

Estate Planning and Florida Law

Speech Outline

June 2013

I. Introduction

- A. Florida law has many benefits and a few unique features that practitioners should be aware of in dealing with Florida trust and estate matters.
- B. In order to gain all the benefits of Florida's favorable laws, one must be a domiciliary of Florida, therefore this talk is designed to use a change of domicile to Florida as a backdrop to discuss some of the benefits of Florida law, and to discuss some issues to be aware of when dealing with Florida.
- C. Scrutiny of domicile and residence has increased in recent years due to perceived lost tax revenue in the state a person is intending to abandon.
- D. Establishing a new domicile and terminating an old domicile are overlapping but separate steps to changing a domicile to a new state.

II. Definition of "Domicile" and "Statutory Resident"

- A. As an initial step, one should review the definition of domicile in the state where domicile will be terminated. The common law definition of domicile, used in many jurisdictions is: "The place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home."
- B. The definition is subjective; therefore, many states have developed objective criteria, with an emphasis on determining residency for the purpose of imposing a particular state's income and estate taxes.
- C. For example, the use of the term "statutory resident" is seen in certain jurisdictions.
 - 1. Example: New York deems an individual a Statutory Resident of New York if he or she (1) maintains a permanent place of abode, and (2) spends more than 183 days in the state (the term "day" means any part of a calendar day").
- D. Pennsylvania defines a "Resident" as a person who is:
 - 1. Domiciled in Pennsylvania; or
 - 2. If not domiciled in Pennsylvania, a person who maintains a permanent place of abode in Pennsylvania and spends, in the aggregate, more than 183 days here. 72 Pa. Stat. Ann. §7301(p)

III. Determining Domicile and Statutory Residency

- A. Determining if one is domiciled in a state or is a statutory resident of that state is a fact-intensive analysis.
- B. Factors that are considered for making these determinations are:
 - 1. Physical Location: The location of homes, family, business and social affairs, as well as the physical location of tangible assets.
 - 2. Documentation: Change of address notices, licenses, voter registration, vehicle registration, and insurance, bank statements, and estate planning documents.
- C. Different States Focus on Different Factors
 - 1. New York: Focuses on the center of one's family, business and civic activity – recent litigation has dealt with the meaning of terms such as “permanent place of abode”, as used in the definition of Statutory Residence.
- D. In establishing a new domicile, one must also proactively terminate one's old domicile, as the ties retained with an old state may be important in a finding that domicile has not been effectively terminated.

IV. Changing Domicile to Florida

- A. Florida follows the following definition of domicile:
 - 1. “A legal residence or "domicile" is the place where a person has fixed an abode with the present intention of making it his or her permanent home. Once established, a domicile continues until it is superseded by a new one. A domicile is presumed to continue, and the burden of proof ordinarily rests on the party asserting the abandonment of one domicile to demonstrate the acquisition of another.” *Keveloh v. Carter*, 699 So. 2d 285, 288 (Fla. Dist. Ct. App. 5th Dist. 1997).
- B. Documentary Evidence Establishing Domicile: Documentary evidence alone is not sufficient to establish domicile, however obtaining documentary evidence strengthens a case for changed domicile.
 - 1. Examples of Documentary Evidence Establishing Florida Domicile
 - a. File the statutorily required Declaration of Domicile (Fla. Stat. § 222.17. Must be filed with the clerk of the circuit court for the county in which the person resides).

- b. Execute updated estate planning documents, stating a Florida domicile. A person's declarations in formal legal documents are considered evidence of intent to establish a new domicile.
- c. Purchase or lease a home in Florida.
- d. Obtain insurance in Florida on the residence.
- e. Change address with service providers, companies, etc. (Postal Service; credit card companies; phone company; banks and financial institutions; physicians; social, organizations).
- f. Apply for the Florida homestead real property tax exemption.
- g. Obtain a Florida driver's license and register cars and boats in Florida with Florida insurance.
- h. Register to vote in Florida.
- i. Use the Florida address in all federal documents (passports, tax returns, Medicare and Social Security).

2. Making Florida One's Domicile

- a. In addition to acquiring documentary evidence, a person's family, friends, business, and social affairs need to be based in Florida.
- b. Home. Spend as much time as possible in Florida. To the extent possible, maintain a log of time spent in Florida versus the old state during any period of transition to Florida.
- c. Family. Holidays with family in Florida, children attending school in Florida schools, family activities in Florida. Having other Florida residents in your family is beneficial.
- d. Property. Moving important tangible assets to Florida, moving important documents to Florida, safe deposit box in Florida bank, Florida bank accounts.
- e. Social. Social/civic/golf/country clubs in Florida, attending Florida events (plays, sporting events, etc.). Attend religious services in Florida.
- f. Civic. Vote in Florida. Volunteer with Florida organizations and charities. Donate to groups/causes based in Florida.
- g. Business. Establish Florida as the principal place of business, and/or work as much time as possible in Florida.

3. Terminating The Old Domicile

- a. Spending more time in Florida than old domicile.
- b. Decreasing activities in the terminating state.
- c. Sell the home in the former state, or remove it from your probate assets in the old domicile (Revocable or Irrevocable Trust (Irrevocable should remove the asset from PA Estate Tax)/QPRT/LLC).
- d. Minimize business activity in the former state. Continuation of business in the old state is considered strong evidence that the old domicile has not been abandoned.
- e. Decrease or stop family activities in the old state.
- f. Close bank accounts, and safe deposit boxes in old domicile.
- g. Do not vote in the old state.
- h. Switch to Florida doctors, accountants, advisors, etc.
- i. Return driver's license from old state.
- j. Abstain from using address from old state in legal documents, specifically, in any estate planning or tax documents.
- k. To the extent necessary, file nonresident tax returns in old state using Florida address.
- l. Provide the state taxing authority in the old state with the Florida Declaration of Domicile, and notify tax authority that you are moving permanently.¹

C. Pennsylvania Income Tax Issues on Change in Domicile.

- 1. Pennsylvania and other states are reticent to recognize change in domicile since a non-resident is only taxable on income from Pennsylvania sources, which includes:
 - a. Income from realty or tangible personal property located in Pennsylvania;

¹ For a complete discussion of Florida domicile see Patrick J. Lannon, Domicile Planning –Don't Take It For Granted, 80 Fla. Bar. 34 (2006); Francis Brogan, Jr., Changing State of Domicile is Easier Said Than Done, Estate Planning Journal, Vol. 39. No. 7 (July 2012).

- b. Income from a trade, profession or occupation carried on in Pennsylvania, or from personal services performed in Pennsylvania;
 - c. A taxpayer's distributive share of income from a business, Pennsylvania S corporation, or professional profits from activities in Pennsylvania as allocated or apportioned;
 - d. Income from intangibles used in taxpayer's Pennsylvania trade, profession, occupation or a business; and
 - e. Effective for tax year starting after December 31, 2003, gambling or lottery winnings resulting from a wager placed in Pennsylvania. 72 Pa. Stat. Ann. §§7301(k) and 7308.
2. An individual domiciled in Pennsylvania who claims to be a non-resident, must prove that they:
- a. Maintain no permanent place of abode in Pennsylvania during the tax year;
 - b. Maintain a permanent place of abode elsewhere during the tax year; and
 - c. Spend in the aggregate no more than 30 days of the tax year in Pennsylvania.
3. An individual not domiciled in Pennsylvania and claiming to be a non-resident must prove that he or she spends less than 184 days in Pennsylvania during the tax year.
4. Pennsylvania has ratified the Northeastern State Officials Association Cooperative Agreement on determination of domicile. The agreement utilizes four main factors in making determinations:
- a. Location of the individual's residence, including their size, use and value;
 - b. Where and how the individual spends their time, including overall living pattern and travel;
 - c. The location of personal possessions considered "near and dear" such as, family heirlooms, collections, valuables and other lifestyle enhancing possessions; and
 - d. The individual's active business involvement.

- e. In the event these four factors are not conclusive, a fifth factor, family connection, is considered. Family connections include the residence of immediate family members and where the individual's children attend school.
5. Two recent 2012 Commonwealth Court opinions illustrate the need to meet and be able to establish that a taxpayer changed domicile. The burden of proof is on the taxpayer to prove that they have changed domicile. In *Southwestern Regional Tax Bureau vs. William B. Kania and Eleanor Kania, his wife*, 2038 C.D. 2011, the Commonwealth Court of Pennsylvania found that taxpayers had established that they were now domiciled in Florida. In 2008, local tax collectors instituted an action against the taxpayers for non-payment of local income taxes. Under the facts of the case, since declaring their domicile in Florida, the taxpayers had: (a) changed their voter registration, (b) obtained a Florida driver's license, (c) used their Florida addresses on tax filings, (d) maintained Florida bank accounts, and (e) taken other steps to insure that they were domiciled in Florida, including spending 55% of their time in Florida (October to May), 35% in Pennsylvania (essentially the summer and holidays), and 10% traveling. They also notified the local tax bureau that they had changed their domicile and were no longer residents of Pennsylvania three years after moving to Florida and conducting all of the steps listed above. The Court found in the taxpayers favor because of the steps listed, despite the fact that the taxpayers still had an accounting practice in Pennsylvania. In the case of *Richard C. Hvizdak vs. The Commonwealth of Pennsylvania*, 833 F.R. 2008 (docket number) although the taxpayer satisfied many of the same items of changing domicile by changing voter registration, driver's license and the like, he did so during the year he claimed to have left Pennsylvania, while his wife and children remained in Pennsylvania. The Court found that he had not changed his domicile and was unable to exclude over \$13,000,000 in income in Pennsylvania.

V. Florida Domicile Effect on Estate Planning

A. Will and Trust Drafting

1. In Florida, there is a significant preference for the use of Revocable Trusts in estate planning. Partially because of the aggressive sale of this type of planning creating a desire for this type of plan, but also due to the real benefits, such as probate avoidance, and the continued management available in the event of incapacity. Ira Bloom, ACTEC Survey on Revocable Trusts (February 2009).
2. Execution

- a. The testator must sign the will at the end; or the testator's name must be subscribed at the end of the will by some other person in the testator's presence and by the testator's direction.
- b. At least two attesting witnesses must sign their names to the will at the time of execution. The witnesses must subscribe their signatures after the testator has affixed his or her signature, and must sign in the presence of each other and in the presence of the testator. Fla. Stat. § 732.502(1).
 - (1) A notary may be a valid witness to the execution of a will if the notary, the testator, and the other witness affix their signatures to the will in each other's presence, even if the notary did not intend to sign the will as a witness. This should not be relied on as good practice. *See Simpson v. Williamson*, 611 So. 2d 544, 546-547 (Fla. 5th DCA 1992).
- c. An interested party can be a witness. Fla. Stat. § 732.504(2).
- d. A will that is executed in conformity with the above, may be made self-proved at the time of execution, or any subsequent date, by the acknowledgment of it by the testator and the affidavits of the witnesses, each made before a notary and evidenced by the notary's certificate, stating that the testator signed the instrument as his or her last will in the presence of the witnesses and that the witnesses, in the presence of the testator and each other, signed the will as witnesses. A will that is self-proved may be admitted to probate without further proof, in the absence of any contest of the will. Fla. Stat. § 732.503.
- e. Provisions to be aware of in Florida Wills:
 - (1) Florida uses the term "Personal Representative".
 - (2) Florida allows a tangible personal property memorandum. Fla. Stat. § 732.515.
 - (3) In terrorem clauses are not permitted. Fla. Stat. § 732.517.
 - (4) Trusts and Wills should include a provision referencing the 360 year rule against perpetuities.
 - (5) A Revocable Trust should include language stating that the Settlor intends to retain the requisite interest and right to comply with the Homestead.

“(d) If the principal of this trust includes my primary residence, I reserve the right to reside upon such real property as my permanent residence during my lifetime. It is my intent to retain the requisite beneficial interest and possessory right in and to such real property to comply with section 196.041 of the Florida Statutes, so that such beneficial interest and possessory right constitute in all respects “equitable title to real estate” as that term is used in section 6., Article VII of the Constitution of the State of Florida. Notwithstanding any provision of this Agreement to the contrary, my interest in any real property in which I reside pursuant to the provisions of this subparagraph (d) shall be deemed to be an interest in real property, and not personalty. So long as such property is my residence and so long as I remain competent, my Trustee shall in no way be held responsible for the supervision, care, control or maintenance of such property, and shall have no duty to perform initial or periodic inspections of such property; nor shall my Trustee be responsible for determining the adequacy or existence of any insurance coverage with respect to such property. In addition, my Trustee shall not be obligated to pay any taxes, insurance premiums, or other expenses related to such property; provided that if my Trustee has knowledge that I have failed to pay any such taxes, insurance premiums or other expenses, my Trustee may pay the same if the trust has sufficient funds to do so. Such property shall remain my residence pursuant to this subparagraph (d) until such time as I advise my Trustee in writing that I no longer intend to occupy such property as my residence or until such time as my Trustee determines that I have permanently vacated such property as my residence.”

B. Tax Laws:

1. Florida does not impose state income tax. Although Florida repealed the intangibles tax in 2007, there are some one time nonrecurring taxes on certain intangibles (for example, mortgages) at a rate of 2 mills.
2. Florida does not impose estate/inheritance taxes.
3. Florida does not impose income tax on trusts; however, moving personal residence to Florida will not, on its own, change the taxation of many existing Trusts.
 - a. New York generally taxes trusts on the residence of the testator or settlor except where all trustees are outside of New York, all trust assets are outside of New York and there is no New York source of income. (New Jersey is similar to New York).
 - b. New Jersey had a law similar to Pennsylvania's current law, but approximately ten years ago, the constitutionality was challenged, a case which New Jersey lost, prompting a change to adopt a law similar to New York.
 - c. Pennsylvania has long taxed trusts based on the residence of the testator/settlor, despite a lack of any other nexus to the jurisdiction. However, a recent case in which Wilmington Trust Company was the Trustee challenging the rule casts doubt on whether Pennsylvania will be able to continue to tax trusts in this manner:
 - (1) In *McNeil v. Commonwealth of Pennsylvania* No. 651 F.R. 2010 (May 24, 2013) the Commonwealth Court found that Pennsylvania could not impose income tax on trusts that lacked a sufficient nexus to the Commonwealth. The Settlor was a Pennsylvania resident when he executed the trusts. The trusts were governed by Delaware law, with a Delaware corporate trustee (Wilmington Trust Company). The trusts provided discretionary distributions of income, owned no Pennsylvania assets, had no Pennsylvania source income, and all of the trust beneficiaries were Pennsylvania residents. No distributions of principal or income were required under the trust instruments, but in 2007 one of the trusts distributed \$1.4 million to a discretionary beneficiary. The tax software used by Wilmington Trust Company forced it to report taxable income from Pennsylvania sources to report the distribution, and the trust claimed a deduction

with respect to the distribution and reported its net PA taxable income as zero. The Department of Revenue issued Notices of Assessment. The trusts filed Petitions for Reassessment with the Board of Appeals, which were denied. The trusts appealed to the Board of Finance and Revenue, which held that the trusts were resident trusts and subject to Pennsylvania income tax. The Board determined that Department Ruling No. 01-040 was not binding, and the period during which it could be relied on had expired. (Ruling No. 01-040 allowed a Trust to avoid PA income tax if it had no PA source income or administration, and it had an Orphans' Court order changing situs). The Commonwealth Court analyzed the Commerce Clause implications of the imposition of PA income tax under the four prong test: (1) substantial nexus to the tax jurisdiction; (2) the tax must be fairly apportioned; (3) the tax being imposed upon the taxpayer must be fairly related to the benefits conferred by the taxing jurisdiction; and (4) the tax may not discriminate against interstate commerce. All four prongs must be met in order for the tax to be constitutional. The court analyzed the first three prongs in depth, finding that no prong had been satisfied.

C. Florida's Trust Law:

1. Decanting: Fla. Stat. § 736.04117.

- a. There has been a great deal of talk about decanting in the past few years, particularly in this region, because of Delaware's decanting statute.
- b. Decanting allows the assets from one irrevocable trust to be transferred into an existing or new trust.
- c. Decanting is an exercise of the Trustee's power to invade principal.
- d. Under Florida's statute, passed in 2007, a trustee who has absolute power under the terms of a trust to invade the principal of the trust, may exercise the power by appointing all or part of the principal of the trust subject to the power in favor of a trustee of another trust.

- (1) “Absolute power” is broadly defined - an absolute power to invade principal is a power that is not limited to ascertainable purposes, such as health, education, maintenance, and support.
 - (2) A power to invade principal for purposes such as best interests, welfare, comfort, or happiness is an absolute power sufficient to decant.
- e. The beneficiaries of the second trust may include only beneficiaries of the first trust. [NOTE: this leaves the door open to the new trust including fewer beneficiaries than the first trust].
 - f. The second trust may not reduce any fixed income, annuity, or unitrust interest in the assets of the first trust.
 - g. If the first trust qualified for either the marital or charitable deduction, such trust cannot decant into a second trust that includes terms that would have prevented the first trust from qualifying for the deduction.
 - h. The exercise of this power must be done in writing.
 - i. Trustee must provide 60-days’ notice to all qualified beneficiaries.
 - j. Decanting cannot be used to avoid the rule against perpetuities.
 - k. Note that no meaningful litigation has occurred to expand on Florida’s decanting statute.
2. Rule Against Perpetuities
- a. 360 year Perpetuities Period for Trusts.
3. Designated Representative: Fla. Stat. § 736.0306
- a. Florida Trust Code prohibits so called “blind trusts” (a trust in which the trustee does not have to notify the beneficiary of its existence) and contains numerous notice requirements.
 - b. Trustee must: (i) file a notice of trust at the settlor's death; (ii) notify qualified beneficiaries of an irrevocable trust of the existence of the trust, of the identity of the trustee, and of their rights to trust accountings; (iii) provide a complete copy of the trust instrument, (iv) account to qualified beneficiaries annually, and (v) notify the beneficiaries that the fiduciary lawyer-client privilege applies to the trustee and any attorney employed by the trustee.

- (1) Note: A qualified beneficiary is a living beneficiary who, on the date the beneficiary's qualification is determined: (a) is a distributee or permissible distributee of trust income or principal; (b) would be a distributee or permissible distributee of trust income or principal if the interests of the present distributees described in “(a)” terminated on that date without causing the trust to terminate; or (c) would be a distributee or permissible distributee of trust income or principal if the trust terminated in accordance with its terms on that date. Fla. Stat. § 736.0103(14).
- c. However, The Florida Trust Code provides that a “Designated Representative” may be nominated in the trust instrument, to represent and bind a beneficiary and receive any notice, information, accounting, or report.
- d. The trust instrument may also authorize any person, other than a trustee of the trust, to designate a Designated Representative to represent and bind a beneficiary and receive any notice, information, accounting, or report.
- e. The designated representative cannot be a Trustee or beneficiary.

4. Mandatory Trust Terms:

- a. Florida’s Trust Code provides the default terms, but the terms of the trust agreement control. However, there are 23 mandatory rules; some important mandatory terms that cannot be modified are:
 - (1) The requirements for creating a trust.
 - (2) Trustee’s duty to act in good faith and in accordance with trust terms.
 - (3) The applicable Statute of Limitations periods.
 - (4) The rules regarding the designation of representative under Fla. Stat. § 736.0306.
 - (5) The ability to modify a trust using a nonjudicial settlement agreement under Fla. Stat. § 736.0412.
 - (6) The trustee's duties to inform the beneficiaries (no blind trust rules discussed above) including duty to account to qualified beneficiaries.

- (7) The effect of an exculpatory term under Fla. Stat. § 736.1011 (cannot relieve a trustee of liability for actions committed in bad faith, and an exculpatory clause is not valid if inserted in abuse of the fiduciary relationship).
 - (8) In terrorem clauses are not permitted. Fla. Stat. § 732.1108
5. Nonjudicial Modification: Fla. Stat. § 736.0412
- a. The Trustees and all qualified beneficiaries may enter into an agreement modifying the trust.
6. Judicial Modification: Fla. Stat. § 736.04113 & Fla. Stat. § 736.04115
- a. Florida’s judicial modification provisions are organized differently, but are generally similar to Pennsylvania, except that Florida additionally allows judicial modification “in the best interest of the beneficiaries”. Florida adopted their UTC in 2007 and this provision has not been interpreted with much detail yet, however in exercising its discretion to modify a trust in the best interests of the beneficiaries the court shall consider:
 - (1) The terms and purposes of the trust.
 - (2) The facts and circumstances surrounding the creation of the trust.
 - (3) Extrinsic evidence relevant to the proposed modification.
 - (4) The court shall exercise its discretion in a manner that conforms with the intent of the settlor to the extent possible.
 - (5) The court shall consider a spendthrift provision, but is not precluded from modifying because of the existence of a spendthrift provision.
7. Nonjudicial Settlement Agreements: Fla. Stat. § 736.0111
- a. Interested persons and the trustee may enter into a binding non-judicial modification with respect to “any matter” involving the trust.
 - b. “Interested persons” means “persons whose interests would be affected by a settlement agreement”

(1) Note: PA provides that “all beneficiaries and Trustees” may enter into a non-judicial settlement agreement. 20 Pa.C.S. § 7710.1

c. “Any matter” is qualified to mean that agreements are limited to the extent the terms and conditions could be properly approved by the court.

8. Trustee’s Duty to Account

a. Qualified beneficiaries are entitled to trust accountings annually, and upon the termination of the trust or upon the change of the trustee. Fla. Stat. § 736.0813.

b. A qualified beneficiary may waive in writing the trustee's duty to account. Note above, cannot be waived in the trust instrument. Fla. Stat. § 736.0813.

9. Homestead Protection: Fla. Const. Art. X, § 4 & Fla. Stat. § 222.01, Et. Seq.

a. A Florida resident may establish his or her residence as a Homestead, which may be up to 160 acres outside of a municipality or one-half of an acre within a municipality, which will generally be exempt from creditors’ claims. Florida does not have a limit on the value of the homestead property. Fla. Const. Art. X, § 4 (a).

b. Exceptions from the protection against the claims of creditors include tax liens, obligations for the purchase of the homestead, and obligations related to the improvement or repair of the homestead. Fla. Const. Art. X, § 4 (a).

c. A homestead is automatically protected upon a person becoming domiciled in Florida.

d. A homestead is not immediately protected in Federal bankruptcy court.

e. The homestead may not be devised if the owner is survived by spouse or minor child. Fla. Const. Art. X, § 4 (c). The homestead may be devised to the spouse if there are no minor children. These restrictions help ensure that property passes to the surviving spouse or children.

f. There is a cap on property tax increases for homestead property. Fla. Stat. § 193.155.

- g. For property tax purposes the assessed value of the home generally excludes the first \$50,000. Fla. Const. Art. VII, § 6.
- h. There is a question with regard to whether homestead protection can be lost because property has been transferred to a revocable trust. In the case of *Crews v. Bosonetto*, 271 B.R. 403 (Bankr. M.D. Fla. 2001), a fraudulent transfer case, the court found that for the purposes of Florida's constitution, homestead protection was extended to "natural persons," and because the trust would not be considered a natural person, the homestead exemption did not apply. More recent cases have found that the homestead exemption does apply where the property is held in a revocable trust (*See Callava v. Feinberg*, 864 So. 2d 429 (Fla. 3d DCA 2004), but *Crews* has not been specifically overturned; therefore, there remains some uncertainty.

D. Florida Powers of Attorney: Fla. Stat. §§ 709.2101-709.2402.

- 1. As of October 2011 there is a new Power of Attorney Act.
- 2. Execution: Signed by the principal and two subscribing witnesses, and acknowledged before a notary public.
- 3. Springing powers of attorney are no longer permitted.
- 4. An agent may exercise the following powers only if the principal signed or initialed next to each specific enumeration of the authority:
 - a. Create an inter vivos trust.
 - b. With respect to a trust created by or on behalf of the principal - to amend, modify, revoke, or terminate the trust, but only if the trust instrument explicitly provides for amendment, modification, revocation, or termination by the settlor's agent.
 - c. Create or change rights of survivorship.
 - d. Create or change a beneficiary designation.
 - e. Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.
 - f. Disclaim property and powers of appointment.
 - g. Make a gift. Unless the power of attorney otherwise provides, a provision granting general authority with respect to gifts authorizes

the agent to only to make outright gifts limited to the annual exclusion from gift tax.

5. If a power of attorney is improperly rejected, the agent may seek a court order mandating acceptance, and liability for damages, including attorney's fees and costs.

VI. Estate Administration

A. Attorney representation is required. Generally, the attorney must be admitted in Florida.

B. Florida has three types of probate proceedings

1. Summary Administration.

- a. Applicable if the value of the decedent's entire estate subject to administration in Florida, exclusive of exempt property, does not exceed \$75,000; or the decedent has been dead for more than two years, regardless of the size of the estate.

2. Formal Administration.

- a. This administration must be used if the decedent's estate does not qualify for summary administration or disposition without administration.
- b. Applicable if the decedent's estate exceeds \$75,000, or the decedent has been dead for less than two years, or the will requires formal administration.
- c. If the decedent had all assets in a trust, formal administration may be advisable to clearly cut off creditor claims.

3. Disposition without administration

- a. Entire estate must consist only of exempt property.

C. Statutory Attorney's Fees: Fla. Stat. § 733.617

1. The Personal Representative's attorney is entitled to reasonable compensation payable from the estate assets without court order. The parties can agree to compensation other than the statutory schedule.
2. The schedule is based on the compensable value of the estate, which is the inventory value of the probate estate assets and the income earned by the estate during the administration as provided in the following schedule:
 - a. \$1,500 for estates having a value of \$40,000 or less.

- b. An additional \$750 for estates having a value of more than \$40,000 and not exceeding \$70,000.
- c. An additional \$750 for estates having a value of more than \$70,000 and not exceeding \$100,000.
- d. For estates having a value in excess of \$100,000, \$3,000 plus 3 percent on the next \$900,000.
 - (1) \$30,000 on the first \$1,000,000 and 2.5 percent for over \$1 million and not exceeding \$3 million.
 - (2) \$80,000 on the first of \$3,000,000 and 2 percent for over \$3 million and not exceeding \$5 million.
 - (3) \$120,000 on first \$5,000,000 and of 1.5 percent for over \$5 million and not exceeding \$10 million.
 - (4) \$195,000 for the first \$10,000,000 and 1 percent over above \$10 million.
- e. Attorney for the personal representative shall be allowed further reasonable compensation for any extraordinary service.

D. Compare with *Johnson* in Pennsylvania

1. Everyone is probably familiar with *Johnson Estate*, 4 Fid.Rep.2d 6, 8 (O.C. Del. Co. 1983), the 1983 case establishing the “unofficial” fee schedule in Pennsylvania. Despite the fact that it is not a statutory schedule, many courts continue to use the schedule to analyze fees, see the recent case of *O’Levich Est.* (O.C. Div. Monro), 3 Fiduc. Rep. 3d 64., in which the court adopted schedule of attorney’s fees set forth in *Johnson Estate* as fair and reasonable, rather than a 5% percentage fee of all probate and non-probate assets, plus an hourly fee for litigation. The application of the *Johnson Estate* schedule resulted in a reduction in attorney’s fees from \$20,000 to \$11,025.48.
2. Johnson Schedule for Attorney’s Fees.

	\$	00.01 to \$	25,000.00	7%	1,750.00	1,750.00
	\$	25,000.01 to \$	50,000.00	6%	1,500.00	3,250.00
	\$	50,000.01 to \$	100,000.00	5%	2,500.00	5,750.00
Attorney	\$	100,000.01 to \$	200,000.00	4%	4,000.00	9,750.00
	\$	200,000.01 to \$	1,000,000.00	3%	24,000.00	33,750.00
	\$	1,000,000.01 to \$	2,000,000.00	2%	20,000.00	53,750.00
	\$	2,000,000.01 to \$	3,000,000.00	1½%	15,000.00	68,750.00

	\$ 3,000,000.01 to \$ 4,000,000.00	1%	10,000.00	78,750.00
	\$ 4,000,000.01 to \$ 5,000,000.00	½%	5,000.00	83,750.00
½% Regular Commission P.O.D. Bonds and Trust Funds	3½% Transfer Joint Accounts		3½% Assets Which Are Taxable at One Half Value	
1% Non-Probate Assets up to \$1,000,000	1% Non-Probate Assets		Joint Accounts Fully Taxable: Full Commission	

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