

Trusts, Insurance and the Morey Problem

Morey v. Everbank

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By

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Morey v. Everbank: Three Drafting Tips to Avoid a Troubling Decision¹

I. Introduction

- A. To many, the mere mention of the name “Morey” leads to thoughts of Mitch Albom's best selling 1997 novel "Tuesday's With Morrie" (spelling notwithstanding) or of the legendary Vaudeville comedian Morey Amsterdam, best known for his role as "Buddy Sorrell" on the timeless television series “The Dick Van Dyke Show.”
- B. Mention the name "Morey" to a Florida trusts and estates attorney and the reaction will be a “raising the hair on the back of the neck” reflex as the thought will be of the ramifications of the Florida First District Court of Appeals (the "Florida Appellate Court") decision of Morey v. Everbank and Air Craun, Inc.² issued on July 24, 2012.
- C. In the Morey decision, life insurance proceeds – which are generally exempt under Florida law from claims by the insured's creditors – were paid to the insured's revocable trust that contained a clause directing that all of the insured's debts were to be satisfied with trust assets.
- D. In its decision, the Florida Appellate Court held that such a clause acted to negate the statutory creditor protection and, as a result, the insurance proceeds were available for the payment of the insured's claims.
- E. The impact of this decision may extend well beyond Florida in that other states have similar exemptions for life insurance, so the issue becomes whether another state, if presented with the same issue, will follow Florida's lead.
- F. This outline will dissect the opinion, present a conflicting decision, discuss which view is correct, illustrate how other state statutes could cause a similar judicial case and ultimately, discuss simple yet creative drafting techniques that will avoid the issue altogether.

II. Case Overview

- A. The Morey decision involves the appeal of a decision from the Circuit Court for Clay County, Florida (the "Circuit Court") wherein the Circuit Court determined that particular life insurance proceeds payable upon the decedent's death, which in certain circumstances under Florida law are exempt from the claims of the decedent's creditors, were, in this instance, not so exempt.
- B. Facts of the Case

¹ A special thank you to George D. Karibjanian, Esquire, of Boca Raton, Florida, for granting permission to use this outline as presented by him at the June 21, 2013 ACTEC 2013 Summer Meeting Asset Protection Committee. (Portions have been omitted and Article V has been added by the speaker).

² 93 So.3d 482 (Fla. 1 Dist. Ct. App. 2012).

- (1) Carlton W. Morey, Jr. executed a self-settled Declaration of Trust on January 19, 2000 (the "Declaration of Trust"), which provided that the Trustees were to pay all expenses of Mr. Morey's last illness and funeral, expenses of administering Mr. Morey's estate, all of his enforceable debts (excluding those secured by life insurance or real or personal property) and all estate and other taxes (the "Payment Provisions").
- (2) The following month Mr. Morey applied to Nationwide Life Insurance Company for two life insurance policies, each with a death benefit in the amount of \$250,000 (the "Insurance").
- (3) The application named the "Carl W. Morey Trust" as the beneficiary. On October 1, 2004, Mr. Morey amended and restated the Declaration of Trust to provide that the residue was to be held in a further trust to be called the "Morey Family Trust."
- (4) Mr. Morey did not, however, execute a corresponding amendment to the beneficiary designation for the Insurance, so upon Mr. Morey's death, the Insurance proceeds (the "Proceeds") were paid to the Trustees of the Declaration of Trust and not to the Trustees of the Morey Family Trust.
- (5) Because the Payment Provisions provided that trust assets were to be used for the payment of all of the decedent's debts and expenses, Mr. Morey's brother, who was the successor Trustee of the Declaration of Trust, filed a petition requesting a ruling confirming that the Proceeds payable to the Declaration of Trust³ were exempt from all "death obligations" and unavailable to Mr. Morey's estate or its creditors.
- (6) The Circuit Court held that the Payment Provisions superseded any applicable statutory protection and therefore the Proceeds were available for the payment of Mr. Morey's debts and expenses.
- (7) The Trustee appealed.

C. Court Analysis

- (1) The Trustee relied on Fla. Stat. § 222.13(1), which provides, in pertinent part, as follows:

“(1) Whenever any person residing in the state shall die leaving insurance on his or her life, the said insurance shall inure exclusively to the benefit of the person for whose use and benefit such insurance is designated in the

³ Note that another part of the Morey decision was a reformation of the Trust to adhere to Mr. Morey's purported intent that the Proceeds be exempt.

policy, and the proceeds thereof shall be exempt from the claims of creditors of the insured unless the insurance policy or a valid assignment thereof provides otherwise...”

- (1) The statute states that the proceeds must be paid to a “person,” and to define “person” in this context, the Florida Appellate Court cited an additional provision under Florida law, namely, Fla. Stat. § 733.808(1), which provides, in pertinent part, as follows:

“(1) Death benefits of any kind, including, but not limited to, proceeds of:

(a) An individual life insurance policy;

...

may be made payable to the trustee under a trust agreement or declaration of trust in existence at the time of the death of the insured.... It shall not be necessary to the validity of the trust agreement or declaration of trust, whether revocable or irrevocable, that it have a trust corpus other than the right of the trustee to receive death benefits.”⁴

- (1) The Florida Appellate Court concluded that the combination of Fla. Stat. § 222.13(1) and Fla. Stat. § 733.808(1) clarifies that the mere fact that life insurance proceeds are payable to a trust, rather than directly to a natural person, does not deprive such proceeds of their exempt status.⁵
- (2) The Florida Appellate Court explained, however, that although Fla. Stat. § 733.808(1) authorizes the payment of insurance proceeds to a trust, the creditor exemption in Fla. Stat. § 222.13(1) does not require the policy's owner to take advantage of the exemption, as the second sentence of Fla. Stat. § 222.13(1) (the “Estate Payment Exception”) would dictate otherwise:

“...Notwithstanding the foregoing, whenever the insurance, by designation or otherwise, is payable to the insured or to the insured's estate or to his or her executors, administrators, or assigns, the insurance

⁴ Note that the Florida Appellate Court could also have defined “person” to include a “trust” by citing Fla. Stat. § 1.01(3), which provides, “The word “person” includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.”

⁵ Morey at 485-6.

proceeds shall become a part of the insured's estate for all purposes and shall be administered by the personal representative of the estate of the insured in accordance with the probate laws of the state in like manner as other assets of the insured's estate."

- (1) In other words, the Florida Appellate Court stated that the insurance policy is a contract, and as such, the freedom to contract is not restricted by the statutory exemption of Fla. Stat. § 222.13(1).
- (2) Therefore, the above-cited provisions of Fla. Stat. § 222.13(1) which render life insurance policy proceeds unavailable to satisfy estate obligations can be waived by naming the insured's estate as a beneficiary of the policy or by naming a trust as the beneficiary whose terms direct distribution of the trust assets to the personal representative if the personal representative so requests.⁶
- (3) As a result of this analysis, the Florida Appellate Court agreed with the Circuit Court and affirmed the Circuit Court's conclusion that the Payment Provisions superseded the creditor exemption of Fla. Stat. § 222.13(1).
- (4) The result was that the Proceeds were available for the payment of Mr. Morey's creditors.

III. Is the Result in Morey Correct?

A. What About Fla. Stat. § 733.808(4)? Isn't This Right On Point? Did The Court Blow It?

- (1) The Florida Appellate Court focused its efforts on Fla. Stat. § 222.13(1), but it never referenced Fla. Stat. § 733.808(4), which provides that death benefits payable to a revocable trust (which the Florida Appellate Court referenced in its discussion of Fla. Stat. § 733.808(1)) are exempt from the decedent's obligations and administration expenses.
- (2) Was this an oversight? Perhaps.
- (3) Would this have changed the decision? Probably not - it is unlikely that such an oversight would have changed the decision as the same analysis would seem to apply in that the exemption afforded under Fla. Stat. § 733.808(4) does not appear to be absolute, and thus could be superseded by a waiver.

B. Waivability of Statutory Provisions – Elements to a Waiver

⁶ See generally Id. at 486 and 487.

- (1) Does the statute specifically provide that it can be waived?
 - (a) In ascertaining the waivability of a statutory exemption, it should first be determined whether the applicable state's exemption statute provides for a specific waiver of the exemption.
 - (b) An example of a specific waiver provision is found in New York EPTL § 11-2.3(a) as to the application of the New York Prudent Investor Act, which provides, in pertinent part, that,

"[a] trustee has a duty to invest and manage property held in a fiduciary capacity in accordance with the prudent investor standard defined by this section, *except as otherwise provided by the express terms and provisions of a governing instrument ...*" (emphasis added.)
- (1) Absent a specific waiver provision, the statutory exemption may be waivable unless specifically provided otherwise.
 - (a) An example of this approach is found in the Florida Trust Code. Despite the lengthy provisions contained in the Florida Trust Code, Fla. Stat. § 736.0105 provides that only twenty-three provisions contained therein are mandatory, and the rest may be overridden within the trust agreement.
 - (b) Some of the mandatory provisions under Fla. Stat. § 736.0105 include the duty of the trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries, the periods of limitation for commencing a judicial proceeding, the formalities required for the execution of a trust and the trustee's duty to pay expenses and obligations of the settlor's estate.
 - (c) For example, in Lawrence v. Commercial Banking Corp., 165 Md. 559, 169 A. 69 (Md. 1933), which involved an attachment of a judgment and the waiver of certain statutory exemptions, the Maryland Supreme Court acknowledged the waiver of a statutory exemption where there was no specific provision against such waiver.
- (2) How is the waiver effected – through a specific reference to the provision to be waived, or does a general waiver of "all rights" (or a general waiver via negative inference) suffice?
 - (a) If the exemption can be waived absent a specific statutory waiver provision, the final issue pertains to the specificity of

the waiver in that must the waiver be specific as to the particular exemption or right waived.

- (b) Some states have held that a waiver must be specific and that the use of the general language to "pay all debts" is not specific enough to waive an exemption.
 - (c) The general theme in cases decided by the Tennessee Supreme Court, the Washington Supreme Court and the Iowa Supreme Court appear to be consistent that a waiver of the exemption afforded to insurance proceeds must be both specifically stated and clear on its face.⁷
 - (d) A caveat to reliance on such decisions is that it appears that the overwhelming majority of such decisions are from the early part of the 20th century and precede the implementation of more modern statutes and exemptions.
 - (e) Further, in the era of more specialized document drafting, there is more judicial awareness of the ramifications of certain clauses in testamentary documents so fewer leniencies are given to reliance on specificity.
- (3) In terms of general waivers, even before the Morey decision, other areas of Florida law appear to consistently determine that general waivers are sufficient to waive specific rights.
- (a) In a decision involving an antenuptial agreement, the Florida Third District Court of Appeals acknowledged that a general waiver of "all rights" includes the waiver of specific rights without reference to such specific rights.⁸
 - (b) Florida also extends the general waiver to include rights that were not yet in existence when the waiver was executed.
 - (c) In the particular case, which was also decided by the Florida Third District Court of Appeals, a general waiver of "all rights" contained in a prenuptial agreement signed in 1956

⁷ See, for example, Cooper v Wright, 110 Tenn. 214, 75 S.W. 1049 (Tenn. 1903); German-American State Bank v. Godman, 83 Wash. 231, 145 P. 221 (Wash. 1915); In re Grilk's Will, 210 Iowa 587, 231 N.W. 327 (Iowa 1930), *all as cited in* 56 A.L.R.2d 865, § 2.; see also Winkler v. Bauman, 89 A.D.2d 529, 452 N.Y.S.2d 440 (N.Y.A.D. 1982), holding that a general waiver of rights in a prenuptial agreement is insufficient to waive certain retirement benefits that must be specifically referenced.

⁸ Hulsh v. Hulsh, 431 So.2d 658 (Fla. 3 Dist. Ct. App. 1983), *rehearing denied* 440 So.2d 352 (Fla. 1983), wherein the Third District Court of Appeals stated that, "...[u]nless it provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse, or a complete property settlement entered into after, or in anticipation of, separation, dissolution of marriage, or divorce, is a waiver of all rights to elective share, homestead property, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to either from the other by intestate succession or by the provisions of any will executed before the waiver or property settlement." Hulsh at 662.

was held to have waived homestead and elective share rights that were not yet statutorily in existence until 1976.⁹

- (4) Other states adhere to this general waiver provision.
 - (a) Maine - in a Maine decision, the Maine Supreme Court inferred, by negative inference, that a waiver of "all rights" in a prenuptial agreement would include a right to the elective share.¹⁰
 - (b) Pennsylvania
 - (i) In addition, in a Pennsylvania Supreme Court decision,¹¹ an antenuptial agreement provided that in exchange for a particular payment made to the prospective wife, the wife agreed that such payment was made "in lieu of any and all of her rights in and to the real and personal property of the [prospective husband], now owned or hereafter acquired, including all and any inchoate intestate rights, and rights as heir of any kind."¹²
 - (ii) In response to this provision, the Pennsylvania Supreme Court stated that, "[i]t is difficult to conceive of a clearer or fuller or more complete release by an intended wife of all her present and future rights and interests in her intended husband's estate."¹³
 - C. Based on this comparison, in Florida at least, it is apparent that the Morey decision was decided correctly.
- IV. Drafting to Overcome the Morey Result
- A. Despite the waiver issues, counsel should not wait for a particular court to rule on the issue; rather, counsel should draft the planning documents to avoid the issue altogether.
 - B. The facts in the Morey decision infer that either the client or the attorney desired to simplify the drafting process.
 - (1) Instead of a specific beneficiary designation for the Insurance, the attorney attempted to simplify the designation by simply having the Proceeds paid to Mr. Morey's Declaration of Trust.

⁹ De Garcia's Estate v. Garcia, 399 So.2d 486 (Fla. 3 Dist. Ct. App. 1981), *rehearing denied* 402 So.2d 1103 (Fla. 1981).

¹⁰ In re Estate of Barrows, 913 A.2d 608 (Maine 2006).

¹¹ In re Hillegass' Estate, 431 Pa. 144, 244 A.2d 672 (Pa. 1968).

¹² Id. at 147, 674.

¹³ Id. at 148, 674.

- (2) Perhaps the client wanted all of his or her assets disposed of under the same document and directed the attorney to keep things simple and not draft clauses that the client would not understand.
 - (3) Knowing this, perhaps the attorney simply avoided transferring insurance to an irrevocable insurance trust and simply directed that the Proceeds are to be paid to the Declaration of Trust.¹⁴
 - (4) After all, any attorney who has attempted to prepare and submit a detailed beneficiary designation with respect to an individual retirement account or insurance policy is probably aware that the third party institutions would prefer that their model beneficiary designations not be modified and that account owners simply list individuals to receive property outright.
 - (5) Notwithstanding these concerns, the Morey decision should be a lesson to any estate planning attorney drafting for simplicity in that sometimes, the simple solution does more harm than good.
 - (6) Further, even if the attorney is not a Florida attorney and is not drafting a Florida document, as illustrated above, the foundation of the Morey decision could be followed in many other states.
- C. The interesting aspect about the Morey decision is that the issue could have been avoided with simple and thoughtful drafting.
- (1) The most obvious solution to avoiding the Morey decision is to draft an irrevocable trust that would prohibit the payments of the Settlor's expenses and debts and subsequently transfer the insurance policy into the insurance trust.
 - (2) The client may, however, have reasons why he or she wishes to retain ownership over the life insurance, such as the ability to borrow against the cash surrender value without having to request for funds from a Trustee.
- D. In this age of creditor protection, in those jurisdictions that provide for an exemption for insurance proceeds, it is important to not only maintain the creditor protection nature of the insurance proceeds but also to maintain that protection for the beneficiaries who survive the Settlor, the easiest way of which to do this is to provide that such proceeds will be held in trust for the beneficiaries.
- E. The following examples illustrate ways to accomplish this while not disturbing said statutory exemption. There is no preference as to the solutions; any may be used depending on the preference of the draftsman.

¹⁴ While an irrevocable life insurance trust is generally used to avoid estate taxes on the life insurance proceeds, it would also avoid exposure to the estate's creditors upon the decedent's death.

F. Solution #1: Exclude the Insurance Proceeds from the Pool of Funds for Expenses

- (1) If for any reason the client wants the simplest of designations for the insurance proceeds, i.e., to provide that the proceeds are to be disposed of under the revocable trust, the simplest and perhaps easiest solution is to add an exclusionary provision in the general expense payment clause to exclude the insurance proceeds.
- (2) The provision could refer specifically to insurance proceeds but could also be general as to exclude any exempt trust proceeds.
- (3) An example of this provision is the following:

"The Trustees shall pay directly or pay to the Personal Representatives of the Settlor's estate (subject to any provisions contained in the Settlor's Will), *such sums out of the portion of the principal of the trust that is not exempt under [applicable state] law from any claims of the Settlor's creditors*, as are required for the payment of the Settlor's enforceable debts, funeral and administration expenses, and the estate and inheritance taxes imposed upon the Settlor's estate...." (emphasis added.)

G. Solution #2: Pay to Resulting Trust

- (1) As referenced above, part of the Morey opinion discussed an attempt to reform the trust to adhere to the decedent's intent.
- (2) The Morey Trust provided for the net trust assets to pass into a resulting trust for the benefit of the descendants.
- (3) One solution to the Morey problem would be to simply provide that the proceeds are to be paid to the resulting trust created under the revocable trust.
- (4) For example, suppose that the insured has three children and that the residuary clause in the revocable trust provides that, "the balance is to be divided into shares, per stirpes, for the Settlor's descendants as survive the Settlor, and each such share shall be disposed of as provided in Article 4 of this Trust," and Article 4 contains lifetime trusts for the descendants. The beneficiary designation for the insurance policy would be drafted to read as follows:

"The Primary Beneficiary of the policy shall be as follows: The proceeds subject to this

designation shall be divided into shares, per stirpes, for such of my descendants as survive me, and each share shall be disposed of as provided in Article 4 of my [name of trust], to be added to and disposed of as a part thereof.”

- (1) The effect of this designation is that under the revocable trust, the share of the balance of the trust assets (after the payment of all of the decedent’s debts, expenses and taxes) for a particular child (the “Residuary Share”) is disposed of and held in further trust under Article 4.
- (2) So as to consolidate and combine the Residuary Share with such child’s share of the insurance proceeds, the preamble to Article 4 should recite language similar to the following:

“All shares or portions for a particular descendant of the Settlor (the “Primary Beneficiary”) directed to be disposed of as provided in this Article 4, *whether under this Declaration or other than under this Declaration*, shall be combined and held by the Trustees in a single separate trust as follows:”
(emphasis added.)

- (3) The effect of the “whether under this” clause ensures that the Trustee or any third party reading the document is aware that the Settlor intends that assets both under the Declaration and other than under the Declaration are to be disposed of under Article 4 for a particular beneficiary.
- (4) The only caveat to the drafter is that should the revocable trust be amended in the future so as to change the article containing the trust provisions for the descendants, the insurance beneficiary designation must likewise be changed.

H. Solution #3: Pour-Over Paragraph

- (1) Another solution is a derivative of Solution #2 but avoids having to provide for a division among the descendants in the actual beneficiary designation.
- (2) The problem in the Morey decision is that the proceeds were paid to a trust that provided for the payment of the decedent’s expenses and debts.
- (3) What is needed is a way to provide for a general disposition to the revocable trust without subjecting the insurance proceeds to the

pool of assets from which the decedent's expenses and debts are paid.

- (4) Query whether providing that the insurance proceeds are to be disposed of as part of the trust residue is sufficient.
- (5) In most instances, this will still subject the proceeds to the decedent's debts and expenses.
- (6) For example, most revocable trusts will contain an expense clause similar to the following:

"The Trustees shall pay directly or pay to the Personal Representatives of the Settlor's estate (subject to any provisions contained in the Settlor's Will), such sums out of the principal of the trust as are required for the payment of the Settlor's enforceable debts, funeral and administration expenses, and the estate and inheritance taxes imposed upon the Settlor's estate..."

- (1) The goal is to provide for a general direction for the insurance proceeds to be disposed of in the revocable trust but have such proceeds avoid the disposition of the trust's general trust assets.
- (2) The solution is to provide that the net residue (i.e., the balance after the payment of all debts, expenses and taxes) is to be disposed of pursuant to a "pot" provision in the trust into which the insurance proceeds will be paid. The "pot" provision will then divide the assets into shares for the descendants and direct the disposition to the resulting trusts.
- (3) For example, suppose that Section 2.5 of the particular revocable trust is the residuary clause, and provides as follows:

"2.5 Balance of Aggregate Principal. The balance of the Aggregate Principal shall be divided into shares, per stirpes, for such of the Settlor's children as survive the Settlor and for the descendants who survive the Settlor of such of them as predecease the Settlor, and each share shall be disposed of as provided in Article 4 of this Declaration."

- (1) To pass the insurance proceeds as part of the trust funds but have them retain their exempt status, the Settlor should provide that the residue is disposed of pursuant to Section 2.6, and then provide for the division among the descendants in new Section 2.6 as follows:

"2.5 Balance of Aggregate Principal. The balance of the Aggregate Principal shall be disposed of as provided in Section 2.6 of this Declaration.

2.6 Disposition of Property. All property directed to be disposed of as provided in this Section 2.6, whether under this Declaration or other than under this Declaration, shall be divided into shares, per stirpes, for such of the Settlor's children..."

- (1) The insurance beneficiary designation is then changed to the following:

"The Primary Beneficiary of the policy shall be as follows: The proceeds shall be disposed of as provided in Section 2.6 of my [name of trust]."

- (1) As with Solution #2, the only caveat to the drafter is that should the revocable trust be amended in the future so as to change the section containing the division of property among the descendants, the insurance beneficiary designation must likewise be changed.

V. Proposed Revisions to Sections 733.808(4) and 736.05053(1), Florida Statutes

- A. Proposed legislation clarifies that life insurance proceeds are generally exempt from administration expenses and creditor claims under Sections 222.13 and 733.808, Florida Statutes.
- B. Proposed legislation clarifies the circumstances under which such exemption can be waived by the insured:
 - (1) If insurance proceeds are paid to a trustee of a revocable trust, then the exemption is waived **only** if the trust instrument expressly provides that Section 733.808(4), Florida Statutes, does not apply.
 - (2) This clarifies that a general "pay all my debts" provision in a will or trust instrument does not waive the statutory exemption from creditor claims for insurance proceeds paid to a trustee.
- C. Suggested 733.808(4): "Unless the trust agreement, declaration of trust or will expressly provides that this subsection does not apply, death benefits payable as provided in subsection (1), subsection (2), or subsection (3), unless paid to a personal representative under the provisions of subsection (3), shall not be deemed to be part of the decedent's estate, and shall not be subject to any obligation to pay the expenses of the administration and obligations of the decedent's estate or for contribution

required from a trust under s. 733.607(2) to any greater extent than if the proceeds were payable directly to the beneficiaries named in the trust.”

- D. Suggested revision to Section 736.05053(1): “A trustee of a trust described in s. 733.707(3) shall pay to the personal representative of a settlor’s estate any amounts that the personal representative certifies in writing to the trustee are required to pay the expenses of the administration and obligations of the settlor’s estate. Payments made by a trustee, unless otherwise provided in the trust instrument, must be charged as expenses of the trust without a contribution from anyone. The interests of all beneficiaries of such a trust are subject to the provisions of this subsection; however, the payments must be made from assets, property, or the proceeds of the assets or property that are included in the settlor’s gross estate for federal estate tax purposes, and may not be made from, ~~other than~~ (a) assets proscribed in s. 733.707(3), and (b) death benefits payable as provided in subsection (1), subsection (2) or subsection (3) of s. 733.808 unless the trust instrument expressly directs that s. 733.808(4) does not apply that are included in the settlor’s gross estate for federal estate tax purposes.”

- VI. RPPTL White Paper on Proposed Revisions to Sections 733.808(4) and 736.05053(1), Florida Statutes

Real Property, Probate and Trust Law Section of The Florida Bar

White Paper on

Proposed Revisions to Section 733.808(4) and Section 736.05053(1), Florida Statutes

I. SUMMARY

The proposed legislation is in response to the court opinion in *Morey v. Everbank*, 93 So. 3d 482 (Fla. 1st DCA 2012) ("*Morey*"). The proposed revisions to Sections 733.808(4) and 736.05053(1), Florida Statutes, are intended to be clarifying in nature and should apply retroactively. Life insurance proceeds are generally exempt from administration expenses and creditor claims under Sections 222.13 and 733.808, Florida Statutes. The proposed revisions clarify the circumstances under which this exemption is waived by the insured: In the case of insurance proceeds paid to a trustee of a revocable trust, the exemption is waived only if the trust instrument expressly provides that Section 733.808(4), Florida Statutes, does not apply.

II. CURRENT SITUATION

A. Statutory Background

Life insurance proceeds are generally exempt from administration expenses and the claims of creditors pursuant to Section 222.13(1), Florida Statutes. However, the exemption is lost if the insurance proceeds are paid to the insured or the insured's estate. Section 222.13(1), Florida Statutes, provides, in relevant part:

. . . whenever the insurance, by designation or otherwise, is payable to the insured or to the insured's estate or to his or her executors, administrators, or assigns, the insurance proceeds shall become a part of the insured's estate for all purposes and shall be administered by the personal representative of the estate of the insured in accordance with the probate laws of the state in like manner as other assets of the insured's estate. (*emphasis added*)

Section 733.808(1), Florida Statutes (titled "Death benefits; disposition of proceeds") provides that death benefits of any kind, including life insurance proceeds, may be made payable to the trustee of an inter vivos trust. (While Section 733.808 applies to many types of death benefits, this discussion and the terminology used in this discussion are focused only on life insurance proceeds.) If the insurance proceeds are paid to a trustee of a trust, the statute provides that the insurance proceeds "shall be held and disposed of in accordance with the terms of the trust . . ." Section 733.808(2) provides for similar rules for insurance proceeds made payable to the trustee named in a last will that is admitted to probate.

Section 733.808(3), Florida Statutes, provides that if no trustee makes a valid claim for the insurance proceeds within 6 months, or if satisfactory evidence is furnished that there is no trustee to receive the proceeds, the insurance company shall pay the insurance proceeds to the "personal representative of the person making the designation, unless otherwise provided by an

agreement” between the insurance company and the insured (i.e., the alternative beneficiary on the designation form or a default beneficiary set forth in the insurance contract).

Section 733.808(4), Florida Statutes, provides that insurance proceeds paid to the trustee or to a default or alternate designee, other than the insured’s estate, are not subject to the claims of creditors or other expenses. Section 733.808(4) provides:

Death benefits payable as provided in subsection (1), subsection (2), or subsection (3), unless paid to a personal representative under the provisions of subsection (3), shall not be deemed to be part of the decedent’s estate, and shall not be subject to any obligation to pay the expenses of the administration and obligations of the decedent’s estate or for contribution required from a trust under s. 733.607(2) to any greater extent than if the proceeds were payable directly to the beneficiaries named in the trust. (emphasis added)

B. Morey

In *Morey*, the insured designated his revocable trust as the beneficiary of a life insurance policy. After the insured’s death, the trustee filed a petition requesting a court determination that life insurance proceeds payable to the trust were exempt from all “death obligations” and, therefore, unavailable to the estate or the estate’s creditors.

The trust instrument in *Morey* directed the trustee to pay to the personal representative such amounts certified by the personal representative to be required to pay the settlor’s “death obligations,” including estate administration expenses, all the settlor’s enforceable debts, and all estate taxes. *Id.* at 484-85 (quoting Article V of the trust instrument).

The court focused on the language in Section 733.808(1), Florida Statutes, which provides that life insurance proceeds paid to a trustee “shall be held and disposed of by the trustee in accordance with the terms of the trust ...” The court concluded that the language of the trust together with the entire structure of the trust evidenced an “apparent intent and practical result” that would be the same if the life insurance proceeds were paid directly to the estate. *Id.* at 487. The court ruled that the settlor waived the statutory exemption in Section 222.13, Florida Statutes. *Id.* at 487.

The holding in *Morey* is contrary to the generally accepted interpretations of Sections 222.13(1) and 733.808(4). The generally accepted interpretations of these sections is that insurance proceeds payable to a trustee of a revocable trust are entitled to the statutory exemption from the claims of the creditors of the insured’s estate, notwithstanding any provision in the trust instrument directing the trustee to use trust assets to pay estate administration expenses or satisfy the claims of the creditors.

There is particular concern that the holding in *Morey* will be interpreted too broadly, and that the case will be construed to erode the long-standing (and until this case unchallenged)

understanding that Section 733.808(4) meant what it said, and that proceeds of insurance payable to a trust established by the insured are exempt from creditors claims.

III. EFFECT OF PROPOSED CHANGES GENERALLY

The effect of the legislative proposal is to clarify that a waiver of the statutory exemption from creditor's claims applicable to insurance proceeds paid to a trust established by the insured must be explicit. The waiver of the exemption cannot be inferred from general "pay all my debts"-type language in a trust instrument.

IV. ANALYSIS OF PROPOSED REVISIONS

The subcommittee suggests that the underlined language be added to Section 733.808(4), Florida Statutes, as follows:

Unless the trust agreement, declaration of trust or will expressly provides that this subsection does not apply, death benefits payable as provided in subsection (1), subsection (2), or subsection (3), unless paid to a personal representative under the provisions of subsection (3), shall not be deemed to be part of the decedent's estate, and shall not be subject to any obligation to pay the expenses of the administration and obligations of the decedent's estate or for contribution required from a trust under s. 733.607(2) to any greater extent than if the proceeds were payable directly to the beneficiaries named in the trust.

The proposed language clarifies that a general "pay all my debts"-type provision in a trust instrument does not waive the statutory exemption from creditor claims for insurance proceeds paid to a trustee. The proposed language prevents an unintentional waiver by providing that the statutory exemption may only be waived with trust language that specifically refers to Section 733.808(4), Florida Statutes.

Further, here are the subcommittee's proposed revisions to Section 736.05053(1):

... The interests of all beneficiaries of such a trust are subject to the provisions of this subsection; however, the payments must be made from assets, property, or the proceeds of assets or property that are included in the settlor's gross estate for federal estate tax purposes, and may not be made from, other than (a) assets proscribed in s. 733.707(3), and (b) death benefits payable as provided in subsection (1), subsection (2) or subsection (3) of s. 733.808, unless the trust instrument expressly directs that s. 733.808(4) does not apply that are included in the settlor's gross estate for federal estate tax purposes.

1 A bill to be entitled "Waiver of Exemption Applicable to Death Benefits".
2 An act modifying s. 733.808 and 736.05053 relating to the waiver of the exemption of creditors'
3 claims to certain death benefits.
4 Section 1. Section 733.808 (4) is amended to read:
5 **733.808 Death benefits; disposition of proceeds.-**
6 (1) Death benefits of any kind, including, but not limited to, proceeds of:
7 (a) An individual life insurance policy;
8 (b) A group life insurance policy;
9 (c) A benefit plan as defined by s. 710.102;
10 (d) An annuity or endowment contract; and
11 (e) A health or accident policy,
12 may be made payable to the trustee under a trust agreement or declaration of trust in existence at the
13 time of the death of the insured, employee, or annuitant or the owner of or participant in the benefit plan.
14 The death benefits shall be held and disposed of by the trustee in accordance with the terms of the trust
15 as they appear in writing on the date of the death of the insured, employee, annuitant, owner, or
16 participant. It shall not be necessary to the validity of the trust agreement or declaration of trust, whether
17 revocable or irrevocable, that it have a trust corpus other than the right of the trustee to receive death
18 benefits.
19 (2) Death benefits of any kind, including, but not limited to, proceeds of:
20 (a) An individual life insurance policy;
21 (b) A group life insurance policy;
22 (c) A benefit plan as defined in s. 710.102;
23 (d) an annuity or endowment contract; and
24 (e) A health or accident policy,
25 may be made payable to the trustee named, or to be named, in a written instrument that is admitted to
26 probate as the last will of the insured, the owner of the policy, the employee, owner, or participant
27 covered by the plan or contract, or any other person, whether or not the will is in existence at the time of
28 designation. Upon the admission of the will to probate, the death benefits shall be paid to the trustee, to

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29 be held, administered, and disposed of in accordance with the terms of the trust or trusts created by the
30 will.

31 (3) In the event no trustee makes proper claim to the proceeds from the insurance company or
32 other obligor within a period of 6 months after the date of the death of the insured, employee, annuitant,
33 owner, or participant, or if satisfactory evidence is furnished to the insurance company or obligor within
34 that period that there is, or will be, no trustee to receive the proceeds, payment shall be made by the
35 insurance company or obligor to the personal representative of the person making the designation, unless
36 otherwise provided by agreement with the insurer or obligor during the lifetime of the insured, employee,
37 annuitant, owner, or participant.

38 (4) Unless the trust agreement, declaration of trust or will expressly provides that this subsection
39 does not apply, death benefits payable as provided in subsection (1), subsection (2), or subsection (3),
40 unless paid to a personal representative under the provisions of subsection (3), shall not be deemed to be
41 part of the decedent's estate, and shall not be subject to any obligation to pay the expenses of the
42 administration and obligations of the decedent's estate or for contribution required from a trust under s.
43 733.607(2) to any greater extent than if the proceeds were payable directly to the beneficiaries named in
44 the trust.

45 (5) The death benefits held in trust may be commingled with any other assets that may properly
46 come into the trust.

47 (6) This section does not affect the validity of any designation of a beneficiary of proceeds
48 previously made that designates as beneficiary the trustee of any trust established under a trust
49 agreement or declaration of trust or by will.

50 Section 2. Section 736.05053(1) is amended to read:

51 **736.05053 Trustee's duty to pay expenses and obligations of settlor's estate.-**

52 (1) A trustee of a trust described in s. 733.707(3) shall pay to the personal representative of a
53 settlor's estate any amounts that the personal representative certifies in writing to the trustee are required
54 to pay the expenses of the administration and obligations of the settlor's estate. Payments made by a
55 trustee, unless otherwise provided in the trust instrument, must be charged as expenses of the trust
56 without a contribution from anyone. The interests of all beneficiaries of such a trust are subject to the

57 provisions of this subsection; however the payments must be made from assets, property, or the
58 proceeds of the assets or property that are included in the settlor's gross estate for federal estate tax
59 purposes, and may not be made from, other than (a) assets proscribed in s. 733.707(3), and (b) death
60 benefits payable as provided in subsection (1), subsection (2) or subsection (3) of s. 733.808, unless the
61 trust instrument expressly directs that s. 733.808(4) does not apply that are included in the settlor's gross
62 estate for federal estate tax purposes.

63 (2) Unless a settlor provides by will, or designates in a trust described in s. 733.707(3) funds or
64 property passing under the trust to be used as designated, the expenses of the administration and
65 obligations or the settlor's estate must be paid from the trust in the following order:

66 (a) Property of the residue of the trust remaining after all distributions that are to be satisfied by
67 reference to a specific property or type of property, fund, or sum.

68 (b) Property that is not to be distributed from specified or identified property or a specified or
69 identified item of property.

70 (c) Property that is to be distributed from specified or identified property or a specified or
71 identified item of property.

72 (3) Trust distributions that are to be satisfied from specified or identified property must be
73 classed as distributions to be satisfied from the general assets of the trust and not otherwise disposed of
74 in the trust instrument on the failure or insufficiency of funds or property from which payment should be
75 made, to the extent of the insufficiency. Trust distributions given for valuable consideration abate with
76 other distributions of the same class only to the extent of the excess over the value of the consideration
77 until all others of the same class are exhausted. Except as provided in this section, trust distributions
78 abate equally and ratably and without preference or priority between real and personal property. When a
79 specified or identified item of property that has been designated for distribution in the trust instrument or
80 that is charged with a distribution is sold or taken by the trustee, other beneficiaries shall contribute
81 according to their respective interests to the beneficiary whose property has been sold or take. Before
82 distribution, the trustee shall determine the amounts of the respective contributions and such amounts
83 must be paid or withheld before distribution is made.

84 (4) The trustee shall pay the expenses of trust administration, including compensation of trustees
85 and attorneys of the trustees, before and in preference to the expenses of the administration and
86 obligations of the settlor's estate.

87 (5) Nonresiduary trust dispositions shall abate pro rata with nonresiduary devises pursuant to the
88 priorities specified in this section and s. 733.805, determined as if the beneficiaries of the will and trust,
89 other than the estate or trust itself, were taking under a common instrument.

90 Section 3. This act is intended to clarify existing law, is remedial in nature, and has retroactive
91 application without regard to the date of the settlor's or decedent's death.

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