

Special Needs Trust Committee of the Elder Law Section of The Florida Bar

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Co-Chairs

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November 9, 2007

Hon. Mary Ann Sloan

Regional Chief Counsel

Social Security Administration

Atlanta Federal Center

61 Forsyth Street, S.W., Suite 20T45

Atlanta, GA 30303

Re: Proposed changes to Atlanta Regional POMS, SI01120 – Trust Property

Dear Ms. Sloan:

We write as Co-Chairs of the Special Needs Trust Committee of the Elder Law Section of the Florida Bar to propose that the Atlanta Regional POMS on trust property be revised because of recent changes in Florida statutes. A copy of the proposed change and other supporting materials are attached for your consideration.

Disabled individuals may be the beneficiaries of trusts created for their benefit under Section 1917(d)(4)(A) of the Social Security Act, 42 USC 1396p(d)(4)(A). By the terms of the statute, the person or entity “establishing” the trust must be “a parent, grandparent, legal guardian, or the court.” However, “SSA considers the grantor to be the individual who provides the trust principal or corpus. The grantor must be the owner or have legal right to the property or otherwise be qualified to transfer it.”¹

If the trust is irrevocable by its terms and under State law, and otherwise meets SSI criteria, the trust is not a resource for SSI purposes. If the trust, however, is revocable by its terms, or by operation of state law, the trust is a countable resource under

¹ Kenneth Brown, Team Supervisor, Social Security Administration, Baltimore Headquarters, “Trusts and the Supplemental Security Income Program,” a paper presented at the Stetson University College of Law annual program on Special Needs Trusts, October 19, 2007, page 12.

SSI rules. Even a trust that states, “this trust is irrevocable” may be revocable if state law follows the traditional Doctrine of Worthier Title.

“In the past, SSA determined that most States followed the general principle of trust law, that even though no power of revocation is reserved, a settlor may revoke a trust where he is the sole beneficiary, with or without the consent of the trust. Generally, the irrevocability of a grantor trust will be recognized if there is named a “residual beneficiary” in the trust document who would, for example, receive the principal upon the grantor’s death or the occurrence of some specific event. As a general rule in trust law, “heirs,” “Heirs at law,” “next of kin,” survivors,” and similar terms were not residual beneficiaries. (See RESTATEMENT (SECOND) OF TRUSTS, §339. The Restatement (Third) of Trusts was published in April 2003, replacing the Restatement (Second). The new Restatement draws upon court decisions and statutes to provide a more contemporary treatment of trust law. According to the new Restatement, the legal community now assumes, absent evidence to the contrary, that most grantors intended to create a remainder interest when they name heirs, next of kin, and the like to receive the remaining assets in the trust upon the grantor’s death. Therefore, they are considered to be residual beneficiaries and the trust is considered irrevocable. [BUT] SSA still looks to State law as expressed by statute and court decisions to determine revocability.”²

The Social Security Administration publishes the Program Operations Manual System, the POMS, as a guide to its staff in administering the various programs under the Social Security Act. In addition to the “national” POMS, there are Regional POMS that discuss matters of state law, such as whether a particular state follows the Doctrine of Worthier Title which would require the naming of specific residuary beneficiaries to ensure the irrevocability of the trust.

In 2002, the Atlanta Regional Office issued such a regional POMS describing the law in each of the states in its jurisdiction, including the State of Florida.³

In 2005 a Committee, composed of members from the Florida Bar’s Elder Law Section and the Real Property, Probate and Trust Law Section and others, began an exhaustive review of Florida trust law and the Uniform Trust Code under consideration or otherwise already adopted by other states. As part of its work, the Committee had in hand and considered the Atlanta Regional POMS on Trust Property. The committee proposed, and the Florida Legislature included in its revisions to Florida trust law, that

² Brown, page 12-13.

³ POMS SI ATL01120.201 - Trust Property - 04/16/2002

the Doctrine of Worthier Title be abolished both as a rule of law and a rule of construction.⁴

The new Florida Trust Code became effective on July 1, 2007.

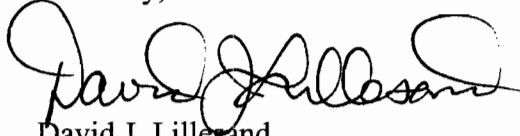
We are enclosing for your review the following documents:

- SI ATL01120.201 - Trust Property - 04/16/2002 (the current regional POMS)
- Florida Statutes, §689.175 (2007) and the relevant sections of Chapter 2006-217, Laws of Florida, which adopted it.
- Proposed changes to the Atlanta Regional POMS on Trusts.

We encourage you to re-examine the Atlanta Regional POMS on Trust Property and to revise it based on the now effective statutory changes in the new Florida Trust Code, including the newly-created section abolishing the Doctrine of Worthier Title.

Please advise if you need additional information or clarification. We will be happy to assist in any way.

Sincerely,



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⁴ Section 23, Chapter 2006-217, Laws of Florida, codified as Florida Statutes, §689.175.

**New 2007 Florida Statute Abolishing
The Doctrine of Worthier Title**

The 2007 Florida Statutes

REAL AND PERSONAL PROPERTY

CONVEYANCES OF LAND AND DECLARATIONS OF TRUST

689.175 Worthier title doctrine abolished.--The doctrine of worthier title is abolished as a rule of law and as a rule of construction. Language in a governing instrument describing the beneficiaries of a disposition as the transferor's "heirs," "heirs at law," "next of kin," "distributees," "relatives," or "family," or language of similar import, does not create or presumptively create a reversionary interest in the transferor.

History.--s. 23, ch. 2006-217.

CHAPTER 2006-217

Committee Substitute for Senate Bill No. 1170

CODING: Words stricken are deletions; words underlined are additions.

An act relating to the Florida Trust Code; creating parts I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, and XIII of chapter 736, F.S.; providing a short title; providing general provisions and definitions; providing for judicial proceedings; providing for representations; providing for creation, validity, modification, and termination of trusts; providing for creditors' claims; providing for spendthrift, discretionary, and revocable trusts; providing for the office of trustee; providing for powers and duties of the trustee; providing for trust investments; providing for liability of trustee and rights of persons dealing with trustee; providing for rules of construction; providing for charitable trusts; providing miscellaneous provisions; creating s. 518.117, F.S.; authorizing investment of certain fiduciary funds by certain fiduciaries; amending s. 660.25, F.S.; providing a definition of the term "investment instrument"; amending s. 660.417, F.S.; revising provisions relating to investment of fiduciary funds in investment instruments by certain banks or trust companies; **creating s. 689.175, F.S.; abolishing the worthier title doctrine**; providing construction of certain instrument language; amending s. 731.103, F.S.; correcting a cross-reference; providing construction relating to establishment of death by certain evidence under certain circumstances; creating s. 731.1035, F.S.; providing for application of rules of evidence in civil actions to certain proceedings; amending s. 731.201, F.S.; revising definitions; conforming terms and correcting cross-references; amending s. 731.303, F.S.; specifying nonapplication of certain orders relating to powers of revocation and powers of appointment; revising provisions relating to representation by a holder of a power of appointment; amending s. 732.513, F.S.; deleting a ground protecting a devise's validity;

amending s. 732.603, F.S.; revising provisions relating to antilapse, deceased devisees, and class gifts; amending s. 744.331, F.S.; revising provisions relating to orders determining incapacity; amending s. 744.441, F.S.; revising authority of certain guardians to prosecute or defend claims or proceedings for certain purposes; specifying duties of a court; creating s. 744.462, F.S.; providing requirements for judicial determinations relating to alternatives to guardianship; providing duties of a court; amending ss. 497.458, 607.0802, 617.0802, 660.46, 660.418, 689.071, 689.075, 709.08, 721.08, 721.53, 732.2075, 732.604, 732.611, 733.212, 733.602, 733.805, 733.817, 738.104, 738.1041, 738.202, 739.102, and 744.361, F.S., to conform terms and correct cross-references; repealing ss. 737.101, 737.105, 737.106, 737.111, 737.115, and 737.116, constituting part I of ch. 737, F.S., relating to trust registration; repealing ss. 737.201, 737.202, 737.203, 737.2035, 737.204, 737.2041, 737.205, 737.206, 737.2065, 737.207, 737.208, and 737.209, constituting part II of ch. 737, F.S., relating to jurisdiction of courts; repealing ss. 737.301, 737.302, 737.303, 737.3035, 737.304, 737.305, 737.3053, 737.3054, 737.3055, 737.306, 737.3061, 737.307, 737.308, and 737.309, constituting part III of ch. 737, F.S., relating to duties and liabilities of trustees; repealing ss. 737.401, 737.402, 737.4025, 737.403, 737.4031, 737.4032, 737.4033, 737.404, 737.405, and 737.406, constituting part IV of ch. 737, F.S., relating to powers of trustees; repealing ss. 737.501, 737.502, 737.503, 737.504, 737.505, 737.506, 737.507, 737.508, 737.509, 737.510, 737.511, and 737.512, constituting part V of ch. 737, F.S., relating to charitable trusts; repealing ss. 737.6035, 737.621, 737.622, 737.623, 737.624, 737.625, 737.626, and 737.627, consisting of part VI of ch. 737, F.S., relating to rules of construction of trust administration; providing an effective date. Be It Enacted by the Legislature of the State of Florida: Section 1. Part I of chapter 736, Florida Statutes, consisting of sections 736.0101, 736.0102, 736.0103, 736.0104, 736.0105, 736.0106, 736.0107, 736.0108, 736.0109, 736.0110, 736.0111, and 736.0112, is created to read:

PART I

GENERAL PROVISIONS AND DEFINITIONS

736.0101 Short title.—This chapter may be cited as the “Florida Trust Code” and for purposes of this chapter is referred to as the “code.”

736.0102 Scope.—This code applies to express trusts, charitable or noncharitable, and trusts created pursuant to a law, judgment, or decree that requires the trust to be administered in the manner of an express trust. This code does not apply to constructive or resulting trusts; conservatorships; custodial arrangements pursuant to the Florida Uniform Transfers to Minors Act; business trusts providing for certificates to be issued to beneficiaries; common trust funds; land trusts under s. 689.05; trusts created by the form of the account or by the deposit agreement at a financial institution; voting trusts; security arrangements; liquidation trusts; trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind; and any arrangement under which a person is nominee or escrowee for another....

PART XIII
MISCELLANEOUS

...

Section 23. Section 689.175, Florida Statutes, is created to read:

689.175 Worthier title doctrine abolished.—The doctrine of worthier title is abolished as a rule of law and as a rule of construction. Language in a governing instrument describing the beneficiaries of a disposition as the transferor’s “heirs,” “heirs at law,” “next of kin,” “distributees,” “relatives,” or “family,” or language of similar import, does not create or presumptively create a reversionary interest in the transferor.

Current Atlanta Regional POMS on Trusts

POMS SIATL 01120 – Trust Property

SIATL01120.201 Trust Property

See [SI 01120.201](#)

A. BACKGROUND

Trusts involving SSI recipients/deemors must be reviewed to determine if they are a countable resource.

Several factors must be evaluated, including irrevocability of the trust, and the identity of the grantor and the beneficiary.

Even though the trust document has a provision stating that it is irrevocable, the trust might still be revocable under state law depending on the beneficiary designations.

The beneficiary and the grantor may be the same person in some instances. The actions of a representative payee, legal guardian, a parent, or any other individual legally empowered to act on behalf of the recipient with respect to his/her funds, in establishing a trust with these funds, are the actions of an agent for the recipient. The actions of the agent are equivalent to the actions of the SSI recipient. Thus, in such cases, it may be said that the SSI recipient has established the trust and therefore is both the trust grantor and beneficiary.

B. SOLE BENEFICIARY TRUST

Laws for each state in the Atlanta Region follow the general principle of trust law that if a grantor is also the sole beneficiary of a trust, the trust is revocable regardless of language in the trust document to the contrary.

However, if there is a residual beneficiary properly designated in the trust document, then the trust is irrevocable by its terms and is not a resource for SSI purposes.

C. RESIDUAL BENEFICIARY

A residual beneficiary, while not a current beneficiary of a trust, is named to receive the benefit of the trust after a specific event occurs, e.g., the death of the primary beneficiary. The trust would no longer be a grantor trust if there is a properly named residual beneficiary and may or may not be revocable according to the language used to name the residual beneficiary.

1. State Laws

State laws differ with respect to the language that must be used to name a residual beneficiary.

2. General

For Alabama, Florida, Georgia, South Carolina and Kentucky, the trust must specify a particular person or entity as the residual beneficiary. In these states, if the trust states that after death the trust will go to a specifically named person or entity, or if it states that the trust is to go “to my children, or issue, or descendants”, this is specific enough to identify a person and the trust is irrevocable.

If, on the other hand, the trust language says that after death, the trust will go “to my estate” or “to the heirs” of the primary beneficiary (or some other non-specific general term), this is not sufficient. This trust would be revocable by the grantor because this wording is not specific enough to identify persons who, upon his death, may become his heirs.

For Mississippi and Tennessee, the above general principle is not followed.

3. Tennessee

For Tennessee, as long as the trust names any residual beneficiary, even an unborn child, it is not a sole beneficiary trust and, therefore, may not be revoked by the grantor.

4. Mississippi

For Mississippi, as long as the trust names a residual beneficiary, other than an unborn child, it is not a sole beneficiary trust and, therefore, can not be revoked by the grantor. Where the residual beneficiary is an unborn child or children, and the grantor has no children, examine the file for evidence that the grantor is unable to have children. If such evidence exists in the file, then the trust would be revocable by the grantor and is a resource. Do not question the grantor or seek additional evidence outside of the file concerning their ability to procreate. If no evidence exists in file, the trust is irrevocable.

5. North Carolina

In North Carolina, a specific person or entity may be designated. In addition, wording such as “to my estate” or “to the heirs” (or some other general non-specific term) is sufficient to name a residual beneficiary.

Refer any questionable trust document to the Office of General Counsel through the Assistance Programs Section in the Regional Office.

**Proposed Changes to
Atlanta Regional POMS on Trusts**

Proposed Changes to Atlanta Regional POMS on Trusts:

SIATL 01120.201 Trust Property

Paragraph 2 should be amended by deleting the word, “Florida” in the first sentence, and adding it in the last, as follows:

2. General

For Alabama, ~~Florida~~, Georgia, South Carolina and Kentucky, the trust must specify a particular person or entity as the residual beneficiary. In these states, if the trust states that after death the trust will go to a specifically named person or entity, or if it states that the trust is to go “to my children, or issue, or descendants”, this is specific enough to identify a person and the trust is irrevocable.

If, on the other hand, the trust language says that after death, the trust will go “to my estate” or “to the heirs” of the primary beneficiary (or some other non-specific general term), this is not sufficient. This trust would be revocable by the grantor because this wording is not specific enough to identify persons who, upon his death, may become his heirs.

For ~~Florida~~, Mississippi and Tennessee, the above general principle is not followed.

A new Paragraph 6 should be added as follows:

6. Florida

In Florida, a specific person or entity may be designated. In addition, wording such as “to my heirs,” or “to my heirs at law,” “to my next of kin,” “to my distributees,” or “to my relatives,” or “to my family” (or language of similar import) is sufficient to name a residual beneficiary.



SOCIAL SECURITY
Office of the General Counsel
Region IV

December 19, 2007

Ms. Emma S. Hemness
Chair, Elder Law Section of the Florida Bar
309 N. Parsons Avenue
Brandon, Florida 33510-4515

Re: Proposed Changes to Atlanta Regional POMS

Dear Ms. Hemness:

We received your proposal to modify the Atlanta Regional POMS dealing with trust property due to recent changes in Florida law. Your request and your proposed changes to the Atlanta Regional POMS are under consideration. Our office contact is Simone D. Pereira, Assistant Regional Counsel. She can be reached at (404) 562-1092 if you have any questions.

Thank you for bringing this matter to our attention.

Sincerely,

Mary Ann Sloan
Regional Chief Counsel

cc:

David J. Lillesand, Esq.
Co-Chair, Special Needs Trust Committee

Alice Reiter Feld
Co-Chair, Special Needs Trust Committee

Mr. Wilson
Ms. Sharfman
Ms. Pereira
Ms. Schindler