OFTEN OVERLOOKED ESTATE PLANNING DRAFTING ISSUES

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1. Leaving assets outright and/or giving beneficiaries withdrawal rights – Trusts for Life

When assets are left outright to a beneficiary (or when the beneficiary is given the power to withdraw the assets), the funds are exposed to the creditors of that beneficiary and are includible in the beneficiary's estate for estate tax purposes – and subject to elective share claims. The beneficiary may not have creditor issues, a pending divorce or a taxable estate at the time the document is drafted or at the time of the settlor's death but there is no way to predict whether there will be issues in the future. Additionally, if the preservation of government benefits is a concern, outright distributions can have disastrous consequences. It is better to allow the assets to remain in trust for the benefit of the beneficiaries for life and, if the settlor wants the beneficiary to have greater control over the assets, allow the beneficiary to serve as her or his own trustee.

2. Not providing what happens if a beneficiary fails to survive

A client leaving assets to a friend or relative is very generous, but thought should be given as to what happens to the devise if the beneficiary fails to survive. Does it go to the would-be beneficiary's descendants? Does it lapse? Does it go to the beneficiary's sibling? Similarly, what happens if a named charitable beneficiary is no longer a charity (or what if it never was and/or the drafting attorney misidentified the entity)?

3. Improperly or inexactly identifying charitable beneficiaries

With charitable beneficiaries, it is very important that the drafting attorney confirm that the would-be organization exists, properly identifies the organization in the document, and specifies what is to happen to the devise if the organization either no longer exists or is no longer a charitable organization. This is the link to the IRS Website to lookup a charity - http://www.irs.gov/Charities-&-Non-Profits/Search-for-Charities. Often charities are not properly identified and that can lead to confusion, litigation, etc. We've had to file numerous "cy pres" actions to confirm the testator's intent for inexact or inaccurately named charitable devises.

4. Trustee succession and power to move trust (change situs and governing law)

The trust should provide a clear road map for both removing and/or replacing trustees (if that comports with the settlor's wishes) as well as a mechanism for appointing a new trustee when no one is serving. Additionally, trusts often need to be moved over the years – the law of one jurisdiction may be more favorable for the needs of the family in the future. For example, Florida law may have worked while the settlor was alive but now that the settlor is deceased, the trust may need to be administered as a directed trust under Delaware law (for example) so that the corporate trustee won't sell off the family business. Providing a clear mechanism for both changing the situs and governing law of the trust as well as for trustee succession can help in the administration of trusts that are to last for multiple generations.

5. Invalid devise of homestead – e.g. credit shelter/marital trust planning

Too often, wills and trusts provide for a typical credit shelter trust and marital trust division upon the first death without an outright devise of the homestead to the surviving spouse. There are many possible reasons for this: (a) out of state documents that were never updated when the clients relocated; (b) the planner thought leaving the homestead in trust for the surviving spouse was good enough to satisfy the homestead rules or didn't think of the homestead issue; (c) at the time the documents were drafted, the residence was owned jointly by the spouses, as tenants by the entireties, and the planner never thought they would transfer the property to just one of the spouses; or (d) the planner believes that both spouse's signing the deed conveying the property into the revocable trust (or individual name) of one spouse is enough to waive homestead rights (e.g., Stone and *Habeeb*). It is always safer to provide for an outright distribution of the homestead to the surviving spouse (assuming that there was no waiver of homestead in a valid nuptial agreement). Some practitioners may only include the outright devise in the client's revocable trust and leave the pour-over will unchanged. However, it is safer to include the outright devise both in the client's will and the client's revocable trust to avoid any argument that the pour-over devise under the will to the trust is an invalid devise.

> Sample trust provision:
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> If (i) Grantor's spouse survives Grantor, (ii) Grantor owns an interest in homestead property as defined under Florida law ("Grantor's Homestead"), (iii) Grantor is not survived by a minor child, and (iv) Grantor's spouse does not have a waiver of homestead as described under Florida law, then Grantor directs Trustee to distribute all of Grantor's right, title and interest in and to Grantor's Homestead, outright, to Grantor's spouse.

If the goal is to use the homestead to fund a credit shelter trust, one option is to suggest an outright bequest to the surviving spouse with a direction that if disclaimed the homestead passes into the credit shelter trust. A statutory change in 2010 codified the treatment of a disclaimer by the surviving spouse of his or her interest in homestead – whether validly devised or not. F.S. §§732.401(4) and 732.4015(3) clarify that (i) if the homestead was invalidly devised and the surviving spouse disclaims a life estate, the vested remainder beneficiaries then become the owners of the homestead property in proportion to their interests, and (ii) if the homestead was validly devised (i.e. there are no minors and it was validly devised outright to the surviving spouse) and if the surviving spouse disclaims an outright devise the spouse will be treated as predeceasing the decedent and the interest will pass as otherwise provided in Chapter 739 (e.g. to a Credit Shelter Trust).

6. Loss of inurement of homestead exemption

The homestead exemption is very powerful. It exempts homesteads from creditors' claims during life and that exemption inures to the heirs if the homestead is devised to anyone in the class of heirs (per Snyder v. Davis). However, the exemption may not inure if the homestead is devised to a trust or if there is a direction to sell the homestead upon the owner's death. It is important that as advisors, we advise clients of these risks.

Cases relating to inurement when homestead devised to a trust:

In *Elmowitz v. Estate of Zimmerman*, 647 So.2d 1064 (Fla. 3d DCA 1994), the court held that homestead lost its protected status when the beneficiary had a mere income interest and no specific rights were granted to the use or occupancy of the homestead real property. The beneficiary's use of the property was at the discretion of the trustee, who could sell it without the beneficiary's consent.

Contrast *Elmowitz* to 2 cases saying devises to trusts were okay and the exemption inured. *HCA Gulf Coast Hospital v. Estate of Downing*, 594 So.2d 774 (Fla. 1st DCA 1992) (testamentary trust for daughter where the trustee had no real discretion and was said to be holding as nominee) and *Engelke v. Estate of Engelke*, 921 So.2d 693 (Fla. 4th DCA 2006) (the trust provisions gave the surviving spouse a specific right to the use of the residence for life with the remainder to children from a prior marriage upon her death, and the courts ruled the homestead character inured to the trusts as beneficiaries).

Direction to sell cases:

If the client directs a sale of the property, the bequest ceases to be a bequest of homestead and instead becomes "just" a bequest of money and as a result the proceeds become subject to the claims of creditors. *Estate of Price v. West Florida Hospital Inc*, 513 So. 2d 767 (Fla 1st DCA 1987) held that when the will contains a direction to sell the homestead and distribute the proceeds, the property loses its protected status. See also *Knadle v. Estate of Knadle*, 686 So. 2d 631, 632 (Fla. 1st DCA 1997), *Thompson v. Laney*, 766 So .2d 1087, 1088 (Fla. 3d DCA 2000) and *Cutler v. Cutler*, 994 So. 2d 341 (Fla. 3d DCA 2008).

In *Engelke v. Estate of Engelke*, 921 So. 2d 693 (Fla. 4th DCA 2006), the court stated: "We have found no case in which a general direction to pay the estate expenses has trumped the constitutional homestead protections which are the rights of the heirs as much as the decedent. Therefore, unless the trust specifically directs that the freely devisable homestead be sold, the rights of the heirs attach at the death of the decedent, and the property is protected from the claims of all creditors." 921 So. 2d 693 at 697.

In *Cutler v. Cutler*, 994 So.2d 341 (Fla. 3d DCA 2008), although there was not an express, direction to sell the homestead, reading the estate plan as a whole, the court reasoned that "she did direct, in a specific manner, that it be used to satisfy her debts. This was the equivalent of ordering it sold and the proceeds distributed to pay debts."

7. Fiduciary selection

Parents often appoint one or more of their children as co-trustees and/or personal representatives. They do not want to have anyone feel excluded and want them all to participate. Unfortunately, children who barely got along with one another while the settlor was alive are unlikely going to improve their relations after the settlor is dead, and the children from the settlor's first marriage are almost certainly not going to like the settlor's new spouse. When appointing fiduciaries, try to advise your clients to avoid creating friction.

8. Tangible personal property reflexively being devised outright

Tangible personal property may just be jewelry of a nominal value. However, it may also be artwork or other collectibles or million dollar yachts and gold bars. At a minimum, drafters should consider excluding collectibles from the definition of tangible personal property or exclude any assets that have a fair market value in excess of a specified dollar amount. Alternately, the assets could be left in trust for the beneficiaries. The will and/or trust should also provide both who pays for the shipping and insuring of these assets as well as whether the insurance policies relating to these assets are devised with the assets.

9. Not providing trusts for minor beneficiaries

When assets are left outright to a minor beneficiary (whether intentionally or unintentionally – the death of a pecuniary beneficiary parent), guardianship becomes a necessity. The guardianship process is costly and burdensome. The need for guardianship can be avoided when the assets are held in trust for the benefit of any minor beneficiaries until they attain majority (or for life).

10. Drafting Discretionary Distribution Clauses

Providing that assets are to be distributed to a beneficiary for "health, education, maintenance and support" is good but does not usually provide the trustee with enough guidance as to what those terms mean. What was the settlor's intent in creating the trust? What did the settlor expect the money to be used for? Should it be used for the purchase of a home? A car? Vacations? What if the beneficiary isn't working or only volunteers? Consider adding a clause describing the intent of the client in exercising discretion.

Additionally, if distributions may only ever be made for "health, education, maintenance and support", then the ability to decant that trust is not currently an option under Florida law. If flexibility is desired going forward, it is generally better to allow an independent, disinterested trustee the ability to make discretionary distributions in the fiduciary's absolute discretion or for something like "best interests". Note: there may be different standards for different trustees. An independent trustee may be given an absolute discretion standard or best interests standard, if serving. A non-independent trustee may be given an ascertainable standard.

Similarly, ascertainable standards are not always well drafted. This is not a time to get creative. Use the words in IRC §2041: health, education, maintenance and support. Comfort, welfare and general terms are generally best avoided. There is plenty of room in the standard terms from the Code.

Additionally, if distributions are to be made for a beneficiary's "accustomed standard of living", what standard does that mean? In the case of a surviving spouse, is that the standard to which the spouse was accustomed before the marriage to the wealthier spouse, or the standard during the marriage? Does it matter how long the marriage was? Or does it matter, that the deceased spouse's earnings sustained the couple's standard of living and the remaining assets in the trust are insufficient to support such a standard without dissipating or perhaps exhausting the trust principal? What's the trustee supposed to do then? Use principal to prop up the standard of living to one the trust can't afford and likely dissipate the entire principal?

What's the standard of living a trustee should consider when looking at a minor child at the time of the death of a trust grantor? The standard of living of the average 10 year old is staying in mom and dad's house and having life paid for! Is that the standard a trust should provide for the beneficiary for life? What about private yachts and planes mom and dad paid for during life? Minors obviously don't own homes, or invest in businesses or professional practices, so does maintaining a standard of living to which the minor was accustomed at the time of grantor's death preclude future principal distributions for such issues?

Here is an interesting issue: if the beneficiary works and earns a living, should the trust pay for the beneficiary's tax bills? Providing that frees up the beneficiary to spend 100% of her/his earnings, but is that intended?

What about considering the beneficiary's assets and income? Direction should be given as to whether a trustee is to consider a beneficiary's other resources before making a distribution and, if so, which assets should be considered – for example, should the beneficiary's home be counted or just the beneficiary's investable assets? Additional thought should be given as to what financial records a trustee may rely upon in assessing a beneficiary's available resources – Are tax returns sufficient? Year-end statements? What about for closely held entities – will the beneficiary have to obtain an appraisal?

And once you take those into account, what does that mean? Should no invasions be made until all of a beneficiary's other assets are exhausted?

11. Not Specifying who is to be favored in a pot trust

When a pot trust permitting distributions to multiple beneficiaries is created, the trustee is often stuck trying to determine whose needs are the most important – did the settlor intend to favor one of the beneficiaries (e.g., the surviving spouse) over the remaining beneficiaries (e.g., the settlor's descendants – possibly not descendants of the surviving spouse). Without a direction in the document, what is a trustee to do? Any decision could

lead to a lawsuit being filed by a beneficiary who does not agree with the trustee's determination. This may result in the trustee having to seek court authority and direction before making decisions that favor one beneficiary over another.

12. Amendments and Codicils

Too often, attorneys are drafting amendments and/or codicils rather than preparing new trusts and/or wills. This can lead to nightmares in terms of administration down the road and, too often, things are missed. For example, sometimes entire articles are deleted under an amendment or codicil when only a section was intended to be deleted. And sometimes provisions are overlooked and are left in, even though they are now contrary to the amended document. Sometimes the changes are so significant that it can cause the fiduciary great trouble in deciphering what the actual terms of the document are once the settlor is deceased – e.g., was that paragraph deleted, what was inserted here, does this even apply? In the age of word processors and technology, it often makes no sense to draft an amendment or codicil instead of new documents. Even if the documents being changed were not drafted by you (perhaps especially if the prior documents were not drafted by you because you are probably not going to know the terms of someone else's documents as well as you know your own), it is often better to prepare new documents rather than a "simple" amendment or codicil that will come back to haunt you later.

13. Reciprocal trusts

Many clients seem to have created irrevocable trusts for the benefit of one another, blithefully unaware of the possible application of the reciprocal trust doctrine. A typical example: in 2012, a husband created a "SLAT" for the benefit of his wife and kids and sprinkling income and principal and funds it with $5 million of assets. Simultaneously, or a short time later, wife created a "SLAT" for the benefit of husband and kids with sprinkling (or maybe mandatory) payments and a limited power of appointment and funds the trust with $5 million of assets. If the reciprocal trust doctrine applied, the trusts would be "uncrossed" and the husband will be deemed to have created the trust for his benefit and wife will be deemed to have created the trust for her benefit, creating estate inclusion and "blowing up" the intentions of the plan.

Many advisors believe that the reciprocal trust doctrine would not apply to the foregoing trusts and rely on *Estate of Levy v. Commissioner*, 46 TCM 910 (1983) in arriving at this opinion. In *Levy*, spouses created trusts for each other which were essentially identical except in one trust there was a limited power of appointment the spouse could exercise while the other trust had no power. In *Levy*, the IRS only challenged whether the power of appointment was valid under state law – it had already conceded in its brief that the reciprocal trust doctrine would not apply if the power of appointment was valid under New Jersey law. No one is clear why the IRS took this position. The *Levy* opinion seemed to be accepted in PLR 200426008. However, neither *Levy* nor the PLR may be cited to as precedent because (a) it does not actually address the issue of whether including a power of appointment in one trust and not the other is "good enough" to

avoid application of the reciprocal trust doctrine and (b) *Levy* is a tax court memorandum opinion, which like a PLR only applies to that taxpayer.

For the reasons stated above, Levy is not reliable or citable precedent. That leaves us, however, with only one case to rely on and take into consideration – and it comes from a pretty good source: the U.S. Supreme Court. Everyone considering making "reciprocal" trusts is reminded to review the analysis in *Estate of Grace v. US*, 395 US 316 (1969).

Grace involved trusts that were created 15 days apart. The Court found this to be sufficiently close in time to be interrelated and said that it did not need to look at the subjective intent of the parties in creating the trusts. Instead, the Court said it would apply the reciprocal trust doctrine when it found there had been a quid pro quo. "[A]pplication of the reciprocal trust doctrine requires only that the trusts be interrelated, and that the arrangement, to the extent of mutual value, leaves the settlors in approximately the same economic position as they would have been in had they created trusts naming themselves as life beneficiaries."

Some advisors have said that if trusts are funded with different amounts, then the reciprocal trust doctrine will not apply because the trusts don't have "mutual value". This analysis seems at odds with the IRS's view in Rev. Rul. 74-533 and Rev. Rul. 57-422. For example, if husband funded a trust for the benefit of wife with $4 million and wife funded a trust for the benefit of husband with $5 million, then under the mutuality of value doctrine, $4 million of each trust will be "uncrossed" – wife will be deemed the settlor of 80% of the trust she created and husband will be deemed settlor of 100% of the trust he created.

Steps to be taken to avoid the reciprocal trust doctrine:

a. The trusts should not be interrelated.
b. They should be not be created at substantially the same time and they should not have substantially the same economic effect on the settlors.
c. Ideally, the trusts should not be from the same plan and should not have the same genesis. There should not be an advisor's memo (or an email – to the client or on a listserv) outlining the creation of these two trusts, as that may come back to hurt the client. There's no bright line test for inter relatedness. The margins of the reciprocal trust doctrine are not clear.
d. Minor changes like in trusteeship or terms (especially changes in the terms for beneficiaries other than the settlors) are not going to avoid the interrelatedness test or the economic effect test.
e. One trust may impose a HEMS standard and the other trust may allow distributions without a standard.
f. One trust may require considering the spousal beneficiary's other resources and the other may not.
g. One trust may include the settlor's spouse as a beneficiary but the other trust merely includes the ability for an independent party to add the settlor's spouse as a beneficiary down the road.

h. One trust allows for conversion to a unitrust for the spouse (or provides for unitrust payments from inception) and the other does not.
i. Including an inter vivos power of appointment in one trust but not the other.
j. Vary the class for testamentary powers of appointment or only include a testamentary power of appointment in one of the trusts.
k. Different trustees.

14. Not including language in the revocable trust to preserve the homestead property tax exemption

Our clients are anxious to avoid probate at all costs and the homestead will often be transferred into the trust to accomplish this (especially after the first death). It is important that the trust contain language preserving the settlor's (or beneficiary's) equitable rights in the property so as to preserve the homestead property tax exemption after the home is transferred.

15. Not including language to allow the trustee to retain a concentration of assets

The settlor may own a business or a residence that will become an asset of a trust. Without language waiving the prudent investor rule and directing the trustee to retain the illiquid assets being transferred, the fiduciary will have a duty to invest the assets prudently – possibly forcing the trustee to sell off the closely-held business interest or residence so that the funds can be invested in a diversified portfolio. Fiduciaries do not generally want to be responsible for managing real estate or running a business and, as a general rule, can face significant liability for failing to invest the assets prudently – everything is fine while the business or residence retains its value but if the market takes a turn, angry beneficiaries will appear with lawyers in tow. If you intend to saddle the fiduciary with illiquid assets, the least you could do is attempt to limit the fiduciary's exposure for carrying out this task. Sample language:

> Trustee is authorized to receive and retain, without regard for diversification or prudence, all assets Trustee receives from Settlor. Trustee is authorized to retain indefinitely all shares of [name of security], even though such a concentration is generally considered inappropriate for trusts. Settlor realizes that there are specific reasons for engaging in certain estate planning techniques, with particular assets, and that the retention of such assets by Trustee, and other facts and circumstances, may conflict with a fiduciary's reasonable business judgment, but may, nonetheless, further the purposes of the trust and Settlor's intent. This trust's purpose represents Settlor's intent to plan Settlor's estate with shares of [name of security], and not necessarily to provide beneficiaries with a diversified portfolio. Settlor hereby waives the prudent investor rule, Trustee's standard of care and performance, a fiduciary's reasonable business judgment, and Trustee's duty to diversify. Trustee shall be held

harmless from all liability for holding and retaining shares of [name of security].

Note that while the foregoing language is helpful, it still may not wholly protect the trustee for failure to diversify and many corporate fiduciaries will not be comfortable relying on it. If the client wants to afford the trustee greater protection (or if the trustee insists on greater protection), it will generally be necessary to create a directed trust.

16. Trying to equalize

Clients often say that they want their children treated equally. They will go through great pains to "equalize things". The client may have gifted $50,000 to one child and is now devising and an equal amount to the daughter so as to equalize them. The client may even index it for inflation (without specifying what CPI [or other index] will be used for purposes of calculating the inflation). And attorneys go along with it because it makes sense – it's appealing to think of things as equal. The problem is that things are not equal and they likely never were equal – one of the children likely got something that the other one didn't along the way (note that at least one of the children had use of the funds during life while the other did not – that is why we are equalizing after all) and trying to equalize things with dollars and cents is really just a trap that clients fall into and they bring their advisors with them. Will a spreadsheet be maintained? Who is going to track the money? When does the tracking begin? What if something is missing on the spreadsheet or list of advances? What if the spreadsheet with all the numbers goes missing? What if multiple spreadsheets are found all with different numbers? What trustee wants that kind of liability to try and figure out what is "equal" post-death?

17. Incentive trusts

Some clients also attempt to incentivize achievement under trusts with particular "carrots and sticks". However, in reality, these types of trusts often exacerbate the underlying issues. For example, they typically don't pay out to the beneficiaries who need help the most (e.g., a beneficiary who is earning less while helping the poor or educating children), and they pay out the most to the beneficiaries who need it the least (e.g. a clause providing a a dollar for dollar invasion of principal for a beneficiary already earning $1 million annually which likely just takes money from a protected environment and puts it in an unprotected one - the beneficiary's own account - for no discernible purpose). The triple protections (creditors, spouses and taxes) are probably most relevant to this beneficiary who doesn't need the money and yet, the incentive clause mandates distributions out of the protective trust.

18. Unitrusts

When incorporating unitusts into an estate plan, it is important to remember to include both a valuation date for unitrust payments and a methodology for valuing closely held assets. Additionally, remember that institutions will generate monthly, quarterly or

annual statements. Therefore, it is helpful to select a valuation date at the end of a month, quarter or year so that the trustee will have statements for that date.

Relatedly, when unitrusts are drafted for spouses and provide for paying the "greater of actual income or the unitrust amount" that can creates valuation issues also. Should we pay out the income each month and then do a unitrust calculation and make up after (quarterly or annually)? Or should we pay out the unitrust amount each month and then do a income calculation and make up after (quarterly or annually)? Or do you look at it month to month and pay the larger amount each month?

19. Over-reliance on portability

Portability is a great new feature that will benefit many smaller estates. However, portability has a number of limitations that do not exist in a typical credit shelter trust/martial plan. For example:

a. Portability is not indexed for inflation but assets in a CST appreciate tax free.
b. GST tax exemption is not portable but may be allocated to a CST, causing the assets to be wholly GST exempt.
c. Electing portability requires the filing of an Estate Tax Return (IRS Form 706) upon the first death, even in a non-taxable estate, but funding a CST does not.
d. Portability does not allow creditor protection for the beneficiaries.
e. Portability does not allow for sprinkling distributions to children or grandchildren, which might lower overall income taxes and meet a surviving spouse's gifting plans.
f. State-level estate taxes may be an issue if clients use portability instead of a CST.
g. Portability is not available if the decedent or spouse is a nonresident noncitizen because IRC §2102(b)(1) doesn't have a DSUE amount…Portability is available potentially for a citizen decedent with a noncitizen spouse using a QDOT, but the application of the rules gets extra complicated, since the surviving spouse can't get/use the DSUE until the QDOT is disposed of and the unused exemption of the deceased spouse is known (typically not until the survivor's death).

However, credit shelter trusts also have their limitations. For example:

a. Using CSTs results in added costs of administration – accounting issues, tax returns, etc.
b. Some clients do not want to have to account to their descendants.
c. The income taxes may be higher if the income is accumulated in the trust.
d. There may be a loss of a step-up in basis on the 2nd death.

Some advisors hope to mitigate the basis step-up limitation associated with credit shelter trusts through the use of springing or formula general powers of appointment. However, those also have issues - see the discussion below.

20. Basis step-up planning - creating estate Inclusion for a Beneficiary of a trust

Trying to create a basis step-up for a beneficiary of an irrevobale trust (i.e. a CST or a trust for children) is a real drafting concern. If one wishes to draft a general power of appointment by formula, there are a host of open-ended questions and concerns. For example:

a. How to define when to create the general power?
b. How broad or limited the general power should be – should it be limited to the creditors of the surviving spouse's estate?
c. Is getting the basis step-up worth losing the GST exemption?
d. Can you give the general power only over assets that have appreciated in the CST?
e. Should there be a cap so that the general power doesn't create estate tax in the survivor's estate?
f. Should there be an ordering provision so that the general power applies first to assets having the most gain? Or to depreciable assets first (so you get a step-up in basis plus a higher depreciation base for income tax purposes too)? Or should you direct the power first over creator-owned IP assets (converting ordinary income assets to cap gains)? Or negative basis assets (commercial real estate LPs)? How about collectibles like artwork or gold (28% tax)?
g. What about consideration for the state estate tax consequences of creating this general power?
h. Will giving the general power of appointment make the trust assets available to a beneficiary's spouse's elective share claims?

21. Failure to plan for elective share

The Florida elective share statute has been based on an augmented elective estate since 1999. Florida Statute §732.2035 includes in the elective estate, assets in the probate, estate, assets in a revocable trust, life insurance, IRAs and other "non-probate" assets passing via beneficiary designations, jointly held property and more. However, F.S. §732.2075 allows for the satisfaction of the elective share via a trust. F.S. §732.2095 describes how to value property in trust used to satisfy the elective share. It also permits contingent interests to be used. Thus, a provision in a will or revocable trust making an elective share trust contingent on the election should be viable.

A typical elective share marital trust will pay all income (the 50% level) and maybe even principal (to get to the 80% value level). If a trust is income only then about 60% of the estate must go into it (the 50% level), but if the trust allows a qualifying invasion (even if by a relatively unfriendly trustee), then only about 37.5% of the estate needs to go into the trust (the 80% level).

Sample Provision:

If Grantor's spouse exercises Grantor's spouse's right to elect to take a share of Grantor's property in accordance with the provisions of Part II of Chapter 732 of Florida law (or the similar or corresponding provision of

the laws of that state where Grantor's spouse is domiciled at the time of Grantor's death) (the "Elective Share Provisions"), or if Grantor's spouse and Grantor are not married to each other at the time of Grantor's death, Grantor's spouse shall be deemed to have predeceased Grantor for purposes of this Agreement, and all rights and interests that depend upon a person surviving Grantor's spouse shall be determined and take effect as of Grantor's death. Notwithstanding the foregoing, if Grantor's spouse exercises Grantor's spouse's right to take a share of Grantor's property under the Elective Share Provisions, then Trustee shall set aside the smallest pecuniary amount necessary to satisfy the Elective Share Provisions with such amount to be held and administered as a separate trust (hereinafter the "Elective Share Trust") in which Trustee will only provide an income interest to Grantor's spouse and a Qualified Power of Invasion as described under Florida law. Grantor's spouse may never serve as Trustee of the Elective Share Trust.