

## RPPTL WHITE PAPER

### REVOCATION OF A WILL OR REVOCABLE TRUST IS SUBJECT TO CHALLENGE

#### I. SUMMARY

This proposal seeks to clarify the law in the area of wills and trust to explicitly provide that the revocation of a will or trust, as well as the amendment of a will or trust, may be challenged on the grounds that the revocation, amendment, or codicil was procured by fraud, duress, mistake or undue influence. The proposed amendments also clarify when the challenge may be brought. This bill does not have a fiscal impact on state funds.

#### II. CURRENT SITUATION

##### A. Post-Death Challenges to the Revocation of a Revocable Trust

Currently, it appears that Florida law does not permit an undue influence challenge to a settlor's revocation of a revocable trust even if that action is brought after the settlor's death.

F.S. Section 736.0406 discusses the effect of fraud, duress, mistake, and undue influence on the creation of a revocable trust. It provides:

A trust is void if the creation of the trust is procured by fraud, duress, mistake, or undue influence. Any part of the trust is void if procured by such means, but the remainder of the trust not procured by such means is valid if the remainder is not invalid for other reasons.

Thus, under F.S. Section 736.0406, the creation of a trust can clearly be challenged on the grounds of fraud, duress, mistake, or undue influence in post-death proceedings. However, nothing in that statute, or anywhere else in the Florida Trust Code, addresses whether a *revocation or amendment* of a revocable trust may be challenged on those same grounds. This has led courts to conclude that a revocation of a revocable trust cannot be challenged on the grounds of undue influence.

The District Court of Appeal, Second District first addressed this issue in *Hoffman v. Kohns*, 385 So. 2d 1064 (Fla. 2d DCA 1980). In *Hoffman*, the Court allowed a challenge to a revocation of a revocable trust in post-death proceedings. The settlor in *Hoffman* executed a one-paragraph revocation of his revocable trust. After the settlor's death, a trust beneficiary sued claiming the revocation of the trust was procured by undue influence. The Court, while finding no case in Florida directly permitting a challenge to the revocation of a trust, set aside the revocation. The Court relied on the Supreme

Court of Florida's decision in *Rich v. Hallman*, 143 So. 292 (1932), which recognized that a lifetime transfer in the nature of a gift could be set aside on the grounds of undue influence.

Almost three years later, the District Court of Appeal, Fourth District decided *Genova v. Florida National Bank of Palm Beach County*, 433 So. 2d 1211 (Fla. 4<sup>th</sup> DCA 1983). In *Genova*, the settlor attempted to revoke her revocable trust. The trustee challenged the attempted revocation on the grounds of undue influence during the settlor's lifetime. The trial court found that the attempted revocation of the trust was the product of undue influence and invalidated the attempted revocation. On appeal, the District Court of Appeal, Fourth District reversed and held that the settlor could not be deprived of her right to revoke the trust in the absence of a judicial or medical determination that she was incapacitated. The Court determined that since the settlor was not incapacitated, she was free to revoke her trust during her lifetime, regardless of whether the settlor had been unduly influenced.

The Supreme Court of Florida accepted jurisdiction of the *Genova* decision by certifying conflict with the *Hoffman* decision. *Florida National Bank of Palm Beach County v. Genova*, 460 So. 2d 895 (Fla. 1984). The Supreme Court of Florida approved the *Genova* decision and found that undue influence cannot be asserted as a basis for preventing a competent settlor from revoking a revocable trust. The Court noted that the settlor's retention of control over the property differentiates a revocable trust from the other types of transfers where undue influence can apply, including gifts, deeds, wills, contracts, etc. The Supreme Court disapproved the *Hoffman* decision.

Recently, in *MacIntyre v. Wedell*, 12 So. 3d 273 (Fla. 4<sup>th</sup> DCA 2009), the Fourth District Court of Appeals considered whether *Genova's* apparent pre-death prohibition on proceedings to challenge a revocation of a revocable trust on the grounds of undue influence applied in proceedings after the settlor's death. In *MacIntyre*, the alleged undue influencer caused the settlor to withdraw funds from her revocable trust and place them in joint name with the alleged undue influencer. The trustee filed suit alleging the transfers were procured by undue influence. The Court, relying on the Supreme Court of Florida's decision in *Genova*, affirmed the lower court's dismissal with prejudice. The Court stated the *Genova* decision plainly suggests that the availability of an undue influence challenge to a settlor's revocation of a revocable trust should not turn upon whether the action is brought when the settlor is alive or dead. The court noted that the Supreme Court accepted jurisdiction of *Genova* based on the conflict with the *Hoffman* decision. *Hoffman* involved a challenge after the settlor's death. Since the Supreme Court of Florida had expressly disapproved the result in *Hoffman*, the Court affirmed the dismissal with prejudice.

Thus, under current law, although the creation or amendment of a trust may be challenged on the grounds of undue influence post-death, a revocation of that same document is not subject to challenge on those same grounds.

## **B. Post-Death Challenges to the Revocation of a Will or Codicil**

Although there are no cases directly on point, it appears that, under current law, the revocation of a will by written instrument may be challenged on grounds of fraud, duress or undue influence. Restatement (Third) of Property (Wills & Don. Trans.) § 4.1 (1999). This Restatement provision is consistent with our current Florida Probate Code. Section 731.201(40), Florida Statutes, defines a “will” as follows:

“Will” means an instrument, including a codicil, executed by a person in the manner prescribed by this code, which disposes of the person's property on or after his or her death and includes an instrument which merely appoints a personal representative or revokes or revises another will.

Under that definition, an instrument revoking a will is a “will”.

Section 732.5165 addresses the effect of fraud, duress and undue influence on the creation of a will. It provides:

A will is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the will is void if so procured, but the remainder of the will not so procured shall be valid if it is not invalid for other reasons.

Section 732.5165 coupled with the definition of a “will” in F.S. 731.201(40) would seem to permit a challenge to a written instrument revoking a will on the grounds of fraud, duress, mistake or undue influence. However, there are no current Florida Statutes addressing whether an interested person could challenge the revocation of a will by act (e.g. destroying a will through undue influence) on those same grounds. Further, there are no Florida cases addressing a challenge to the revocation of a will on the grounds of fraud, duress, or undue influence.

## **C. Pre-Death Challenges to the Revocation of a Revocable Trust**

Under the current version of section 736.0207, a guardian of the property of an incapacitate settlor can bring an action to contest the validity of all or part of a trust before the trust becomes irrevocable. Under 744.441(11), court approval is necessary and can only be obtained upon a finding that the “action appears to be in the ward’s best interests during the ward’s probable lifetime.”

## **III. ANALYSIS**

Due to *MacIntyre*, it appears that an interested person cannot successfully bring a post-death proceeding contesting revocation of a revocable trust on undue influence grounds when the trust revocation was executed by a competent settlor. Presumably, *MacIntyre* may be extended to bar a post-death challenge to the revocation of revocable trust based on fraud, duress, or mistake, leaving lack of testamentary capacity as the sole grounds for such a challenge.

If Florida courts do not permit a post death challenge to a settlor's revocation of the settlor's revocable trust, the problems appear evident. First, intended trust beneficiaries can be deprived of their inheritance, but yet have no remedy to correct the wrongdoing. If a sole intestate heir unduly influences the settlor to revoke the settlor's revocable trust, which left everything to the settlor's favorite charity, thereby causing the will pour over clause to fail, then the property would pass by intestacy. See § 732.513(4), Fla. Stat. The favorite charity would be denied a remedy.

Additionally, any time a party brings a trust contest challenging an amendment or a restatement of trust, the contest challenges not only the validity of the challenged part, but also the revocation of the prior part. It is inconsistent to be able to challenge the revocation of a prior amendment by challenging the subsequent amendment, but to be unable to solely challenge a revocation of the trust or a part of the trust. It also is inconsistent to allow a post death challenge to an amendment to a revocable trust, but not permit a challenge to the revocation of the trust itself.

Further, once a settlor has died, the ability to challenge a trust revocation ought to be consistent with the ability to challenge a revocation of a will, especially since revocable trusts serve as will substitutes. A revocation of a will is subject to a post death challenge on the grounds that the revocation was procured by fraud, duress or undue influence. Restatement (Third) of Property (Wills & Don. Trans.) § 4.1 (1999).

Finally, the dissents' reasoning in both *Genova* opinions is persuasive. If a settlor is unduly influenced to revoke her revocable trust, then the revocation is not a free act of the settlor, but the will of another.

Concerning a guardian's right to challenge a ward's revocation of all or part of a revocable trust, there is a concern that litigating a revocation that only affected testamentary dispositions of property could deplete the ward's assets available to care for the ward during the ward's lifetime. The guardian already has the power in section 744.441(19) to create revocable or irrevocable trusts which extend beyond the life of the ward for estate planning purposes. Further, any litigation over testamentary dispositions would be a waste of assets should the ward be restored to capacity. In that instance, the ward could change his or her estate plan as desired upon being restored to capacity.

#### **IV. EFFECT OF PROPOSED CHANGES**

The proposed change would amend F.S. Sections 732.5165, 732.518, 736.0207, and 736.0406 to make clear that revocation of a will or revocable trust on the grounds of fraud, duress, mistake or undue influence is subject to challenge on the death of the testator/settlor. The amendment to F.S. Section 736.0406 clarifies that the creation of a trust amendment or a restatement of the trust is subject to challenge. The amendment to F.S. Section 744.441 limits a guardian's authority to challenge a revocation of a revocable trust during the settlor's lifetime if the revocation relates solely to a devise.

#### **V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

The proposal does not have a fiscal impact on state or local governments.

#### **VI. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR**

The proposal will not have a direct economic impact on the private sector.

#### **VII. CONSTITUTIONAL ISSUES**

There appear to be no constitutional issues raised by this proposal.

#### **VIII. OTHER INTERESTED PARTIES**

Elder Law Section