Dennis R. Hower

Florida Supplement To Accompany

WILLS, TRUSTS, AND ESTATE ADMINISTRATION FOR THE PARALEGAL

Fifth Edition

Prepared by

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To Mikey and My Parents
I would like to thank the faculty, staff, and students of FMU, Lakeland campus, Betty Martinez and the Learning Resource Staff, and Pam Jefferies for encouraging me to take on this endeavor.

I especially want to thank Darlene Costakis and Anthony Mauro for all of their help in bringing this project together. And, Mikey, too—if it was not for his “computer geekness” I would have gone mad!
While writing, I was torn between inserting examples of forms or not. I chose not to. Look in the statutes, form books, and at files in the Clerk’s office or in the office where you work for examples of how the different pleadings should look and read. Utilize your computer to check out legal, state, and educational websites.

Make sure you are aware of any local rules of court that may affect the papers you file. Remember, a statute or a rule will often explain what information is needed in papers, such as a petition or a will.
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In this supplement, a page reference follows each head—(Hower 000). This page reference correlates with Dennis Hower’s textbook, Wills, Trusts, and Estate Administration for the Paralegal, Fifth Edition.
Chapter 1 of the textbook is applicable to Florida law. Florida has adopted and follows the Uniform Probate Code (UPC). Florida Statutes relating to the Florida Probate Code (FPC) are Chapters 731–735. The Florida Probate Code encompasses:

- Chapter 731, which includes information about Wills and Probate Estates in general.
- Chapter 732, which deals with Intestate Succession and Wills. Topics that are covered by this chapter include Intestate Succession, Elective Share of Surviving Spouse, Pretermitted Spouse and Children, Exempt Property and Allowances, Rules of Construction, General Provisions, Production of Wills, and Anatomical Gifts.
- Chapter 733, which covers the Administration of Estates and goes step-by-step through the proceedings, including Commencing Administration, Priority to Administer and Qualifications of Personal Representative, Appointment of Personal Representative and Bonds, Curators, Successor of Personal Representative, Removal of Personal Representative, Duties and Powers of the Personal Representative, Creditors’ Claims, Special Provisions for Distribution, and Closing Estates.
- Chapter 734, which deals with Foreign Personal Representatives and Ancillary Administration.
- Chapter 735, which discusses Family Administration and Small Estates, including Summary Administration and the Disposition of Personal Property without Administration.
The explanation in Chapter 2 regarding real and personal property follows Florida law.

PROPERTY: TERMINOLOGY AND CLASSIFICATION (HOWER 25)

FORMS OF PROPERTY OWNERSHIP (HOWER 32)

Forms of Concurrent Ownership—Ownership by Two or More Persons (Hower 34)

Joint Tenancy (Hower 34)

Creation of a Joint Tenancy (Hower 41)
According to Florida law, express language in the instrument of conveyance is required in order to create a joint tenancy with right of survivorship. Otherwise, a tenancy in common is created. Fla. Stat. § 689.15.

Tenancy by the Entirety (Hower 50)
A tenancy by the entirety, one created by conveying property to a husband and wife, is considered to be a tenancy with right of survivorship in Florida. Fla. Stat. § 689.15.

ESTATES IN REAL PROPERTY (HOWER 56)

Freehold Estates (Hower 57)

Fee Simple Estate or Fee Simple Absolute (Hower 57)
As long as words of limitation are not used in conveying or granting real property, a fee simple estate is created. Fla. Stat. § 689.10.
Life Estate (Hower 60)

Future Interests—Reversion and Remainder (Hower 61)
Reverter and forfeiture provisions of unlimited duration in a deed of conveyance are considered to be a restraint on alienation and against public policy. Fla. Stat. § 689.18(1).
An exception to the above rule is a conveyance of real property made to any governmental, educational, literary, scientific, religious, public utility or transportation, or charitable or nonprofit corporation or association. If a conveyance of real property is made to such an organization, a reverter or forfeiture provision will be upheld, regardless of the duration. Fla. Stat. § 689.18(5).

Dower and Curtesy (Hower 64)
Florida has abolished dower and curtesy. Fla. Stat. § 732.111.

Spouse’s Right to Election or Elective Forced Share (Hower 65)
The deceased spouse must have been domiciled in Florida at the time of death in order for the surviving spouse to be able to receive an elective share of the estate. Fla. Stat. § 732.201. The surviving spouse may elect to take an elective share. A surviving spouse cannot take both an elective share and under the will. A surviving spouse has six (6) months from the date of the first publication of notice of administration or two (2) years after the date of the decedent’s death to file for an elective share of the estate. Fla. Stat. § 732.2135.
The elective share is an amount equal to 30% of the net probate estate. Fla. Stat. § 732.2065. See generally Fla. Stat. § 732.2035, which lists the property included in the elective share estate, and Fla. Stat. § 732.2095, which explains how property of the elective share is valued. See Chapter 4 for further information.
Florida is not a community property state.
THE PARTICIPANTS (HOWER 70)

The Personal Representative (Hower 70)

Appropriate Terminology (Hower 70)

In both the Florida Statutes and the Florida Probate Rules, the individual who administers the estate of a decedent is called the personal representative. The personal representative is considered a fiduciary as defined in Fla. Stat. § 737.302. The person who is appointed as personal representative of an estate must be sui juris and a resident of Florida at the time of death of the person whose estate is going to be administered. According to Florida law, not everyone is qualified to be a personal representative. An individual is not qualified to be a personal representative if he or she has been adjudicated a felon, incompetent, or under the age of 18 years. Fla. Stat. § 733.303.

The Role of the Personal Representative (Hower 71)

The personal representative’s responsibility is to settle and distribute the decedent’s estate as stated in the will and according to Florida law. Florida has adopted the UPC; Fla. Stat. § 733.612 lists the various transactions that a personal representative is authorized to carry out.

Letters of Administration (page 73) are issued by the court to the personal representative to act on behalf of the estate. Fla. Stat. § 733.401 and Fla. Prob. R. 5.235 (2001).

The Attorney (Hower 75)

All personal representatives shall be represented by an attorney certified to practice law in Florida. There are two exceptions to this rule: 1) if the personal representative is the sole interested individual, or 2) if the personal representative is a Florida attorney. Fla. Prob. R. 5.030 (2001).

The Paralegal or Legal Assistant (Hower 77)

In Florida, the lawyer is ultimately responsible for the conduct and actions of the “nonlawyer assistant.” Florida Rules of Professional Conduct, Rule 4-5.3.
The Probate Court (Hover 78)

Probate proceedings are held in the Circuit Civil division of the Florida state courts.

The Clerk or Court Administrator (Hover 80)

The keeper of all court files, documents, and records is called the Clerk of the Court in Florida.
DEATH WITH A WILL—TESTACY (HOWER 90)

Terminology Related to Wills (Hower 90)

Orthodox or Traditional Terminology (Hower 91)

UPC Terminology (Hower 91)
Since Florida has adopted the UPC, most of the terms used in the Florida Probate Code adhere to the UPC terminology.

Holographic Will (Hower 91)
In Florida, for a will to be considered valid, it must adhere to Fla. Stat. § 732.502, which states that all wills must be in writing, signed by the testator at the end, with two witnesses in the presence of each other, and notarized. Holographic wills are not recognized in Florida. The exception to the rule is if a will is executed by an individual in accordance with the law of the state or country from which he or she originated and is in accordance with Fla. Stat. § 732.502(1), which states that a will must be signed not only by the testator or his or her agent, but also two witnesses, for the will to be recognized in Florida.

Nuncupative (Oral) Will (Hower 92)
Florida does not recognize oral wills. All wills must adhere to Fla. Stat. § 732.502 in order to be considered valid.

Living Will (Hower 97)
Florida recognizes Living Wills. See Chapter 7, Final Draft and Execution of a Valid Will in the textbook.

Types of Dispositions—Gifts Made in a Will (Hower 97)

Ademption, Lapses, and Abatement (Hower 99)

Ademption (Hower 99)
Florida, like most states, follows the common law rule of ademption, although it must be noted that the state has several exceptions to the rule. Fla. Stat. § 732.605 explains what to do if the testator in-
tended a specific devise of certain securities to go to a specific devisee rather than the equivalent value:

Fla. Stat. § 732.605 Change in securities; accessions; nonademptions.

(1) If the testator intended a specific devise of certain securities rather than their equivalent value, the specific devisee is entitled to:

(a) As much of the devised securities as is a part of the estate at the time of the testator’s death.
(b) Any additional or other securities of the same entity owned by the testator because of action initiated by the entity, excluding any acquired by exercise of purchase options.
(c) Securities of another entity owned by the testator as a result of a merger, consolidation, reorganization, or other similar action initiated by the entity.

(2) Distributions before death of a specifically devised security not provided for in subsection (1) are not part of the specific devise.

If, for some reason, a guardian of a specific devise must sell the property to care for the testator, or if the property is condemned or destroyed by fire, the specific devisee has a right to a general pecuniary (monetary) devise equal to the sale or award or proceeds. The exception to this rule is if the testator had some type of disability, but the court has adjudged that the disability has ceased, and the testator survives such an adjudication by one year. Fla. Stat. § 732.606(1).

If there is any remaining specifically devised property, the specific devisee has a right to the remainder, plus any purchase price owed by the testator at the time of death. A condemnation award results for the taking of the property unpaid at death, insurance proceeds for fire or casualty insurance, or property that was owned by the testator at the time of death as a result of foreclosure. Fla. Stat. § 732.606(2).

Lapses (Hover 100)
Florida has an antilapse statute that explains if a devisee dies before the testator, the devisee’s descendants will take per stirpes in the devisee’s place. If the testator does not want a descendant to take under the will, the testator must state his or her intentions specifically. In that way, the descendant will be treated as if he or she predeceased the testator. Fla. Stat. § 732.603.

Abatement (Hover 101)
If the estate has insufficient assets to pay debts and taxes owed, or no provisions were made within the will, property from the estate will be applied to satisfy the debts of the decedent. Property will be taken from the estate in the following order:

1. Property not disposed of by the will.
2. Property devised to the residuary devisee or devisees.
3. Property not specifically or demonstratively devised.
4. Property specifically or demonstratively devised.

Fla. Stat. § 733.805(1).

DEATH WITHOUT A WILL—INTESTACY (HOWER 106)

Terminology Related to Intestacy

The textbook defines the terms associated with intestacy.
**Intestate Succession Laws (Hower 109)**

**Per Stirpes Distribution (Hower 111)**

In Florida, it is assumed that inheritance shall be per stirpes. Fla. Stat. § 732.104. Per stirpes inheritance is assumed whether it is through a will or by intestacy. If a testator wants beneficiaries to share on a per capita basis, it must be specifically stated in the will.

**General Rules of Distribution under State Intestate Succession Statutes (Hower 116)**

Florida Statutes §§ 732.102 and 732.103 lay out the order in which the spouse and heirs of an *intestate* estate will share.

The share that the surviving spouse will take:

1. If no lineal descendants survive, the spouse will take the entire estate.
2. If the surviving lineal descendants are the children of both the decedent and the surviving spouse, the spouse will receive the first $20,000 of the *intestate estate*, and one-half of the balance of the *intestate estate*.
3. If those that survive are the spouse and lineal descendants of the decedent only, the surviving spouse will receive one-half of the estate.

The share that other heirs of an *Intestate Estate* Will receive if there is no surviving spouse:

1. Lineal descendants of the decedent will share.
2. If no lineal descendants, then to ascendants (mother and father, equally), or to those that survive them.
3. To the decedent’s brothers and sisters or their descendants if they are deceased and no parent survives.
4. If none of the above survive the decedent, then one-half of the estate will go to the kindred of the decedent’s paternal kindred and the other one-half to the maternal kindred in the following order:
   a. To the grandfather and grandmother equally, or to those that survive them.
   b. If no surviving grandparents, then to aunts, uncles, and the descendants of the deceased aunts and uncles.
   c. If none of the above descendants survive, then to the kindred of the last deceased spouse.
   d. If none of the above survive the intestate, the estate will escheat to the state.

**Rights of a Surviving Spouse (Hower 117)**

**Surviving Spouse’s Elective (Forced) Share (Hower 119)**

See Chapter 2 of this supplement for a brief discussion on this topic. The Elective Share of the Surviving Spouse Statutes in Florida are as follows:

- Fla. Stat. § 732.201 Right to Elective Share
- Fla. Stat. § 732.2025 Definitions used within the statute
- Fla. Stat. § 732.2035 Property that Enters Into the Elective Estate
- Fla. Stat. § 732.2045 Exclusions and Overlapping Application
- Fla. Stat. § 732.2055 Valuation of the Elective Estate
• Fla. Stat. § 732.2065 Amount of the Elective Share
• Fla. Stat. § 732.2075 Sources from which the Elective Share is Payable and Abatement
• Fla. Stat. § 732.2085 Liability of Direct Recipients and Beneficiaries
• Fla. Stat. § 732.2095 Valuation of Property Used to Satisfy Elective Share
• Fla. Stat. § 732.2105 Effect of Election on Other Interests
• Fla. Stat. § 732.2115 Protection of Payors and Other Third Parties
• Fla. Stat. § 732.2125 Right of Election—Who Can Exercise

Rights of Children (Issue) (Hover 125)

**Adopted Children (Hover 126)**
An adopted child is considered to be the natural child or a lineal descendant of the adoptive parent. The adoptive child is considered natural kindred to all of the adoptive parent’s family. An adopted child is not considered to be a lineal descendant of their natural parents. Fla. Stat. § 732.108(1).

**Nonmarital Children (Hover 127)**
The term for nonmarital children in Florida is Children Out-of-Wedlock. In order for a child out-of-wedlock to inherit from the estate of the natural father:

1. The natural parents must have participated in a marriage ceremony, whether the child out-of-wedlock had been born or not. The marriage between the natural parents is still looked upon with a favorable eye even if the marriage is void; or
2. Paternity of the natural father is established by the court before or after the father’s death; or
3. The natural father acknowledges in writing his paternity.


It should be noted that adopted individuals and children born out-of-wedlock are considered when determining those in line for purposes of intestate succession. Fla. Stat. § 732.608.

**Pretermitted (Omitted) and Posthumous Children (Hover 128)**
Florida provides for pretermitted children. If the child has not received an advancement, then the child shall receive a share of the testator’s estate equal to what the omitted child would have received should the testator have died without a will. If the child was intentionally omitted from the will or if the parent of the pretermitted child was given a substantial amount of the estate, the pretermitted child will not be able to take. Fla. Stat. § 732.301.

**Additional Rights or Protection for a Surviving Spouse and Children (Hover 129)**

**Homestead Exemption (Hover 129)**
Fla. Const. art. X, § 4 is the law followed in regards to homestead and homestead exemptions.

A homestead in Florida is considered to be the residence of the owner or the owner’s family. It cannot be devised by the owner, if the owner is survived by a spouse or minor children, unless it is devised to the surviving spouse if there are no minor children. Fla. Stat. § 732.4015. The homestead has been determined to be 160 acres of rural land or one-half acre of land if it is within the limits of a municipality and personal property valuing $1,000.00. Fla. Const. art. X, § 4.
In order to determine whether the homestead property belonged to the decedent, a petition must be filed with the appropriate court. The contents of the petition must include: a) the date of the decedent’s death; b) where the decedent was domiciled at the time of death; c) the name of the decedent’s surviving spouse and the names and birth dates of the decedent’s surviving lineal descendants; d) a legal description of the land which the decedent lived on; and e) any supporting facts. Fla. Prob. R. 5.405 (2001).

The court will issue an order on the petition, which shall describe the real property that is supposed to be the homestead with a determination whether it is in fact the homestead of the decedent. If the court makes a determination that some or all of the property is the homestead, the court shall then identify who is entitled to the homestead property and define the share of each. Id. If the decedent is survived by a spouse and lineal descendants, the surviving spouse takes a life estate in the homestead, with a vested remainder going to the lineal descendants in being at the time of the decedent’s death. Fla. Stat. § 732.401.

Under Florida law, in addition to the homestead, other exemptions exist: exempt property and the family allowance. This is property of the decedent that the surviving spouse and children have a right to share.

**Exempt Property (Hower 131)**

*Exempt property* is property of a decedent who was domiciled in Florida at the time of death that the surviving spouse and children are entitled to share. Exempt property includes tangible personal property up to $10,000, automobiles, and Florida Prepaid College Program contracts. Fla. Stat. § 732.402. A proceeding similar to the one to determine homestead property is also necessary. Fla. Prob. R. 5.406 (2001).

**Family or “Widow’s” Allowance (Hower 131)**

*A family allowance* is something in addition to homestead and exempt property. Its purpose is to assist the surviving spouse and the minor children of the decedent while assets are tied up in probate. The *family allowance* limit is $6,000. Fla. Stat. § 732.403.
REQUIREMENTS FOR THE CREATION OF A VALID WILL (HOWER 142)

Capacity of the Testator (Hower 143)

Any individual who is of sound mind and 18 years or older may make a will. Fla. Stat. § 732.50.
Query: If an individual under the age of 18 is married and has a child, can that person write a will(s) to provide for the child?

Lucid Interval (Exclusive to Florida not Found in Hower)

The court looks at the following criteria to determine whether the testator had testamentary capacity at the time that the will was executed, regardless of the testator being deemed legally incompetent:

1. Whether the testator mentally understood the nature and extent of his property to be disposed of.
2. Whether the testator understood what it meant to have a will.
3. If the testator had been certified legally incompetent, whether the testator had a lucid moment when the will was executed. This can be done by a preponderance of the evidence.

Formal Requirements of a Will (Hower 145)

In order for a will to be valid in Florida, it must not only be in writing, but adhere to specific formalities regarding the testator’s signature, and the witnesses and their signatures. Fla. Stat. § 732.501. Basically, the testator must sign at the end of the will and the testator and witnesses must sign the will in the presence of each other. The law provides for the event that a testator may not sign the will under his or her own power. If this is the case, under the direction and in the presence of the testator, an individual may sign the will for the testator. Id.
Holographic Will (Hower 91)
Previously discussed in Chapter 4.

Nuncupative Will (Hower 92)
Previously discussed in Chapter 4.

**Signature of the Testator (Hower 147)**
The signature of the testator or the person he or she designates must be at the end of the will. Fla. Stat. § 732.502. Even if the testator had the intent to sign the will but did not by mistake, the will is invalid. A will must be executed with all of the statutory formalities in order to assure the authenticity of the will and to avoid fraud. *Dalk v. Allen*, 774 So.2d 787 (Fla. 5th DCA 2000).

**Signatures of Witnesses (Hower 150)**
Two attesting witnesses are required in Florida. Fla. Stat. § 732.502. According to the statute, no age limit is stated. It should be assumed that the same criteria used to determine capacity for the testator should be used for the witnesses: One must be of sound mind and 18 years of age.

If a witness signed the will prior to the testator, but said witness saw the testator sign the will, and each of the witnesses and the testator signed the will in each other’s presence, the order of signing makes no difference. *Bain v. Hill*, 639 So.2d 178 (Fla. 3rd DCA 1994).

**Interested Persons (Interested Witnesses Hower 151)**
An interested person can be the personal representative and/or a beneficiary in the estate. An interested person may have a stake in the outcome in any proceeding affecting the estate. An heir at law or a devisee who has received his or her distribution is not considered an interested person. Fla. Stat. § 731.201.

If an individual who is designated an interested person unlawfully and intentionally kills or helps to kill the testator, he or she will not share in the estate. A conviction in any degree of murder will affect the rights of the killer. The killer will be treated as if he or she had predeceased the decedent. Fla. Stat. § 732.802.

**Publication and Self-Proofing of a Will or a Codicil (Exclusive to Florida; not Found in Hower)**
It is not necessary for the testator to “announce” to the witnesses that they are about to sign the will or a codicil to the will.

Self-proved wills are acceptable in Florida. The witnesses are required to attest to and sign a self-proving clause that is part of the will or codicil. It is signed in front of a notary public. Fla. Stat. § 732.503. The self-proving clause legitimizes the will—it states, as on page 154 of the textbook, that all of the steps taken to create the will or codicil conform to the law. If a self-proved will is admitted to probate, no other proof of the legitimacy of the document is needed. Fla. Stat. § 733.201.

**A Will Written in a Foreign Language (Exclusive to Florida; not Found in Hower)**
If a will is written in a foreign language, it cannot be admitted to probate in Florida unless it is accompanied by an English translation of the will. Fla. Stat. §733.204.
MODIFICATION OF A WILL—
CODICIL V. NEW WILL (HOWER 154)
If it is decided by the testator that a codicil should be drafted, it shall be executed with the same formalities as a will. Fla. Stat. § 732.502.

A codicil that refers to a previous will has the effect of republishing the will as modified by the codicil. Fla. Stat. § 732.5105.

REVOCATION AND REJECTION OF A WILL (HOWER 156)

In order to revoke a will or codicil, the testator must have the intent to revoke and actually do something to the document, such as burn, tear, cancel, deface, obliterate, or destroy the will. The statute also states that someone else at the testator’s direction may revoke the will or codicil by an act, such as previously stated. Fla. Stat. § 732.506.

If the testator revokes a will that revokes a former will, the revocation of the will does not revive the former will, even if the former will is in existence when the subsequent will was revoked. Fla. Stat. § 732.508.

The revocation of a will revokes all codicils to that will. Fla. Stat. § 732.509.

If a later will or codicil is discovered and expressly or impliedly revokes a will that is in the midst of probate, the later will may be offered into probate by an interested person. Revocation of probate proceedings will commence. It must be noted that a later will or codicil may not be offered after the closing of the estate. Fla. Stat. § 733.208.

Lost Wills (Hower 157)

To establish and probate a destroyed or lost will in Florida, it is done in one proceeding. In order for a lost or destroyed will to be probated, testimony from each witness must be reduced to writing and submitted to the court. Formal notice must be given to those who would share in the property in order for the lost or destroyed will to be admitted to probate. If there is a copy of the lost or destroyed will in existence, that shall be attached to the petition. Either two disinterested witnesses must clearly and distinctly prove the content of the lost or destroyed will or, if there is a correct copy of said will, only one disinterested witness is necessary. Fla. Stat. § 733.207.

Revocation by Operation of Law (Hower 159)

In Florida, if the testator divorced a spouse that had been included in the will, only the clauses that involved issues regarding the ex-spouse will be void. It is as if the ex-spouse died at the time of the dissolution of marriage. Fla. Stat. § 732.507.

WILL CONTESTS (HOWER 161)

If an interested person, upon whom notice was served, challenges the validity of the will, the qualifications of the personal representative, the venue, or has a claim against the estate, he or she is required to file the objections with the court within the later of 3 months after the first publication of the notice of administration or 30 days after the date of service on the objecting party. Fla. Stat. §§ 733.212 and 733.703.

The personal representative has the ability to settle claims against the estate, provided they have the approval of the beneficiaries who could be adversely affected. The prerequisite to settling a claim is that the claim must be made within the statutory time for filing claims. Fla. Stat. § 733.702.

If the validity of the will is in question, an action may not be brought until the testator has died. Fla. Stat. § 732.518.
If a will is challenged due to the testator’s lack of testamentary capacity, the burden of proof is on the contestant. *American Red Cross v. In re Estate of Haynsworth*, 708 So.2d 602,606 (Fla. 3rd DCA 1998). The test to determine testamentary capacity is as follows: The testator must understand the condition of his property; his relations to the persons who were, should, or might have been the objects of his bounty; and the scope and bearing of the provisions of his will. *Id.* at 605.

When a will is challenged on the grounds of undue influence, the influence must amount to over-persuasion, duress, force, coercion, or artful or fraudulent contrivances to such an extent that there is a destruction of free agency and willpower of the testator. *Raimi v. Furlong*, 702 So.2d 1273, 1287 (Fla. 3rd DCA 1998). If a presumption of undue influence is found, the burden of proof shifts to the beneficiary of the will to come forward with a reasonable explanation of his or her active role in the preparation of the decedent’s will. If the presumption is rebutted, the contestant must establish undue influence by a preponderance of the evidence. *Id.*

**In Terrorem or “No Contest” Clause—A Forfeiture Clause (Hower 166)**

In Florida, a will may not have a provision that penalizes an interested person for contesting the will or bringing any other type of proceeding against the estate. Fla. Stat. § 732.517.
Chapter 6 in the textbook explains step-by-step the checklists and sequence one must go through in order to prepare a will. These concepts are applicable to Florida.
Final Draft and Execution of a Valid Will

The information in Chapter 7 is applicable to Florida.

CONTENTS OF A STANDARD WILL (HOWER 201)

Appointment of Personal Representative (Hower 212)

Any person who is appointed personal representative must: 1) be a resident of Florida at the time of death of the person whose estate he or she seeks to administer; 2) have no felony convictions; and 3) be mentally competent. Fla. Stat. § 733.302. Another qualification for a personal representative is that the individual be 18 years or older. Fla. Stat. § 733.303. National banks, trust companies incorporated in Florida, savings and loan associations, and other banking organizations qualified to exercise fiduciary powers in Florida may be named as a personal representative. Fla. Stat. § 733.305.

Florida Statute § 733.617 lists the rate of compensation that a personal representative is entitled to receive. If the personal representative takes it upon himself or herself to complete any “extraordinary services,” the court has the discretion to compensate for such tasks. Id. If the testator includes the rate of compensation the personal representative would be entitled to in the will, that is what the person would receive, unless the testator did not specifically state the criteria that compensation was to be based upon. A personal representative may renounce the amount of compensation stated in the will and elect to be paid according to the statute. Id.

Appointment of Personal and/or Property Guardian (Hower 214)

The provisions regarding guardianship of a minor and guardianship of property are found in the Florida Statutes under Chapter 744, Domestic Relations.

Simultaneous Death Clause (Hower 216)

Florida has a Simultaneous Death Law (Fla. Stat. § 732.601). Florida does not follow the 120 Hour Survival Rule of the UPC with respect to tenants by the entirety or joint tenants. An exception to the rule is that the law will not apply if there is a will or other provisions made for the distribution of property if it is different from the way it is set out in the statute. Id.
Testator’s Signature (Hower 219)

The testator’s signature or mark must be at the end of the will. Someone else may sign the will in the testator’s presence and at the testator’s direction. The signing or acknowledgement of the will must be witnessed by at least two people. Fla. Stat. § 732.502.

ADDITIONAL NONTESTAMENTARY DOCUMENTS (HOWER 224)

Self-Proving Affidavit Clause That Creates a Self-Proved Will (Hower 224)

The testator and witnesses may self-prove the will at the time of its signing or acknowledgement. Fla. Stat. § 732.503. See also Chapter 5, page 154. For an example of an accepted self-proving clause and notarial subscription look at the Florida statute.

Right to Die Laws and Related Advance Medical Directive Documents (Hower 228)

Living Will: Death with Dignity (Hower 229)

Florida Statute § 765.302 gives an explanation of a living will. Florida Statute § 765.303 has a sample form of a living will.

Under Fla. Stat. § 765, the Health Care Advance Directives laws are explained. The statute is divided into four parts: 1) General Provisions; 2) Health Care Surrogate (See Fla. Stat. § 765.203 for a suggested form for designation of the Health Care Surrogate); 3) Life-prolonging Procedures; and 4) Absence of Advance Directives.
Provisions for trust administration in Florida can be found in Chapter 737 of the Florida Statutes. The statute mainly deals with trust administration, and the powers, duties, and responsibilities of the trustee. If no provisions regarding administration are set out in the trust, the trustee should rely on the statute; it will automatically apply. In § 737.111(1) of the statute, it states that a trust must be executed by the settlor with the same formalities required for the execution of a will in order for the trust to be valid.

The trustee is considered a fiduciary. If the individual is named trustee on the basis of special skills or expertise, the trustee is under a duty to use those skills. Fla. Stat. § 737.302. As a fiduciary, the trustee is required to follow the standards set forth in Fla. Stat. § 518.11 in regards to investing trust assets, otherwise known as the Prudent Investor Rule. The Prudent Investor Rule states that a fiduciary has a duty: 1) to invest and manage assets as a prudent investor would; 2) to diversify the investments; 3) to review the investment portfolio and make decisions whether to keep or dispose of certain investments; and 4) to make the trust productive. Id.
CLASSIFICATION OF TRUSTS (HOWER 276)

Express Trusts—Private versus Public (Charitable) (Hower 276)

Public Trust (Hower 277)
Charitable trusts are covered in Fla. Stat. §§ 737.501 to 737.512.

Express Trusts—Inter Vivos (Living) versus Testamentary (Hower 281)

An express trust that includes real property alone or in combination with personal property as its principal is covered in Fla. Stat. §§ 689.05 to 689.075. The latter section of this statute also discusses the powers that are retained by the settlor. See Zuckerman v. Alter, 615 So.2d 661 (Fla. 1993) (Florida Supreme Court discusses at length how to determine the validity of an inter vivos trust).

Miscellaneous Trusts (Hower 287)

Totten Trusts (Hower 288)
Florida recognizes the Totten trust. See Fla. Stat. § 655.81 (Deposits in trust) and Fla. Stat. § 655.82 (Pay-on-death accounts). (Sample form of pay-on-death designation. Id. § 655.82(9).)

Revocable Living Trusts (Hower 297)

Florida has a statute that states the trustee must file a notice of trust with the court in the county of the settlor’s domicile when the settlor dies. Fla. Stat. § 737.308.
The information on estate planning and long-term care in the textbook is applicable to Florida.

LONG-TERM CARE (HOWER 341)

Florida has established the Office of State Long-Term Care Ombudsman, which is located in the Department of Elder Affairs. Fla. Stat. § 400.0063. The reason the Florida legislature established this office is two-fold: 1) A need for a mechanism whereby a long-term care facility resident or his or her representative may make a complaint against a facility or its employees, and 2) to be able to receive funds under the Federal Older Americans Act. Fla. Stat. § 400.0061.
PERSONAL REPRESENTATIVES: TYPES, PRE-PROBATE DUTIES, AND APPOINTMENT

TYPES OF PERSONAL REPRESENTATIVES (HOWER 360)

In Florida, the individual who administers the estate is called the personal representative. The duties and powers of the personal representative are discussed in Fla. Stat. §§ 733.601 to 733.619. Once the personal representative is appointed, the court then grants the authority to act on behalf of the estate through the issuance of letters of administration. Fla. Stat. § 733.401.

Sometimes a curator is appointed. This occurs when there is a danger of the decedent’s property being destroyed, wasted, or removed beyond the jurisdiction of the court. A curator may act as a personal representative on special order of the court. The curator has twenty days to file an inventory of the property. The curator must turn over the property to the personal representative when one is appointed. If the curator does not account for and deliver the property within the time limit, they are considered in default and are subject to provisions in the statute that pertains to the removal of the personal representative. An individual who acts as a curator is allowed reasonable compensation for his or her services. Fla. Stat. § 733.501.
Small Estate Settlement and Administration (Hower 398)

In Florida, if a decedent leaves only exempt personal property (see Chapter 4, Additional Rights or Protection for a Surviving Spouse and Children and Fla. Stat. § 732.402), personal property exempt from creditors, and nonexempt personal property whose value does not exceed the sum of funeral expenses and medical and hospital expenses for the last sixty days of the last illness, no administration or formal proceedings will be required. Fla. Stat. § 735.301. This is called disposition without administration.

The court may authorize payment, transfer, or disposition of the decedent’s personal property, tangible or intangible, if satisfied with the informal application by affidavit or letter of an interested party indicating that the only property the decedent possessed was such as defined above. Id. The clerk of court, if asked by the applicant, shall assist an applicant in the preparation of the required writing. Fla. Prob. R. 5.420(c) (2001).

If the decedent dies prior to receiving an overpayment of federal income taxes, not exceeding $500.00 and irrespective of whether the decedent filed jointly or separately, the amount of the overpayment may be refunded: a) directly to the surviving spouse; or b) if no surviving spouse, to one of the decedent’s children. An application by the applicant must show that the decedent was not indebted, or that arrangements have been made to pay decedent’s debts, or that the entire estate is exempt from creditors, and that no administration has been initiated or planned. Id.

Summary Administration (Hower 400)

Summary administration can be utilized for the administration of a resident or nonresident decedent’s estate if: 1) the decedent’s will does not state or direct administration as required; and 2) the property that makes up the estate does not exceed $25,000 or the decedent has been dead for more than two years. Fla. Stat. § 735.201.

A petition for summary administration may be filed by any beneficiary and signed by the surviving spouse, if any; the heirs at law or beneficiaries who are sui juris; and the guardians of any heirs at law or beneficiaries who are not sui juris. The petition shall contain:

1. The name, last known address, social security number, and date and place of death of the decedent and the state and county of the decedent domicile.
2. The names and addresses of the beneficiaries and the dates of birth of any who are minors (these two clauses come from Fla. Stat. §733.202(b) and (c)).
3. Facts showing that the petitioners are entitled to summary administration, according to Fla. Stat. § 735.201.
4. A complete list of assets of the estate and their estimated value and a list of assets claimed to be exempt.
5. A statement that the estate is not indebted or that provisions have been made for the debts to be paid.

When the petition is filed in a testate estate, the decedent’s will shall be proved and admitted to probate. Fla. Prob. R. 5.530(b) (2001).

The distribution of the assets in a summary administration are discussed in Fla. Stat. 735.206. Notice to Creditors in relation to a summary administration is explained in Fla. Stat. § 735.2063.

**Family Administration (Exclusive to Florida not Found in Hower)**

*Family administration* is a type of administration that is allowed in Florida if: 1) In an intestate estate, the only heirs at law are the surviving spouse, lineal descendants, and lineal ascendants; 2) In a testate estate, beneficiaries are the surviving spouse, lineal descendants and ascendants, and if there is a specific or general devise to someone other than those stated, that the devise constitutes a minor part of the decedent’s estate; 3) The testator did not direct administration of the estate; 4) The value of the gross estate is less than $60,000; and 5) That the entire estate consists of personal property or, if real property forms a part of the estate, that the administration has proceeded to the point that all claims have been paid or barred. Fla. Stat. § 735.101.

The petition for family administration shall include:

2. Facts showing that the petitioners are entitled to family administration.
3. A list of the assets of the gross estate and their estimated value.
4. A statement that the estate is not indebted or that provisions have been made for the payment of debts or the claims are barred.
5. A proposed schedule of distribution.

Fla. Stat. § 735.107 explains the steps taken in a family administration distribution of assets. It also states that if there was a will involved, it shall be proved and admitted to probate. *Id.*

**Family Settlement Agreements (Hower 403)**

In Florida, this type of administration of an estate is called a *private agreement among distributees* and is governed by Fla. Stat. § 733.815.

**Order Admitting a Foreign Will to Probate (Hower 425)**

Ancillary Administration (Exclusive to Florida not Found in Hower)

If a nonresident of Florida dies leaving assets in the state, has debts owed, or owes a resident of the state, *ancillary administration* is an alternative. If a qualified personal representative is designated in the decedent’s will to administer the estate in Florida, ancillary letters will be issued to that individual. If the personal representative is not qualified, and an alternate is not stated in the will, someone who is entitled to a majority of the Florida property may have letters issued to someone they select and who is qualified to act in Florida. Fla. Stat. § 734.102. See also Fla. Prob. R. 5.470-5.475 (2001) (filing requirements, notice, claims procedure, order, notification of and objection to claims); Fla. Stat. § 734.1025 (nonresident decedent’s estate less than $25,000 of property in Florida and determination of claims).
In Florida

1. Petition for administration of the will—any interested person may file a petition, regardless of whether the decedent died testate, intestate, or is a nonresident.
   a. If the decedent died testate: the petition must i) Have information regarding all unrevoked wills and codicils being presented for probate; ii) State that the petitioner is unaware of any other unrevoked will or codicil; iii) State that the original will is in the possession of the court or accompanies the petition, or an authenticated copy of the will probated in another jurisdiction accompanies the petition.
   b. If the decedent died intestate: i) After reasonable diligence, the petitioner is unaware of any unrevoked wills or codicils or, if the petitioner is aware of any unrevoked will or codicil, why the will or codicil is not being probated; or ii) Give the facts concerning the will or codicil.
   c. If the decedent was a nonresident of Florida, the petition shall state: i) domiciliary proceedings are pending in another state or country, if known; and ii) If so, the name and address of the foreign personal representative and the court issuing letters. Fla. Stat. § 733.202. See also Fla. Prob. R. 5.200(2001).

NOTE: Self-proved wills executed in accordance with Florida law may be admitted to probate without further proof. Fla. Stat. § 733.201.

2. Appointment of the personal representative—after the petition for administration is filed and the will is admitted to probate, the court shall appoint the person qualified to be personal representative. Fla. Stat. §§ 733.301 and 733.401. See Fla. Stat. § 734.101 for information on Foreign Personal Representative.

3. Notice of Administration—the personal representative must publish a notice of administration. The publication must be once a week for two consecutive weeks in the county where the estate is administered, or if there is no newspaper published in the county, in a newspaper of general circulation. The personal representative must serve a copy of the notice on the surviving spouse, beneficiaries, and the trustee of any trust described. The personal representative must also make a diligent search of creditors of the decedent and serve them with a copy of notice within three months after the first publication of the notice. The notice requires any interested person to file with the court all claims against the estate and any objections by an interested person on whom notice was served that has a challenge regarding the will, estate, jurisdiction of the court, the personal representative, or venue. Fla. Stat. § 733.212.

PROCEDURES BEFORE ESTATE DISTRIBUTION (HOWER 427)

1. The personal representative must take and file an inventory of the property of the estate within sixty days of the issuance of letters. The list of property will be reasonably detailed and have listed each item’s fair market value. The personal representative is also responsible for the initial opening of any safety deposit box that the decedent may have had. This is to be done in front of an employee of the institution where the box is located. An inventory of the contents must be taken and submitted to the court within ten days after the box is opened and then serve a copy of the contents on the Department of Revenue and any interested persons. If the personal representative discovers any property not included in the original inventory or a mistake regarding property in the inventory, they shall amend the inventory. Fla. Stat. § 733.604.
2. The personal representative may employ appraisers to assist in determining the fair market value of any asset of the estate. Fla. Stat. § 733.605.


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**DISTRIBUTION OF THE ESTATE AND PAYMENT OF CLAIMS**

(HOWER 442)

1. Distribute Family Allowance—see page 15 of this Supplement for an explanation of the family allowance.

2. Homestead—see page 14 of this Supplement for an explanation of homestead and homestead exemption in Florida.

3. Creditor’s Claims (Hower 443)
   a. Caveat—if a creditor of the estate of the decedent is apprehensive that an estate, testate, or intestate will be administered without the creditor’s knowledge, he or she may file a caveat. The caveat must contain the decedent’s social security number or date of birth as a type of identification, along with information regarding the caveator of the estate. Fla. Stat. § 731.110.
   b. Order of payment (Hower 448)
      i. Cost of administration and compensation of the personal representative and attorneys’ fees.
      ii. Funeral expenses not to exceed $6,000.
      iii. Debts and taxes.
      iv. Expenses for medical care and hospitalization of the last sixty days of the last illness, compensation for persons attending the decedent in their last illness.
      v. Family allowance.
      vi. Any arrearage from court-ordered child support.
      vii. Debts acquired after death of the decedent that pertain to his or her business.
      viii. All other claims.

(Fla. Stat. § 733.707.)

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**THE FINAL ACCOUNT AND CLOSING THE ESTATE**

(HOWER 454)

Distribution and Discharge—when the personal representative has completed everything, except for distribution, he or she shall file a final accounting and a petition for discharge, which will include: 1) A complete report of all receipts and disbursements since the last accounting; 2) A statement that the personal representative has completed the administration of the estate; 3) The proposed distribution of the assets of the estate; 4) Any prior distributions; 5) A statement that objections to this report or proposed distribution of assets be filed within thirty days. The final accounting and petition for discharge must be filed within twelve months after issuance of letters for estates not required to file a federal estate tax return; otherwise, it is due twelve months from the date the return is expected. Fla. Stat. § 733.901.

An Order of Discharge of the Personal Representative should be drafted to be filed with the petition and final accounting. The court will sign this document, which will release the personal representative and bar any action against him or her. *Id.*
Subsequent Administration (Exclusive to Florida not Found in Hower)

Sometimes after an estate has been closed, additional property of the decedent is found or if further administration of the estate is necessary, an interested person may file a petition for further administration of the estate. The subsequent administration shall be filed in the original probate court file. Fla. Stat. § 733.903. See Fla. Prob. R. 5.460 (2001) (contents of the petition, and the court order).
As discussed on pages 27–31 of this supplement, Family Administration, Summary Administration, and Disposition without Administration are informal alternatives to formal administration in Florida. See the previous chapter in the Supplement for a brief explanation of Informal Probate Administration in Florida.
Florida does not have an inheritance tax. Florida does have a tax that is imposed on generation-skipping transfers of property, both real and personal, of residents and nonresidents. Fla. Stat. §§ 198.021 and 198.031.

The discussion in the textbook on Federal Income Tax issues is thorough and is applicable to the administration of estates in Florida.
Florida paralegals are not self-regulating at this time. The Florida Bar, through the Rules of Professional Conduct, covers paralegals. In the rules, a paralegal or anyone else employed by a lawyer, but who is not a lawyer, is referred to as a “nonlawyer.”

Rule 3-1.2 gives the Florida Supreme Court the power and duty to set the standards for the practice of law in Florida. Rule 1-8.1, Programs and Functions, gives the board of governors, the body that regulates the Florida Bar, not only the power but also the responsibility of enforcing the Florida Rules of Discipline and the Rules of Professional Conduct.

Rule 4-5.3, Responsibilities Regarding Nonlawyer Assistants, states quite clearly that the individual ultimately responsible for a nonlawyer’s conduct and work product is the lawyer. Another of the Florida Bar’s Rules is Rule 4-5.5, which pertains to the Unlicensed Practice of Law (UPL). This rule explains what UPL is and how it may occur in reference to lawyers. Occasionally, The Florida Bar News publishes a synopsis of cases that have been brought against nonlawyers for the alleged Unauthorized Practice of Law.

Unauthorized Practice of Law (Hower 541)

Another rule of the Florida Bar Rules that paralegals should be aware of is Rule 10-2.1(a). This rule pertains exclusively to the Unlicensed Practice of Law and nonlawyers, including paralegals who assist individuals with completing legal forms. The following language will be found on any legal form where it is necessary to elicit factual information in regards to completing the form and in telling the individual how to file the form:

10-2.1(a), Unlicensed Practice of Law. The unlicensed practice of law shall mean the practice of law, as prohibited by statute, court rule, and case law of the State of Florida. For purposes of this chapter, it shall not constitute the unlicensed practice of law for a nonlawyer to engage in limited oral communications to assist a person in the completion of blanks on a legal form approved by the Supreme Court of Florida. Oral communications by nonlawyers are restricted to those communications reasonably necessary to elicit factual information to complete the blanks on the form and inform the person how to file the form.

Except for forms filed by the petitioner in an action for an injunction for protection against domestic or repeat violence, the following language shall appear on any form completed pursuant to this rule and any individuals assisting in the completion of the form shall provide their name, business name, address, and telephone number on the form:
This form was completed with the assistance of:

Name of Individual: ____________________________________________________________

Name of Business Address: ______________________________________________________

Telephone Number: ____________________________________________________________

Before a nonlawyer assists a person in the completion of a form in the manner set forth in this rule, the non-lawyer shall provide the person with a copy of a disclosure. A copy of the disclosure, signed by both the non-lawyer and the person, shall be given to the person to retain and the nonlawyer shall keep a copy in the person’s file. The disclosure does not act as or constitute a waiver, disclaimer, or limitation of liability. The disclosure shall contain the following provisions:

(Name) told me that he/she is not a lawyer and may not give legal advice or represent me in court.

(Name) told me that he/she may only help me fill out a form approved by the Supreme Court of Florida. (Name) may only help me by asking me factual questions to fill in the blanks on the form. (Name) may also tell me how to file the form.

(Name) told me that he/she is not a lawyer and cannot tell me what my rights or remedies are or how to testify in court.

______ I can read English

______ I cannot read English but this notice was read to me by (Name) in (Language) which I understand.