

# KATZ BASKIES & WOLF PLLC

Trusts & Estates, Tax & Business Law

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## GENERAL NEWS

### Significant New Changes Made to Florida Law Impact Estate Planning and Probate Administration

This year, the Florida legislature passed significant changes to Florida trusts & estates law. Some highlights include the following:

#### New Durable Power of Attorney Statute

The entire Durable Power of Attorney statute was replaced with a new, more in-depth statute. The new statute took effect October 1, 2011, and it includes many changes. The good news is the statute grandfather's in existing Durable Powers created prior to its effective date. For clients executing new Durable Powers after October 1, a new form will be introduced.

#### Increase in Surviving Spouse's Share of Intestate Estate

Previously, Florida's intestate succession law provided that, if a decedent's surviving descendants are also lineal descendants of the surviving spouse, the surviving spouse received the first \$60,000 in property of the estate, plus one-half of the remaining estate. The descendants got the rest.

The new law amends the statute so that if all the decedent's surviving descendants are also descendants of the surviving spouse, and if the surviving spouse has no other descendants, then the intestate share of the surviving spouse will now be **100%** of the estate.

However, if the decedent has one or more descendants who are not also descendants of the surviving spouse, or if the surviving spouse has descendants who are not also descendants of the decedent, then the intestate share of the surviving spouse is one-half of the estate.

#### Reformation or Modification of Wills Permitted

Florida law will now permit courts to reform the terms of a will, even if the will is unambiguous on its face, to conform the terms to the testator's intent. By clear and convincing evidence, it is now possible to prove that both the testator's intent and the terms of the will were affected by a mistake of fact or law. Under the new statute, in determining the testator's intent, extrinsic evidence is admissible, even if that evidence contradicts the plain meaning of the will.

The bill also provides that a will can be modified in order to achieve the decedent's tax objectives, provided the modification is not contrary to the testator's probable intent. This change brings the probate code more in line with the trust code which already permits such modifications for trusts.

In a reformation proceeding to correct a mistake or in a modification proceeding to achieve tax objectives, the court has the discretion to direct that costs (including attorney's fees) be paid from a party's interest in the estate, or can enter a judgment which may be satisfied from other property.

#### New Fiduciary Attorney-Client Privilege

Previously, Florida law provided that the attorney-client privilege might not be absolute in the context of a fiduciary relationship. Under the "fiduciary exception", if the legal work was done on behalf of and for the benefit of a trustee, but the ultimate benefit was for the beneficiary, the privilege between the trustee and his lawyer might not apply if the beneficiary was the "real client".

The new Florida statute provides that when a client acts as fiduciary (defined to include personal representative, trustee and/or guardian), communications between the fiduciary and her/his/its lawyer are privileged and protected to the same extent as if the client was not acting as fiduciary. From now on, it will be clear that the fiduciary is considered a client of the lawyer. Going forward, a special notice regarding the fiduciary lawyer-client relationship is required to be included in certain statutory mandated notices.