

**WILL REFORMATION  
LEGISLATION**

**By**

**Brian Felcoski, Coral Gables**

# WILL REFORMATION LEGISLATION<sup>1</sup>

By Brian J. Felcoski

*“A reformation relates back to the time the instrument was originally executed and simply corrects the document's language to read as it should have read all along.” Providence Square Assn., Inc. v. Biancardi, 507 So. 2d 1366, 1371 (Fla. 1987).*

## **I. FLORIDA HISTORY OF REFORMATION**

### **A. Common Law:**

#### **1. Equitable Remedy:**

- a. Ancient Remedy: “Reformation is an ancient remedy used to reframe written contracts to reflect accurately the real agreement between contracting parties when, either through mutual mistake or unilateral mistake coupled with actual or equitable fraud by the other party, the writing does not embody the contract as actually made.” *Mutual of Omaha Ins. Co. v. Russell*, 402 F.2d 339, 344 (10th Cir. 1968).
- b. Extraordinary Remedy: “Reformation is an extraordinary remedy, and courts exercise it with great caution.” *Id.*
- c. No Alterations: “In reforming a written instrument, an equity court in no way alters the agreement of the parties. Instead, the reformation only corrects the defective written instrument so that it accurately reflects the true terms of the agreement actually reached.” *Ayers v. Thompson*, 536 So. 2d 1151, 1154 (1st DCA 1988).

---

<sup>1</sup> I want to extend my sincere thanks and gratitude to my colleagues, Elisa F. Lucchi and Jon Scuderi, for their assistance in the preparation of this outline.

## 2. Mutuality of Mistake:

- a. What is a Mutual Mistake? “A mistake is mutual when the parties agree to one thing and then, due to either a scrivener's error or inadvertence, express something different in the written instrument.” *Providence Square Assn., Inc. v. Biancardi*, 507 So. 2d 1366, 1372 (Fla. 1987).
    1. “The most common situation calling for reformation is where both parties commit error in embodying the final written agreement, thereby giving rise to the mutual mistake doctrine.” *Mutual of Omaha Ins. Co. v. Russell* at 344, n. 17.
  - b. Reforming Mutual Mistakes: The equitable remedy of reformation is available where, “due to a mutual mistake, the instrument as drawn does not accurately express the true intention or agreement of the parties to the instrument.” *Providence Square Assn., Inc. v. Biancardi*, 507 So. 2d 1366, 1369 (Fla. 1987).
  - c. Unilateral Mistakes: Reformation was not available to correct a unilateral mistake of one party because it was not coupled with constructive or equitable fraud by the other party. *Mutual of Omaha Ins. Co. v. Russell*, at 344-345.
    1. Absent fraudulent or inequitable conduct, the remedy for a unilateral mistake was to rescind or cancel the written instrument.
3. Clear and Convincing Evidence: “The general rule is that when, because of a mutual mistake, a written instrument does not express the true agreement of the parties, equity will reform the written instrument where the mutual mistake has been established by clear and convincing evidence.” *Vanater v. Allstate Ins. Co.*, 279 So. 2d 40 (Fla. 4th DCA 1973)

## B. Reformation of Trusts:

1. Historically, Inter Vivos Trusts Could be Modified to Correct Certain Mistakes; Namely Mistakes in the Expression:

- a. Mistake in the Expression – versus – Mistake in the Inducement:
    - i. Expression: A mistake of fact or law in the expression is a mistake that occurs when the terms of the trust misstate the settlor's intention, fail to include a term that was intended to be included, or include a term that was not intended to be included.
    - ii. Inducement: A mistake of fact or law in the inducement is a mistake that occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded, but the settlor's intention was based on a misunderstanding. Namely, the mistake arose in the reasons that led to the creation of the trust.
  - b. *Forsythe v. Spielberg*, 86 So. 2d 427 (Fla. 1956):
    - i. In 1956, the Florida Supreme Court held that “a trust agreement like any other testamentary devise should not be modified or invalidated for mistake in the inducement.” *Id.* at 430.
2. Eventually, the Reformation of Testamentary Trusts was Recognized in *Robinson v. Robinson*, 720 So. 2d 540 (Fla. 4th DCA 1998):
- a. In this case of first impression, the court noted: “This case presents an issue of first impression in Florida, namely, whether the testamentary aspects of an inter vivos trust are subject to reformation after the death of the settlor.” *Id.*
  - b. Here, the provisions of the decedent's pour over will and trust conflicted with each other:

“According to the will, estate taxes were to be paid from the residuary estate without apportionment. The trust instrument, on the other hand, directed that taxes be paid out of the trust principal prior to the principal's division into the three subtrusts.” *Id.*
  - c. The surviving spouse then filed suit to reform the will and trust alleging that the will and trust contained numerous ambiguities

which would allow the court to admit extrinsic evidence as proof of the decedent's intent. *Id.* at 541.

- d. After an evidentiary hearing, the trial court concluded that the provisions of the decedent's will and trust conflicted and that clear and convincing evidence established the decedent's intent as to which document would bear the impact of estate taxes. *Id.*
- e. On appeal, the appellate court reversed the judgment and found that although the provisions of the will and trust conflicted, the trust controlled and was not internally ambiguous. Absent an ambiguity, the evidence of intent was inadmissible. *Id.*
- f. The surviving spouse petitioned the trial court for a ruling on the trust reformation count. The trial court granted the petition for reformation and ordered reformation of the trust instrument and found:

“[T]he trust instrument itself, while part of a testamentary scheme, was not a testamentary device and could be reformed after the death of the settlor where evidence of a unilateral mistake existed.” *Id.*

- g. A beneficiary of a sub-trust appealed arguing that case law as it applies to “either invalidation of trusts based on mistake in the inducement, reformation of wills, or reformation of deeds, should control.” *Id.* The appellate court disagreed.
- h. The appellate court noted that “no Florida case has addressed whether an inter vivos trust may be reformed after the death of the settlor where evidence of a unilateral mistake exists.” *Id.*
- i. Citing cases decided in Illinois in 1949, Massachusetts in 1980 and Delaware in 1964, the appellate court noted that in the aforementioned cases, reformation of trusts were permitted after the death of a settlor where clear and convincing proof of a drafting error existed. *Id.* at 542.
- 1. Citing *Reimburg v. Heiby*, 404 Ill. 247, 88 N.E. 2d 848 (1949), the appellate court noted: “The facts and circumstances

recounted impel the conclusion that it is not merely the right but the undoubted duty of the court of equity to reform the instrument to conform with the intention of the grantor. The power and authority of a court of equity to correct the mistakes of a scrivener incorporated into a contract, deed, or other instrument is so well known as to require no citation of authorities.” *Id.*

j. The appellate court decided the trust could be reformed based on a unilateral drafting mistake to comport with the intention of the settlor, stating:

1. It is the “duty of the court of equity to reform the instrument to conform with the intention of the grantor” where the mistake is shown by clear and convincing evidence. *Id.*
2. “A trust with testamentary aspects may be reformed after the death of the settlor for a unilateral drafting mistake so long as reformation is not contrary to the interest of the settlor.” *Id.* at 543.

3. The Florida Trust Code:

- a. Overview: In Florida, both inter vivos *and* testamentary trusts can be reformed.
- b. Reformation of Trusts for Mistake is Permitted with Clear and Convincing Evidence:
  - i. In 2006, Fla. Stat. §736.0415 was enacted to permit the reformation of trusts to correct mistakes. The text of Fla. Stat. §736.0415 (2010) reads as follows:

*Upon application of a settlor or any interested person, the court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor’s intent if it is proved by clear and convincing evidence that both the accomplishment of the settlor’s intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. In determining the*

*settlor's original intent, the court may consider evidence relevant to the settlor's intent even though the evidence contradicts an apparent plain meaning of the trust instrument.*

ii. Fla. Stat. §736.0415 applies to both inter vivos and testamentary trusts.

c. Reformation of Trusts to Achieve the Settlor's Tax Objectives is Permitted:

i. In 2006, Fla. Stat. §736.0416 was enacted to permit the modification of trusts to achieve a settlor's tax objectives. The text of Fla. Stat. §736.0416 (2010) reads as follows:

*Upon application of any interested person, to achieve the settlor's tax objectives the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intent. The court may provide that the modification has retroactive effect.*

4. A Higher Standard of Proof is Required:

a. Clear and Convincing Evidence – What is it? According to *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983):

“[A] workable definition of clear and convincing evidence must contain both qualitative and quantitative standards...clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.”

b. Clear and Convincing is Allowed for Reformation:

1. In *Robinson v. Robinson*, the appellate court permitted the reformation of a trust with testamentary aspects, but looked to other jurisdictions and found that the reformation of trusts was permitted after the death of a settlor where clear and convincing proof of a drafting error existed. *Robinson v. Robinson*, 720 So. 2d at 542. After *Robinson*, certain Florida cases began to adopt the clear and convincing standard.
2. In *Popp v. Rex*, 916 So. 2d 954 (Fla. 4th DCA 2005), the court found that testimony established by clear and convincing evidence was enough to reform the trust to provide for the settlor's actual but unwritten intent that if one of her children dies, the undistributed portion of the trust would go to her remaining child or issue. The rationale of the *Robinson* case was upheld. *Id.* at 958.

c. Who has the Burden of Proving the Standard of Clear and Convincing Evidence?

1. In *Reid v. Sonder*, 36 Fla. L. Weekly D611 (Fla. 3d DCA 2011), the court noted that “the party seeking reformation at all times has the burden to prove, by clear and convincing evidence, that the trust, as written, does not reflect the settlor's intent.” *Id.*
  - i. Here, the deceased grantor's trust first left a pecuniary endowment gift to a college and then left a pecuniary amount to his nurse. The trust funds were insufficient to pay for both gifts. The nurse moved to abate the enumerated pecuniary gifts proportionately. The motion was denied, so the nurse petitioned to reform the trust claiming the instrument did not give evidence to the settlor's intent. *Id.*
  - ii. In denying the petition for reformation, the probate court determined the nurse failed to meet her burden of proof by clear and convincing evidence. The court noted that “an appellate court may not overturn a trial court's finding regarding the sufficiency of the evidence unless the finding is unsupported by record evidence, or as a matter of law, no

one could reasonably find such evidence to be clear and convincing.” *Id.* at 2.

- iii. The court concluded that a reasonable trier of fact could have been left without a firm belief or conviction that the trust terms were contrary to the grantor’s intent and that the endowment to the college should be satisfied first. *Id.*

### C. Reformation of Wills:

1. In General: Historically, the non-trust provisions of wills could not be reformed due to mistake.
  - a. “From the beginning this court has undeviatingly held to the view that in construing wills its guide and polar star is the intent of the testator. The cases of this court affirming this proposition are legion. There is no higher duty nor greater responsibility on the courts than that of seeing to it, in proper cases, that the will of the dead is honored.” *In re Estate of Reece*, 622 So. 2d 157, 158 (Fla. 4th DCA 1993), (citing *Morgenthaler v. First Atlantic National Bank of Daytona Beach*, 80 So. 2d 446, 452 (Fla. 1955)).
  - b. “The court may not alter or reconstruct a will according to its notion of what the testator would or should have done.... It is not the purpose of the court to make a will or to attempt to improve on one that the testator has made. Nor may the court produce a distribution that it may think equal or more equitable.” *In re Estate of Barker*, 448 So. 2d 28, 31-32 (Fla. 1st DCA 1984).
  - c. “The court’s finding, that wills cannot be reformed, is not in dispute.” *Robinson v. Robinson*, 720 So. 2d at 541.
2. No Equitable Reformations: The court may not alter or reconstruct a will according to its notion of what the testator would or should have done. . . . It is not the purpose of the court to make a will or to attempt to improve on one that the testator has made. Nor may the court produce a distribution that it may think equal or more equitable. *Owens v. Holzhauser*, 930 So. 2d 873, 874 (Fla. 2d DCA 2006) (citing *In re Estate of Barker*, 448 So. 2d 28, 31-32 (Fla. 1st DCA 1984)).

3. No Reformation for Scrivener's Error: In the case of *In re Mullin's Estate*, 128 So. 2d 617 (Fla. 2nd DCA 1961), a scrivener's error in drafting a codicil which excluded residuary legatees was insufficient to revoke the probate of an otherwise valid codicil. The court noted that, in the absence of fraud or undue influence, a testator "is to be treated though he knew its contents and *a variance between the instructions which he has given and the contents of the will as executed does not render the will invalid.*" *Id.* at 620 [*emphasis original*].
4. No Reformation for Tax Advantages: In the case of *Estate of Reece*, even where all the beneficiaries agreed to reformation, the court stated: "Reduced to its most simple terms, the issue presented to the court is whether a circuit court in the State of Florida, in the exercise of its equitable jurisdiction, can and will rewrite the decedent's last will and testament so as to afford to the estate the greatest tax advantages allowable pursuant to the Tax Reform Act of 1986 where the testator, for reasons best known to himself, who had ample opportunity, failed to do so? . . . The court answers the question presented in the negative." *Estate of Reece*, 622 So. 2d at 158.
5. No Extrinsic Evidence unless there is Ambiguity: In the case of *Estate of Barker*, 448 So. 2d 28 (Fla. 1st DCA 1984), extrinsic evidence of the testator's intent regarding the revocation of an earlier will was not admissible. Without aid of extrinsic evidence, the subsequent will was clear as to its meaning and did not preclude distribution of residuary estate to legal heirs who were specifically bequeathed only \$1 each.
6. No Mutual Mistakes in Wills = No Reformations: Because a decedent's will is: (1) a unilateral legal document, (2) is non-contractual in nature, and (3) the scrivener is acting as the testator's agent, the rationale is that there is no second party to engage in fraudulent or inequitable conduct. *Owens v. Holzauer*, 930 So. 2d at 874.

## II. CONSTRUCTION OF WILLS – FLORIDA

- A. Background: In Florida, we currently have the express legislative authority to reform certain donative documents which contain

testamentary provisions, such as testamentary and irrevocable trusts. However, we do not have the express legislative authority to reform the non-trust provisions of a will.

- B. No Reformation or Re-Writing Permitted: Under current Florida law, a will may not be reformed or rewritten. *Owens v. Holzhauser*, 930 So. 2d at 874.
- C. Historically, Construction was Permitted only for Patent and not for Latent Ambiguities: Historically, extrinsic evidence of the testator's intent was only admitted to construe a latent ambiguity and not a patent ambiguity. See *Perkins v. O'Donald*, 77 Fla. 710, 82 So. 401, 404 (Fla. 1919).
1. Patent Ambiguity: "A patent ambiguity is one that appears in the language of the will itself." *Rice's Estate*, 406 So. 2d 469, 476 (Fla. 3d DCA 1981).
  2. Latent Ambiguity: "A latent ambiguity is one that arises in applying the words of a will to the subject matter or object of a devise or to the devisee." *Id.*
- D. No Distinction Between Latent and Patent Ambiguities: Florida cases now disregard the historical distinctions between latent and patent ambiguities.
1. "Extrinsic evidence is admissible in the case of a so-called 'patent' ambiguity in a will, and is not confined to resolving a 'latent' ambiguity." *Campbell v. Campbell*, 489 So. 2d 774, 778 (Fla. 3d DCA 1986).
  2. "We do not feel that it is necessary to decide whether or not a particular ambiguity is patent or latent and hold that, if the will, when considered as a whole and in light of the surrounding circumstances, is ambiguous, extrinsic evidence may be considered in construing it." *Id.* at 778-779.

E. Extrinsic Evidence is Allowed for Ambiguities:

1. In the case of *Wilson v. First Florida Bank*, 498 So. 2d 1289 (Fla. 2nd DCA 1986), extrinsic evidence was allowed. Here, a portion of the will contained no words of conveyance to establish the intention to transfer property and the will did not contain a valid residuary clause. The court permitted extrinsic evidence to determine the testator's intent and noted:
  - a. "The paramount objective in constructing a will is to ascertain the intent of the testator. The will as a whole should be considered in order to ascertain the testamentary scheme... The construction of the will which leads to a valid testamentary disposition is favored over one which results in intestacy... If possible, the intent should be determined from the will itself... However, in case of ambiguity, extrinsic evidence is admissible to explain the intent of the testator." *Id.* at 1291.

F. Extrinsic Evidence is not Allowed without an Ambiguity:

1. Extrinsic evidence is not allowed without an ambiguity.
  - a. When a will is clear and unambiguous on its face, extrinsic evidence of the testator's intent is inadmissible. *Owens v. Holzauser*, 930 So. 2d at 874.
  - b. If a will is clear and is not ambiguous, a court may only look to the four corners of the will itself to determine distribution of an estate even if the actual terms of the will do not reflect the intent of the deceased. *Rice's Estate*, 406 So. 2d 469 (Fla. 3d DCA 1981).
2. Extrinsic evidence is not allowed for scrivener's errors.
  - a. In the case of *Azcunce v. Estate of Azcunce*, 586 So.2d 1216 (Fla. 3d DCA 1991), extrinsic evidence was not allowed. Here, father drafted a codicil to his will prior to the birth of his fourth child. The will allowed for the creation of a trust for his wife and three children when he died. His fourth child was born shortly after the publication of the father's codicil which did not mention the

fourth child, likely due to a scrivener's error. Shortly after the publication of the codicil, the father suddenly died. Mother filed suit on behalf of the fourth child challenging the will and requesting that the child be considered pretermitted. Here, the court did not look at evidence because there was no ambiguity. The court stated:

- i. "...there is utterly no ambiguity in the subject will and codicils which would authorize the taking of parol evidence herein...the mistake of which Patricia [the daughter] claims amounts, at best, to the draftsman's alleged professional negligence in failing to apprise the [father] of the need to expressly provide for Patricia in the second codicil." *Id.* at 1219.

G. Testamentary Trusts Can be Reformed Even if Clear and Unambiguous:

1. In *Robinson v. Robinson*, the appellate court permitted the reformation of the testamentary aspects of an inter vivos trust after the settlor's death. *Robinson v. Robinson*, 720 So. 2d at 540.
2. The Florida Trust code permits the reformation of trusts contained in a will.

H. Limited Judicial Construction of Will with Federal Tax Provisions from 1/1/10 to 12/31/10 to Comport with Testator's Probable Intent:

1. In 2010, Fla. Stat. §733.1051 was enacted to grant courts the ability to construe the terms of a will to define the respective shares or determine beneficiaries, in accordance with the intention of a testator for dispositions occurring within 2010 for wills containing provisions that distributed assets using language from the federal estate tax. Fla. Stat. §733.1051 (2010) states in part:

*(1) Upon the application of a personal representative or a person who is or may be a beneficiary who is affected by the outcome of the construction, a court at any time may construe the terms of a will to define the respective shares or determine beneficiaries, in accordance with the intention of a testator, if a disposition occurs during the applicable period and the will contains a provision that:*

*(a) Includes a disposition formula referring to the terms “unified credit,” “estate tax exemption,” “applicable exemption amount,” “applicable credit amount,” “applicable exclusion amount,” “generation-skipping transfer tax exemption,” “GST exemption,” “marital deduction,” “maximum marital deduction,” “unlimited marital deduction,” or “maximum charitable deduction”;*

*(b) Measures a share of an estate based on the amount that may pass free of federal estate tax or the amount that may pass free of federal generation-skipping transfer tax;*

*(c) Otherwise makes a disposition referring to a charitable deduction, marital deduction, or another provision of federal estate tax or generation-skipping transfer tax law; or*

*(d) Appears to be intended to reduce or minimize the federal estate tax or generation-skipping transfer tax.*

.....

***(3) In construing the will, the court shall consider the terms and purposes of the will, the facts and circumstances surrounding the creation of the will, and the testator's probable intent. In determining the testator's probable intent, the court may consider evidence relevant to the testator's intent even though the evidence contradicts an apparent plain meaning of the will.***

### **III. MODERN TREND TO REFORMATION OF WILLS**

- A. Overview of the Restatement Third Property §§ 12.1 and 12.2: Many states have adopted the approach in the Restatement Third which allows: (1) construction of wills where appropriate, and (2) reformation of wills for unilateral mistake by the testator (or the scrivener as the testator’s agent).
- B. Restatement Third Property § 12.1: Allows for extrinsic evidence so long as there are safeguards to prevent against mistaken evidence through a strict burden of proof.

1. Text of Rest. 3d Prop. §12.1:

Reforming Donative Documents to Correct Mistakes. *A donative document, though unambiguous, may be reformed to conform the text to the donor's intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's intention was. In determining whether these elements have been established by clear and convincing evidence, direct evidence of intention contradicting the plain meaning of the text as well as other evidence of intention may be considered.* Rest. 3d Prop. – WDT §12.1.

2. Rationale of Rest. 3d Prop. §12.1: The rationale is that admitting evidence outside the four corners of a will is inherently suspect but, possibly correct. *Rest. 3d Prop. – WDT, §12.1, comment b.* However, the law deals evidence that is inherently suspect but possibly correct on one of two ways, namely: (1) to exclude evidence; or (2) to consider extrinsic evidence with safeguards to prevent against mistaken evidence through a strict burden of proof. *Id.*

- a. The drafters of the Restatement Third believed that the consideration of extrinsic evidence was the only option which would give effect to the testator's intent. *Id.* at comment b.
- b. The standard of proof must be clear and convincing evidence in order to impose a heightened sense of responsibility on the trier of fact. *Id.* at comment e.
- c. If the grounds are established by clear and convincing evidence, an order of reformation may be supported in addition to other equitable relief such as a constructive trust. *Id.* at comment f.
- d. To support the remedy of reformation, the extrinsic evidence must establish by clear and convincing evidence: (1) that a mistake of fact or law affected the expression, inclusion, or omission of specific terms of the document, and (2) what the donor's actual intention was in a case of mistake in expression or what the

donor's actual intention would have been in a case of mistake in the inducement. *Id.* at comment g.

- e. A petition of reformation may be brought before or after the donor's death. *Id.*
- f. Unless otherwise stated, a judicial order of reformation will relate back to alter the text at the date of execution. *Id.* at comment f.

C. Restatement Third Property §12.2: Allows a donative document to be modified to achieve the donor's tax objectives.

1. Text of Rest. 3d Prop. §12.2:

Modifying Donative Documents to Achieve Donor's Tax Objectives. *A donative document may be modified, in a manner that does not violate the donor's probable intention, to achieve the donor's tax objectives.* Rest. 3d Prop. – WDT, §12.2.

- 2. Rationale of Rest. 3d Prop. §12.2: The rationale is that a donor would have modified their donative document if they realized that the donor's desired tax objectives would not have been achieved. *Id.* at comment b.
  - a. Achieving the donor's tax objectives through modification is fairly straightforward if state taxes are involved, but are more complex if federal taxes are involved. *Id.* at comments b, c, and d.
  - b. However, federal law recognized certain modifications of a donative document as controlling for certain federal tax purposes. *Id.*
  - c. Establishing the donor's tax objectives by a preponderance of the evidence. *Id.* at comment c.
  - d. Establishing the donor's tax objectives by a preponderance of the evidence (by the express terms of the document, by inference, or by extrinsic evidence). *Id.* at comment c.

- e. Modification must not violate the donor's probable intention. *Id.* at comment f.

D. Overview of the Uniform Probate Code §§ 2-805 and 2-806: The language in these sections of the UPC was patterned after the language in Sections 415 and 416 of the Uniform Trust code, which in turn was based on the Restatement Third of Property. As such, the rationale of the drafters of the UPC was the same as the drafters of the Restatement Third.

a. Text of UPC §2-805:

*Reformation to Correct Mistakes. The court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor's intention if it is proved by clear and convincing evidence that the transferor's intent and the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement.*  
Uniform Probate Code §2-805.

b. Text of UPC §2-806:

*Modification to Achieve Transferor's Tax Objectives. To achieve the transferor's tax objectives, the court may modify the terms of a governing instrument in a manner that is not contrary to the transferor's probable intention. The court may provide that the modification has retroactive effect.*  
Uniform Probate Code §2-806.

#### **IV. 2011 FLORIDA LEGISLATION**

A. House Bill 325 and Senate Bill 648: The Florida House of Representatives passed HB 325 on April 14, 2011. The bill was sent to the Florida Senate as SB 648. On April 29, 2011, the Florida Senate passed SB628. SB628 creates the following three new statutes which shall take effect on July 1, 2011, namely: Florida Statutes Sections 732.615, 732.616, and 733.1061.

B. Fla. Stat. §732.615: Reformation of Wills

1. Text of §732.615:

*Reformation to correct mistakes.—Upon application of any interested person, the court may reform the terms of a will, even if unambiguous, to conform the terms to the testator's intent if it is proved by clear and convincing evidence that both the accomplishment of the testator's intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement. In determining the testator's original intent, the court may consider evidence relevant to the testator's intent even though the evidence contradicts an apparent plain meaning of the will. (HB 365 & SB 648)*

2. No Ambiguity Needed to Reform a Will:

- a. The terms of the will may be reformed if it is proved by clear and convincing evidence.
- b. Who can Petition the Court for Reformation? Upon application of any interested person, the court may reform the terms of a will even if the will is unambiguous.
- c. One may assume that a personal representative has the ability to petition for reformation.
  1. As defined in Fla. Stat. §731.201(23) (2010), the term “interested person” varies from time to time as it relates to particular persons in various proceedings, but generally refers to:
    - i. Anyone who may reasonably be expected to be affected by the outcome of the particular proceeding involved;
    - ii. The personal representative of an estate in any proceeding affecting the estate or the rights of a beneficiary in the estate; and

iii. The trustee of a trust over which the decedent had a right of revocation, in any proceeding affecting the expenses or claims relating to the administration and obligations of a decedent's estate.

d. A trustee has the ability to petition for reformation.

i. The court in *Reid v. Temple Judea* stated: “A trustee is generally obligated to follow the settlor's true intent and purposes in discharging his/her duties in managing the trust. Although *Robinson* and its progeny had no occasion to, and did not, address whether a *trustee* could seek to reform a trust, we conclude that as “an indispensable party in all proceedings affecting the estate” . . . a trustee clearly has standing to seek reformation.” *Reid v. Temple Judea*, 994 So. 2d 1146, 1148 (Fla. 3d DCA 2008).

3. Clear and Convincing Evidence: The terms of a will may be reformed if grounds for the reformation are proved by clear and convincing evidence.
4. Mistakes Subject to Reformation: In some circumstances, a mistake does not always involve an ambiguity. Instead, a mistake may involve a mistake of fact or law. The new proposed Florida Statute §732.616 permits reformation for mistakes of fact or law, whether in expression or inducement, where the terms of the will do not reflect the testator's intent.
5. Extrinsic Evidence: In order to determine the testator's original intent, the court may consider extrinsic evidence even if the evidence contradicts the plain meaning of the will.
6. Miscellaneous: This statute will be comparable to an existing provision applicable to testamentary trusts, revocable trusts and other trusts under Fla. Stat. §736.0415.

C. Fla. Stat. §732.616: Modification of Wills

1. Text of §732.616:

*Modification to achieve testator's tax objectives.—Upon application of any interested person, to achieve the testator's tax objectives the court may modify the terms of a will in a manner that is not contrary to the testator's probable intent. The court may provide that the modification has retroactive effect. (HB 365 & SB 648)*

2. Tax Objectives:

- a. Upon application of any interested person, the court may modify the terms of a will to achieve the testator's tax objectives.
- b. Any modification must not be contrary to the testator's probable intent.

3. Extrinsic Evidence: In order to determine the testator's tax objectives, the court will likely consider extrinsic evidence even if the evidence contradicts the plain meaning of the will.

4. Preponderance of the Evidence: The evidence will likely be proved by a preponderance of the evidence, which is less rigorous than the clear and convincing standard.

5. Retroactive Effect: The court has the ability to provide that the modification have retroactive intent.

6. Miscellaneous: This statute will be comparable to an existing provision applicable to testamentary trusts, revocable trusts and other trusts under Fla. Stat. §736.0416.

7. Private Letter Ruling? If tax objectives are the driving force behind a modification, consult with a tax expert to determine whether to make any modifications contingent on obtaining a favorable private letter ruling from the Internal Revenue Service.

D. Fla. Stat. § 733.1061: Attorney's Fees and Costs

1. Text of §732.1061:

*Fees and costs; will reformation and modification.—*

*(1) In a proceeding arising under s. 732.615 or s. 732.616, the court shall award taxable costs as in chancery actions, including attorney's fees and guardian ad litem fees.*

*(2) When awarding taxable costs, including attorney's fees and guardian ad litem fees, under this section, the court in its discretion may direct payment from a party's interest, if any, in the estate or enter a judgment which may be satisfied from other property of the party, or both. (HB 365 & SB 648)*

2. Fees and Costs:

a. A court shall award taxable costs as in chancery actions, including attorney's fees and guardian ad litem fees. "In chancery or equity actions, the well settled rule is that 'costs follow the judgment unless there are circumstances that render application of this rule unjust.'" *Estate of Simon*, 549 So.2d 210, 212 (Fla. 3d DCA 1989).

i. The court has the ability to charge attorney's fees and costs directly to a party.

ii. The court has the discretion to tax the fees and costs against a party's interest in the estate or as a personal judgment against a party to that party's property which is not part of the estate.

E. Tax Issues: Extreme care must be exercised if the reformation of a will or trust involves tax aspects.

1. The U.S. Supreme Court and the IRS have taken the position that a decision of the highest court of a state will be considered binding on the IRS only if:

a. The decision resulted from an adversary proceeding;

- b. The proceeding was not brought solely to gain tax advantage;
- c. The decision determined property rights; and
- d. The case was litigated in the state's highest court or the state's highest court has spoken on the issue.

*Commissioner v. Estate of Bosch*, 387 U.S. 456, 87 S.Ct. 1776 (1967)

2. Exercise caution when reforming documents as reformation changes the document as of the time of execution and retroactive changes might not be given effect by the IRS.