointment of a non-relative as guardian of property was inappropriate where the incapacitated person was the sole life beneficiary under a trust and the appointed guardian was sole residuary beneficiary under the same trust. 167 According to the court, Florida Statutes section 744.309(2) prohibits the appointment of a non-relative as guardian where a conflict of interest may occur. 168

The issue of attorney fees has also received the appellate courts' attention. Namely, *Department of Health & Rehabilitative Services v. Whaley* 169 involved, *inter alia*, fees to be paid to a guardian ad litem.

162. *Id.*
163. 616 So. 2d 96 (Fla. 2d Dist. Ct. App. 1993).
164. *Id.* at 97-98.
165. *Id.* at 98.
166. 576 So. 2d 401 (Fla. 5th Dist. Ct. App. 1991).
167. *Id.* at 401-02.
168. *Id.* at 402.
169. 574 So. 2d 100 (Fla. 1991).
Florida’s Department of Health and Rehabilitative Services (“HRS”) was not held responsible for fees of an attorney who was appointed by the trial court as counsel for a guardian ad litem. Therefore, the court observed that HRS has no responsibility for or control over the guardian ad litem program. This is a different statute than that required for appointment of an attorney under guardianship laws in chapter 744 of the Florida Statutes, over which the courts have jurisdiction to order payment of attorney fees from a ward’s assets.

Also concerning fees is *In re Bockmuller*, where the ward was adjudicated incapacitated November 9, 1989, although she retained the rights to vote and to marry. After the ward was placed in a retirement home, she told an attorney she wanted to go home and would hire someone to assist her. The attorney filed an appearance and petitioned for restoration of capacity and restoration of additional rights. The trial court found as a matter of law there was no conflict, adverse interest, or any other basis for removal of the guardians. However, the attorney continued to attempt to remove the woman’s guardians until her death on February 6, 1991. Later, the attorney petitioned the trial court for attorney fees and costs, which were to be paid from the ward’s guardianship assets. Appeal was taken from the trial court’s order awarding attorney fees and costs.

The appellate court ruled that a ward’s right to contract or hire an attorney was removed by the order determining her incapacity. The court stated that counsel for a ward must be contracted by one of the guardians or appointed by the court. Further, a ward has no power to contract with an attorney to represent her in any proceeding. The appellate court also found that the attorney’s fees charged for time spent in his continued efforts to remove the guardians served only to deplete the ward’s estate and served no benefit to the ward or her estate. The order authorizing payment of attorney fees and costs was vacated and set aside.

170. *Id.* at 101.
172. *Id.* at 609.
173. *Id.*
174. *Id.*
175. *Id.*
176. *In re Bockmuller*, 602 So. 2d at 609.
177. *Id.* at 610.
178. *Id.*
The case of *Metzger v. First National Bank of Clearwater* concerned fees incurred by a party other than the guardian of the property. The ward’s husband unsuccessfully petitioned the court to partition jointly held bank accounts for himself and the ward. The ward’s daughter was guardian of the person and a bank was guardian of the property. The guardian of the person opposed the husband’s petition for partition and defended the trial court’s order on appeal. The guardian of the person requested attorney fees, asserting that her efforts benefitted the guardianship estate in the trial court and appellate courts.

The appellate court ruled that attorney fees for services beneficial to the ward may be awarded even though those services were not rendered by the ward’s guardian. “[E]ven if [a person] is motivated by thoughts of perhaps eventually inheriting what was left of the joint accounts if [ward survived husband], the existence of such a motive is irrelevant to the determination whether her efforts benefitted the guardianship estate.”

The Fourth District Court of Appeal in *Midland National Bank & Trust v. Comerica Trust Co.* held that upon the death of an incapacitated ward, unpaid administrative expenses and debts of a guardianship, as well as debts of the ward which pre-existed creation of the guardianship but which the court had ordered paid, are promptly payable from the ward’s guardianship estate prior to the guardian making distribution to the ward’s probate estate. The court observed that the guardianship is a unique entity that must, to the extent of its assets, satisfy or discharge all guardianship administrative expenses, as well as obligations incurred by the guardian for the ward, before the net assets remaining are distributable to the persons entitled to them.

*In re Brown* involved the court’s jurisdiction over the guardian. The Fourth District Court of Appeal determined that there was no merit to the guardian’s contention that the lower court had no jurisdiction over her in her capacity as the trustee of an inter vivos trust. The court found that the guardian had petitioned the court for appointment as guardian and,

180. Id. at 373 (citing *In re Dean*, 319 So. 2d 589 (Fla. 2d Dist. Ct. App. 1975)).
182. 616 So. 2d 1081 (Fla. 4th Dist. Ct. App. 1993).
183. Id. at 1086.
184. Id.
185. 611 So. 2d 1342 (Fla. 4th Dist. Ct. App. 1993).
186. Id.
in doing so, "clearly submitted herself individually to the court's jurisdiction."\textsuperscript{187}

The guardian's power to act was the issue in \textit{Goeke v. Goeke}.\textsuperscript{188} Here, the court held that a guardian, with the approval of the court, has the statutory power, pursuant to section 744.441 of the Florida Statutes, to establish and modify IRA trusts or IRA custodial accounts for the ward.\textsuperscript{189} This includes the authority to designate the ward's estate or family members as beneficiaries for the IRA contract. The court noted that designation of a beneficiary in an IRA agreement is not equivalent to writing or amending a will for the ward. The guardian's exercise of this power must be appropriate for, and in the best interest of, the ward.\textsuperscript{190}

\section*{VII. ELECTIVE SHARE}

The elective share of a surviving spouse continues to plague the courts in their attempt to follow the Florida Statutes.\textsuperscript{191} The manner of election was the focus in \textit{Harmon v. Williams}.\textsuperscript{192} In \textit{Harmon}, the surviving spouse's attorney had, within the elective share time limits, signed and filed a "Notice of Intention to Petition for Elective Share" but no formal election was ever filed. In holding the purported elective share election invalid, the court stated that it was not signed either by the surviving spouse or by her guardian, as required by the statute.\textsuperscript{193} The court conceded that an attorney-in-fact under a durable power of attorney may be authorized to make such election; however, that factual situation was not presented before the court.\textsuperscript{194} Furthermore, the election was held to be invalid because the petition was merely a notice that a petition to determine the elective share would be filed later, without stating any statutory grounds for the delay.\textsuperscript{195}

In \textit{In re Estate of Palmer},\textsuperscript{196} the court held that the "surviving spouse is entitled to interest on [the] elective share from the date of the order

\begin{itemize}
\item \textsuperscript{187} \textit{Id.}
\item \textsuperscript{188} 613 So. 2d 1345 (Fla. 2d Dist. Ct. App. 1993).
\item \textsuperscript{189} \textit{Id.} at 1347.
\item \textsuperscript{190} \textit{Id.}
\item \textsuperscript{191} See FLA. STAT. §§ 732.201-732.215 (1991).
\item \textsuperscript{192} 596 So. 2d 1139 (Fla. 2d Dist. Ct. App. 1992).
\item \textsuperscript{193} \textit{Id.} at 1142.
\item \textsuperscript{194} \textit{Id.} at 1143.
\item \textsuperscript{195} \textit{Id.} at 1142.
\item \textsuperscript{196} 600 So. 2d 537 (Fla. 4th Dist. Ct. App. 1992).
\end{itemize}
directing the personal representative to make payment."\textsuperscript{197} The personal representative of the estate had withheld payment of the elective share because of additional estate taxes from the decreased marital deduction resulting from the election. In the previous related case of \textit{Tarbox v. Palmer},\textsuperscript{198} the court had held that the election of the elective share by the surviving spouse had not increased estate taxes but merely accelerated their time for payment by the residuary beneficiaries of the QTIP trust for the spouse; therefore, the surviving spouse was not to bear any additional tax.\textsuperscript{199}

This elective share and burden of estate taxes issue has arisen again in the controversy over the estate of Joe Robbie. In his estate plan, Joe Robbie left assets in a QTIP trust for his wife. The assets included the Miami Dolphin football team and part of Joe Robbie Stadium. Elizabeth Robbie, Joe Robbie’s surviving spouse, and mother of his eleven children, filed for an elective share, which could result in accelerating approximately twenty-five million dollars in estate taxes. If the entire QTIP trust principal had been held at her death, the estate taxes would have been deferred until that time. As of the writing of this article, the issue is unresolved. A literal reading of section 732.215 of the Florida Statutes could, in some cases if not this one, eliminate the spouse’s entire elective share if the present increase in estate taxes is charged against it. Also unresolved at this time is whether a surviving spouse (in this case Elizabeth Robbie) who files for an elective share would forfeit his or her right to benefits from the remaining estate assets which pour over into a revocable trust created by the deceased spouse which names the surviving spouse as an income and/or principal beneficiary. Florida law may be clarified if the Robbie case is resolved by a court rather than settled out of court. In any event, it should prompt more attorneys to provide appropriate language in revocable trusts as to the effect of a spouse filing an elective share.\textsuperscript{200}

\textsuperscript{197. Id. at 538 (citing Price v. Florida Nat’l Bank, 419 So. 2d 389 (Fla. 3d Dist. Ct. App. 1982)).}  
\textsuperscript{198. 564 So. 2d 1106 (Fla. 4th Dist. Ct. App. 1990).}  
\textsuperscript{199. Id. at 1108.}  
\textsuperscript{200. For a discussion of the Robbie litigation, see Barry A. Nelson, \textit{Litigation in the Joe Robbie Estate Illustrates Elective Share/Revocable Trust Traps}, 66 FLA. B.J. 38 (Jan. 1993).}
A. Creditors' Claims Post-Pope

In the last two years, the Florida Legislature has responded to state and national case law and consumer concerns by adopting specific legislation. Chapters 731 through 733 are considered the “Florida Probate Code” and chapter 737 includes the limited Florida statutes on trusts.

A significant case decided by the United States Supreme Court, Tulsa Professional Collection Services, Inc. v. Pope\(^\text{201}\) dealt with the proper notice required for creditors of a probate estate under the Fourteenth Amendment Due Process Clause of the United States Constitution. In that case, the widow of a decedent was appointed by an Oklahoma probate court to be the executrix of her husband’s estate. Under Oklahoma law, with which she complied, she was required to publish notice in a local legal newspaper and to give creditors of her husband’s estate up to sixty days within which to file claims against the estate. The collection company had been assigned the claim for decedent’s hospital expenses from the hospital in which Mr. Pope died. The company claimed that they should have received actual notice of the claim period since, certainly under the circumstances of this case, the hospital was a known or ascertainable creditor. The Supreme Court left it to the various states to make specific provisions for creditors’ claims periods and the procedures to be followed. As a result, Florida modified section 733.212 of the Florida Statutes.

In Florida, the personal representative of the estate is now obliged to send notice to known and ascertainable creditors of the decedent.\(^\text{202}\) An affidavit of the mailing must be signed and filed with the court by the personal representative, who must make a diligent search for creditors.\(^\text{203}\) The search usually includes a review of the preceding two or three years of check registers, tax returns, and finally, the mail arriving after the death.

B. House Bill 1295

A composite bill changing several unrelated provisions of trust and probate statutory law was passed by the 1993 Florida Legislature and, by a

\(^{203}\) Id.
whisker, became law absent the Governor’s signature. House Bill 1295 covered four topics: creditors’ rights and revocable living trusts; fees for attorneys and personal representatives in the event of disputes; changes in the prudent investor rule; and the application of certain rules of construction found in the Probate Code to trust agreements. 204

One of the efforts of the bill was to make trust administration more similar to probate administration. There has not been a reported case on the specific obligation of a trustee holding assets of a decedent to notify the decedent’s creditors of the existence of the trust nor any case requiring payment from trust corpus to a decedent’s creditors. This is in contrast to specific probate statutes and case law. 205 While a trustee taking over as trustee from a grantor/decedent has always had the obligation to notify beneficiaries of a change of trustee, 206 this author believes that only professional trustees commonly carry out this notice requirement. Under the most recent law passed, a trustee has an obligation to publish a notice to creditors in a local newspaper for two consecutive weeks and consequently delay distributing trust assets until the three month creditor period has elapsed. 207

In addition to the notice for claimants, a trustee is obliged to pay any administrative expenses and timely filed enforceable creditors’ claims from trust funds upon certification by the personal representative that there are insufficient funds in the probate estate with which to pay them. 208 The new statute does not address the fairly common situation as to who certifies if there is no certification. It also does not provide a procedure for creditors whose claims are denied by a trustee where there is no probate estate. There is no mention of taxes, either because of an oversight on the part of the authors or because the Internal Revenue Code already provides that the tax obligation follows the assets. The various circuit courts and clerks will need to establish procedures and filing fees for this additional function, although the clerks may have to steel themselves for the abundance of individual trustees who will be attempting to do this on their own without an attorney. This statutory change diminishes the difference between the revocable living trust and the probate process for many individuals in Florida, making such trusts less attractive.

204. Ch. 93-257, 1993 Fla. Laws 2500.
205. See supra text accompanying notes 103-31.
207. Ch. 93-257, § 15, 1993 Fla. Laws 2500, 2510 (to be codified at FLA. STAT. § 737.305701(a)(c)).
208. Id. § 14, 1993 Fla. Laws at 2509 (to be codified at FLA. STAT. § 737.3056(1)).
Another change contained in this composite bill addresses the old "prudent investor" rule enunciated many years ago by Justice Putnam in Harvard College v. Amory. As modern portfolio theory evolved, more investment options became available, and this new world had trouble fitting in with the quaint language. The new law amends sections 518.11, 660.431, 733.212, 733.607, 733.617, 733.707, and 737.302 and creates section 518.112 of the Florida Statutes.

There are two main parts to the changes adopted in the prudent investor rule. The first is that the fiduciary (trustee, personal representative, guardian) is obliged to consider not just the individual investments in a vacuum, but rather the entire portfolio taken as a whole. The fiduciary must consider the needs of the beneficiaries, wards, and the goal of the trust agreement. Diversification is specifically encouraged.

The second major change applicable to investment duties of fiduciaries is that for the first time under Florida statutory law, the investment function can be delegated. If a fiduciary wishes to assign both the duty and the responsibility of investments in a particular fiduciary account to anyone else, including an investment manager or a bank, the trustee can do so without fully resigning as trustee. There is a specific procedure to be followed of notifying the beneficiaries of any trust or seeking court approval in the case of a guardianship and then delegating. Many current trust agreements allow for the hiring of investment advisors by the trustee, but the trustee is expected to retain full power and responsibility in such a situation.

Chapter 737 is the part of the Florida Statutes that addresses trusts in Florida. There is very little statutory law contained therein. Some rules of construction which have been found in the Florida Probate Code will now be found in the chapter on trusts. For example, a willful slayer, that is one who kills the grantor or another person upon whose death such beneficiary's interest depends, cannot recover anything as a beneficiary of a trust. The language is not identical to the language in the existing probate statute on killers not being entitled to revenue from an estate.

211. Id. § 2, 1993 Fla. Laws at 2501 (amending FLA. STAT. § 518.11 (1991), to be codified at FLA. STAT. § 518.11(1)(a)(c)).
212. Id.
213. Id. §§ 15-16, 1993 Fla. Laws at 2510-12 (to be codified at FLA. STAT. §§ 733.3057, 737.621).
ently, if you intend to kill someone and expect to be convicted of intentional murder, make sure your victim has a revocable trust. Another section adopted in the trust law is the assumption that any distribution is on a “per stirpes” basis.\textsuperscript{215} It would have been more useful if the “antilapse” statute\textsuperscript{216} had been adopted as part of the 1993 amendments to chapter 737.

**IX. JOINT BANK ACCOUNTS**

The question of how joint bank accounts are held has been the subject of several cases and a new statute passed by the 1992 Florida Legislature. Prior to July 3, 1992, the ownership of joint bank accounts depended on the type of financial institution in which the account was opened. For savings banks and savings and loan associations, there was a \textit{conclusive} presumption that, in the absence of fraud or undue influence, a savings account held in the names of two or more people constituted a joint tenancy with rights of survivorship. However, for commercial banks and credit unions, in the absence of fraud or undue influence, there was a \textit{rebuttable} presumption of survivorship rights by proving contrary intent by “clear and convincing evidence.” Many cases introduced clear and convincing evidence of such contrary intent: (1) the form and the language on the account card itself and signature cards; (2) the age and physical condition of an owner; (3) the relationship of the parties; (4) the use of the account; (5) the knowledge of the surviving tenants; (6) the source of the deposits; (7) the control of any passbook; and (8) the relationship of the account to the owner’s estate plan. If the action involving ownership was brought by a co-tenant rather than a survivor, the statutory presumptions did not apply.

In a leading case, \textit{In re Estate of Combee},\textsuperscript{217} the Second District Court of Appeal applied the statutory presumption to joint commercial bank accounts opened by the decedent with two other persons as signatories. The contractual language on the bank’s signature contract card clearly expressed a right of survivorship. The trial court had allowed parol evidence but excluded the testimony of the surviving tenants as self-serving. In the absence of clear and convincing proof of a contrary intent to rebut the

\textsuperscript{215} Ch. 93-257, § 16, 1993 Fla. Laws 2500, 2511 (to be codified at FLA. STAT. § 737.624).

\textsuperscript{216} FLA. STAT. § 732.603 (1991).

\textsuperscript{217} 583 So. 2d 708 (Fla. 2d Dist. Ct. App. 1991).
statutory presumption, the bank accounts were held to be survivorship accounts and the surviving co-tenants became the account owners.\footnote{218}{Id. at 712-13.}

The distinction between financial institutions holding joint bank accounts was abolished by chapter 655 of the Florida Statutes in July, 1992.\footnote{219}{FLA. STAT. §§ 655.001-655.954 (Supp. 1992).} "Unless otherwise expressly provided in a contract, . . . signature card, . . . [or the like], a deposit account in the names of two or more persons \textit{shall be presumed} to have been intended by such persons to provide that, upon death of any one of them, all rights . . . vest in the survivor."\footnote{220}{Id. § 655.79(1) (emphasis added).} The rebuttable presumption may be overcome by proof of fraud or undue influence or by clear and convincing proof of a contrary intent.\footnote{221}{Id. § 655.79(2).} True convenience accounts are excepted from this rule, and \textit{Totten} trust accounts are still recognized. As a practical matter, a customer must aggressively demand a convenience account if that is desired.

Between husband and wife, jointly held real property is presumed to be held as tenancy by the entireties, but the presumption does not apply to personal property owned by a husband and wife together. "[T]he intention of the parties must be proven unless the instrument creating the tenancy clearly bears an express designation that the tenancy is one held by the entireties."\footnote{222}{First Nat'l Bank of Leesburg v. Hector Supply Co., 254 So. 2d 777, 781 (Fla. 1971).} The distinction is important since creditors wishing to attach the joint bank accounts of a husband and wife to satisfy the debt of one spouse may reach the account if held as joint tenants with rights of survivorship but not if held as tenants by the entireties.\footnote{223}{See Terrace Bank of Florida v. Brady, 598 So. 2d 225 (Fla. 2d Dist. Ct. App. 1992).} The Florida courts have been concerned with ascertaining the spouses' intent in establishing and using a joint bank account. Bank signature cards have been examined, although they typically refer to such accounts as joint with right of survivorship and do not mention a tenancy by the entirety. Also, whether the joint bank account was created from jointly owned funds and whether it was used for the spouses' joint expenses were other considerations in the courts' attempts to ascertain the spouses' intentions.

In \textit{Terrace Bank of Florida v. Brady},\footnote{224}{598 So. 2d 225 (Fla. 2d Dist. Ct. App. 1992).} the court seemed to shift its focus from the intent of the depositor-spouses to an examination of the
bank’s policies and regulations as to joint bank accounts being held as tenants by the entireties, including whether the bank offered such accounts and whether they were specifically requested by the spouses upon creation.\textsuperscript{225} The court also stated that the burden of proof required of a married couple attempting to shield their bank account from the claims of a spouse’s creditor meet the “clear and convincing” standard of evidence.\textsuperscript{226} The Florida Statutes now impose the same standard to all joint bank accounts. Consequently, husbands and wives desiring protection from individual liability should take appropriate action to clearly and convincingly designate and treat their joint bank accounts as “tenancy by the entirety” accounts.

**X. CONCLUSION**

Probate and trust law in Florida continues to evolve. The Florida Legislature has attempted to codify many aspects, particularly in the trust law area. However, it is certain that the most recent statute will be amended in the next legislative session and we will see additional codification in this area. Also certain will be the continued plethora of cases as the parties and courts attempt to deal with these new statutes as well as aspects not covered by them. It is such activity that makes the attorney’s practice in probate and trust law interesting and (hopefully) rewarding.

\textsuperscript{225} Id. at 228.
\textsuperscript{226} Id.