Subject: Jeff Baskies & Changes to Florida Trusts and Estates Practice 2015: It's Time to Review and Revise Your Florida Health Care Surrogate Forms Steve Leimberg's Estate Planning Newsletter

Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2336

Date: **19-Aug-15**
From: **Steve Leimberg's Estate Planning Newsletter**
Subject: **Jeff Baskies & Changes to Florida Trusts and Estates Practice 2015: It's Time to Review and Revise Your Florida Health Care Surrogate Forms**

"Every winter/spring, the Florida legislature meets in regular session, and seemingly in every session significant changes are made to Florida's trusts and estates laws. In fact, the Florida Bar's Real Property, Probate and Trust law section is one of the busiest legislative proponents/activists, presenting and passing a variety of legislation each year.

2015 was no different as there were significant changes made to Florida guardianship law (regarding the fees of examining committee members and attorneys as well as adopted major changes for professional guardians), to the Florida tax apportionment statute (re-written), to the Florida Uniform Transfers to Minors Act (Florida now has UTMAs that can last to age 25) and to Florida's health care surrogate statutes (providing new flexibility and choices).

For those who practice in Florida (and those of you who sometimes do from your offices out of state), here is an overview of some of the most important changes. Moreover, this newsletter hopefully serves as a reminder that we all should revise our Florida designation of health care surrogate forms."

Jeff Baskies provides members with commentary that reviews a number of important legislative changes made to Florida's trusts and estates laws in 2015. Jeff would like to extend a special acknowledgement and thank you to the **Florida Bar's Real Property, Probate and Trust Law Section** and the faculty and steering committee for their **35th Annual RPPTL Legislative & Case Law Update** seminar and materials.

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Here is his commentary:

EXECUTIVE SUMMARY:

Every winter/spring, the Florida legislature meets in regular session, and seemingly in every session significant changes are made to Florida's trusts and estates laws.[i] In fact, the Florida Bar's Real Property, Probate and Trust law section is one of the busiest legislative proponents/activists, presenting and passing a variety of legislation each year.

2015 was no different as there were significant changes made to Florida guardianship law (regarding the fees of examining committee members and attorneys as well as adopted major changes for professional guardians), to the Florida tax apportionment statute (re-written), to the Florida Uniform Transfers to Minors Act (Florida now has UTMAs that can last to age 25) and to Florida's health care surrogate statutes (providing new flexibility and choices).

For those who practice in Florida (and those of you who sometimes do from your offices out of state), here is an overview of some of the most important changes; please note this newsletter is not intended as a comprehensive review of every change, just a few issues selected by the author. Moreover, this newsletter hopefully serves as a reminder that we all should revise our Florida designation of health care surrogate forms.

COMMENT:

A number of important legislative changes to Florida's trusts and estates laws were enacted in 2015, including the following:

Guardianship Law

Over the past few years, there's been a growing attention to and interest in the role of professional, for-profit guardians in Florida. Their role has been the subject of significant criticism and pointed investigative journalism.[ii]

Thus it was not a shock when Representative Kathleen Passidomo (Naples, FL) organized a working group to propose legislative changes in regard to oversight of and the workings of professional guardians. House Bill 5 passed and created new checks and balances on professional guardians under Florida law. For example, FS 744.309 was adopted defining corporate for-profit guardians and requiring fiduciary bonds and liability insurance for them. Also, FS 744.312(4) and (5) were added to mandate a rotating appointment system (frequently called the "wheel"), prohibiting a professional guardian who was first appointed as the emergency temporary guardian from subsequently being appointed as the permanent guardian (except in certain limited circumstances), and adopting an express prohibition against guardians abusing, neglecting or exploiting wards and requiring reporting of any such abuse to the Department of Children and Families' hotline. FS 744.359.

In addition to the new checks and balances on professional guardians, HB 5 also changed Florida law with regard to durable powers of attorney which previously were suspended upon the filing of a petition to determine incapacity. FS 709.2109(3) provided for the automatic suspension of all durable powers of attorney if anyone initiated judicial proceedings to either determine the incapacity of an individual or to have a guardian advocate appointed for such individual. The suspension of the durable powers of attorney lasted for the duration of the pending proceeding – i.e. until the petition was dismissed or withdrawn – unless the court entered an order specifically authorizing the agent to act under the durable power of attorney.

Some felt this automatic suspension was necessary to protect alleged incapacitated persons who might be victims of abuse by their agents, and others felt the automatic suspension might thwart the wishes of the principals. Since the person signed a presumptively valid durable power of attorney which was obviously intended to apply if/when the person became incapacitated – hence the "durable" part – suspending the durable power of attorney automatically might undermine the intent of the creators of those documents.

Apparently, a compromise was reached to balance the competing concerns (fear of abusive agents vs fear of thwarting the principal's intent), so that if certain family members (spouses, children, grandchildren, and parents) are named as agents, their durable powers of attorney will not automatically be suspended under newly adopted FS 709.2109(3), but if anyone else is named as agent, those durable powers of attorney will still be automatically suspended. FS 744.3203(5). Also, in case family members might also be abusing durable powers, new FS 744.3203 provides a process for an individual to file a verified motion to suspend a power of attorney of a family member and provides guidance as to the types of information that must be in the motion and the grounds for courts to consider in determining whether or not to suspend those durable power of attorney.

Also, regarding guardianship law changes, House Bill 7 passed making settlements involving guardianship proceedings confidential. This change is particularly important in tort settlements involving minors. With the passage of this new statute, the confidentiality exceptions to Florida's public records laws will now apply to (i) settlements which require court approval under FS 744.3025 (i.e. settlements involving minors), as well as (ii) petitions for approval of settlements on behalf of a ward (or minor), (iii) reports of ad litems which may have been required or filed in connection with the proceedings to approve settlements and finally the (iv) orders approving such settlements. FS 744.3701. As a result of this new change, potentially sensitive, private health or financial issues of a ward (or minor) will now remain confidential and not generally available under Florida's public records laws.

There were additional changes in the areas of fees and costs (for example, expert witness testimony will no longer be required in most guardian's fees and guardian's attorneys' fees proceedings), emergency temporary guardians (requiring a hearing and notice procedure), considerations in appointment of a guardian (adding the wishes of the ward's next of kin to

the list of considerations) and in other areas of guardianship practice.

The guardianship changes are all made effective July 1, 2015

Tax Apportionment

The legislature updated Florida's estate tax apportionment statute. Most of the statute applies to all apportionment proceedings pending or commenced on or after July 1, 2015; however, some amendments only apply prospectively to decedents who die after July 1, 2015. In any tax apportionment proceeding, one should carefully check the effective date provisions.

Essentially, Florida's entire tax apportionment statute appears to have been re-written with the intent to apply most of the same rules (for how tax apportionment works) while dealing with new tax issues that had not been previously considered.

For example, the new act adds some definitional provisions to the apportionment statute, addresses apportionment of tax on Section 529 qualified tuition plan accounts which come back into the taxable estate if the donor dies during the 5 year recapture period, addresses apportionment of GST tax and estate tax on Section 2044 property consistently with the Internal Revenue Code ("IRC"), changed the terms for governing instruments to alter tax apportionment, and generally modified and updated the entire apportionment statute.

As noted, some of the changes are effective for any apportionment matters pending or commenced on or after July 1, 2015, while other provisions only apply to estates of decedents dying after July 1, 2015.

Uniform Transfers to Minors Act

Florida's Uniform Transfers to Minors Act is Chapter 710, FS. It was adopted back in 1985, based on the NCCUSL Uniform Act. The UTMA directs the process for the creation of custodial accounts for gifts, bequests or other transfers to minors. Under the UTMA, minors are defined as persons under the age of 21. FS 710.102(11). The UTMA itself was a modification of the old UGMA, which generally defined minors as those persons under the age of 18.

UTMA accounts may be created by gift or exercise of a power of appointment (governed by FS 710.15) or by a transfer from an estate or trust via the governing instrument (e.g. a "postponement of possession" clause) (governed by FS 710.106).

A number of states have modified their UTMAs to permit custodianships to last until the age of 25, and now Florida has done so as well. A custodianship under Florida law can be crated if the transferor, the custodian or the minor resides in Florida, or if the custodial property (e.g. real property) is in Florida.

Creating an age 25 UTMA via will or trust (under FS 710.106) should be relatively easy, as FS 710.123(1)(a) now allows for the designation of an age 25 termination date at the time of the creation of the UTMA account. Note, however, that while it is now possible to set the termination date at 25, this new option only applies if the minor is under age 21 at the time of death, because new FS 710.123(4) provides that someone from ages 21-25 is only a minor for purposes of selecting the termination date of a UTMA.

However, creating an age 25 UTMA for a lifetime transfer (under FS 710.105) will be more complex. Presumptively, the primary reason for the added complexity was the Florida bar RPPTL section's desire to help avoid unwitting taxable gifts.

Generally gifts to UTMAs qualify for the gift tax annual exclusion under Section 2503(b) of the Code as they are not treated as gifts of future interests under Section 2503(c) of the Code. However, Section 2503(c) of the Code only applies where the funds pass to the donee on attaining the age of 21.

Therefore, absent some type of safeguards, transfers to UTMAs designated to last until age 25 would fall outside the annual exclusion and would be treated as gifts of future interests in property, and thus would require the filing of gift tax returns (form 709s) and the application of applicable credit to the transfers.

To ensure gifts to UTMAs will qualify for the annual exclusion, the Florida legislature adopted a provision in FS 710.123(2) granting minor beneficiaries of age 25 UTMAs the right to withdraw the custodial funds at age 21. However, the legislature also adopted a statutory system allowing for the right to withdraw the UTMA assets to be limited in duration, so that if the beneficiary of the custodial assets fails to exercise the right to withdraw within a defined time period (generally 30 days from the age of 21), then the UTMA funds will remain in the UTMA until the beneficiary reaches age 25 without further right to withdraw until that birthday.

To create an age 25 UTMA with a limited right of withdrawal period at age 21, a transferor to such account may deliver a written instrument to the custodian at the time of the transfer to the UTMA, defining the finite time period in which the minor may exercise this withdrawal right, and if the right is not exercised the custodial property will remain to age 25. The custodian is required to give the minor written notice of this right to withdraw at least 30 days before and no later than 30 days after the minor's attaining the age of 21. The withdrawal period may not lapse prior to the later of 30 days after the notice is given or 30 days after the minor's 21st birthday. FS 710.123(3).

The new UTMA statute is effective as of July 1, 2015

Health Care Surrogates

New heath care surrogacy initiatives provide greater flexibility and more choices in drafting and implementing Florida designations of health care surrogates, including presently exercisable designations of health care surrogates (sometimes referred to as "durable" health care surrogates. The new act also codifies the ability of parents to name health care surrogates for their minor children, which is an extremely helpful tool for those who may be traveling without their children, for example. Further, the new act defines "health information" and gives the surrogate express access to such (a move to align with HIPAA).

As a result of the Act, after October 1, a client may designate a surrogate to make health care decisions even if the client is not determined to be incapacitated (i.e. the client may executed a durable health care surrogate). However, if the principal has capacity, the statute indicates the principal's decisions are to be controlling over those of the surrogate if the directions conflict. Further, even with a durable health care surrogate in place, treating physicians still must communicate treatment plans and/or changes in treatment plans to principals with capacity.

The Act provides that a principal with capacity may amend or revoke a durable health care surrogate in a variety of ways (including a written amendment, a written revocation, destroying the designation, and even oral/verbal expressions).

Note, this new option to create a durable health care surrogate is just that: optional. A client may still create an "old fashioned" designation of health care surrogate that only becomes operative upon a finding of incapacity. In fact, many clients may still prefer that approach; therefore, the options should be clearly explained to clients now.

Nevertheless to make the option available and to better demonstrate the choices to clients, it is likely wise for all planners to modify their Florida designations of health care surrogate to give the options and have initialing in certain boxes to indicate if the clients prefer durable health care surrogates or traditional ones that only begin upon incapacity.

With respect to parents and guardians desiring to delegate decision-making for their minor children, there has been a very wanted change to the statutes added. For example, many of us have clients who are parents who are traveling without their minor children. Often those clients wish to empower whoever is watching the minors with written authority to make health decisions in case a child gets injured, for example. Previously, there was no clarity as to how a parent or guardian could delegate that authority to a 3rd party.

Now, House Bill 889 adds FS 765.2035(6), a statutory framework for parents and guardians to name health care surrogates for minors in case they are unavailable to provide informed consent themselves. As noted, this provision will be particularly helpful for parents who travel without their minor children.

As an aid to all, the statutes provide proposed forms which are suggestive and not mandatory. However, the exemplary forms provide guidance for the preparation of both

durable designations of health care surrogates (with "check the box" designations to make the document effective immediately) and health care surrogate for minors forms. FS 765.203 (suggested form for adult designations) and 765.2038 (suggested form for minors).

These new statutory provisions are effective October 1, 2015, so we have time to review and revise our forms. Note, the statutes do not invalidate existing Florida designation of health care surrogate forms.

Conclusion

Hopefully this newsletter serves as a helpful overview of some of the important 2015 legislative changes to Florida trusts and estates practice, although as noted, this newsletter is not intended as a comprehensive review of every change. Clearly, however, all practitioners who help Florida resident clients should review and revise our designation of health care surrogate forms.

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

Jeff Baskies

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CITATIONS:

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[i] Per the Florida Senate Website: "Normally, the regular legislative session starts on the first Tuesday after the first Monday in March for a period not to exceed 60 calendar days. To provide time for enactment and judicial review of redistricting plans before elections in 2022, the regular legislative session that year starts in January." https://www.flsenate.gov/Reference/FAQ

Fun post from Wikipedia: The Florida Legislature operates on a regular legislative session starting on the first Tuesday after the first Monday in March for a period not to exceed 60 calendar days. Special sessions are called as needed by the Governor. Prior to 1991, the regular legislative session began in April. Senate Joint Resolution 380 (1989) proposed to the voters a constitutional amendment (approved November 1990) that shifted the starting

date of regular session from April to February. Subsequently, Senate Joint Resolution 2606 (1994) proposed to the voters a constitutional amendment (approved November 1994) shifting the start date to March, where it remains. The reason for the "first Tuesday after the first Monday" requirement stems back to the time when session began in April. Session could start any day from April 2nd through April 8th, but never on April 1 -- April Fool's Day.

[ii] Investigative reports were made by many, including the following: "Elder guardianship: A well-oiled Machine," The Sarasota Herald Tribune's Investigative Series (December 2014); "Guardianship Horror Stories May Lead to Change," by Carli Teproff and Kathleen McGrory, Times/Herald Tallahassee Bureau, The Tampa Bay Times (Sunday, March 22, 2015); "Fix Florida's Elder Guardianship Program," Sun Sentinel Editorial Board (April 10, 2015); Channel 9, WFTV's Investigative Report on Financial Abuses.