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Guidry v. Pinellas Central Bank and Trust Co., 310 So. 2d 386 (Fla. 2d Dist. Ct. App. 1975)

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cision upon an ancient doctrine, which in common law was not applied to criminal matters, the court did not undertake the evaluation necessary to determine the reasonableness of the search.

Education is fundamental to a democratic society, but it becomes vacuous if those being educated are also denied their rights. An appreciation of basic civil rights can only be learned in an environment where such rights are rigorously protected. In the words of Justice Jackson:

> That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[59]

RANDALL O. REDER

Wills and Trusts—TRUST INSTRUMENT PROVIDING FOR PAYMENT OF ESTATE TAXES IS INSUFFICIENT TO AVOID APPLICATION OF FLORIDA APPORTIONMENT STATUTE, ABSENT EXPRESS PROVISION IN TESTATOR'S WILL—*Guidry v. Pinellas Central Bank and Trust Co.*, 310 So. 2d 386 (Fla. 2d Dist. Ct. App. 1975).

On May 4, 1972, Henrik Ovesen created a revocable inter vivos trust naming Pinellas Central Bank and Trust Company [hereinafter Pinellas Bank] as trustee.[1] Reserving the income to himself for life, Ovesen directed that his wife, Emilie, was to receive the income at his death. After the death of Ovesen and his wife, the trustee was to set up two trusts. From the first, Ovesen's daughter, Emilie Erslev, was to receive income for life, remainder to Mellon National Bank and Trust Company [hereinafter Mellon Bank] as trustee for a family foundation.[2] From the second, his granddaughter, Patricia Guidry, was to receive income for life. Upon her death both income and principal were to be distributed for her children's educational needs, if any.[3] The excess was also to be distributed to the Mellon Bank for the family foundation.

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59. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943), *quoted in* Buss, *supra* note 33, at 792.

1. Guidry v. Pinellas Central Bank and Trust Co., 310 So. 2d 386, 387 (Fla. 2d Dist. Ct. App. 1975).
2. *Id.*
3. *Id.* The trust provided that the trustee was "authorized to distribute income and

Mr. Ovesen directed Pinellas Bank, as trustee of the inter vivos trust, to pay all inheritance, legacy, succession, or transfer taxes imposed upon his estate by reason of his death. His stated purpose was that all devisees, legatees, and beneficiaries of his will or insurance contracts should receive their interests without diminution.[4]

On May 31, 1973, after the creation of the trust, Henrik Ovesen executed a will bequeathing his entire probate estate to his wife, with Pinellas Bank as executor. The will included no provision for the payment of estate taxes.[5] Thereafter Ovesen's only named beneficiary, his wife, predeceased him. At his death, his probate estate, augmented by his wife's sizeable estate, passed under Florida's intestacy statute to his heirs at law.[6] Ovesen's granddaughter, Patricia Guidry, and Mellon Bank as trustee of the family foundation, refused to permit Pinellas

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principal for the educational needs, if any, of Patricia Guidry's children who may not have attained twenty-three years of age at the time of her death." *Id.*

4. *Id.* Paragraph I(C) of the trust instrument provided:

> The Trustee shall pay to the Executor or Administrator of the Donor's estate from the principal of this trust such sums as the Executor or Administrator shall request in writing for the purpose of paying the expenses of the Donor's last illness, funeral expenses and expenses of administration of said estate, any other valid obligation of the Donor existing at Donor's decease, and all inheritance, legacy, succession or transfer taxes imposed by reason of the Donor's decease upon said estate or in respect to any interest therein or in respect to any property which shall not come into possession of said Executor or Administrator, to the end (without limiting the generality of the foregoing) that all devisees, legatees and beneficiaries under the Donor's Will or otherwise, and beneficiaries of insurance or other contracts with insurance companies may receive their respective interests without diminution by reason of any of said taxes, expenses of administration, debts or other obligations, except as the residue of this trust may be thereby reduced, and notwithstanding the fact that the Donor's estate may be sufficient to pay the foregoing. In the Trustee's discretion, it may pay directly any estate inheritance or other taxes levied as above, and any funeral expenses, debts, or claims against the estate of the Donor. If the Trustee has not received a written request for funds to pay taxes, expenses or obligations within eight months of the date of the death of the Donor, the Trustee, shall not be required thereafter to hold any assets of this trust for the purpose of paying such sums.

Id.

5. *Id.* at 388.

6. 310 So. 2d at 388.

When Mrs. Ovesen predeceased her husband, his testamentary bequest to her lapsed. *See* FLA. STAT. §§ 732.603, .604, and .101 (1975). Lapse "refers to a legacy or devise which would have taken effect if the testator had died the instant after he executed the will; but which fails because the devisee or legatee has, in some way, become incapable of taking under the will between the time that the will was made and the time that the testator died." 4 W. PAGE, THE LAW OF WILLS § 1413 (3d (Lifetime) ed. 1941). FLA. STAT. § 732.103 (1975) sets out the distribution of intestate estates when there is no surviving spouse.

Bank to pay estate taxes from the corpus of the trust.[7] Pinellas Bank sought a declaratory judgment to authorize it to pay the taxes.[8]

The issue for the court was whether a donor's direction in a *trust instrument* for the payment of estate taxes was sufficient to avoid the application of the Florida apportionment statute, which required that estate taxes be apportioned between probate and nonprobate assets unless the decedent's *will* directed otherwise.[9] Since Ovesen's direction

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7. 310 So. 2d at 388. Due to the inclusion of Mrs. Ovesen's estate in her husband's estate, the amount required to pay the estate taxes would have depleted the trust. *Id.*

8. *Id.*

9. The Florida apportionment statute, Act of May 28, 1965, ch. 65-230, § 1, 1965 Fla. Laws 539 provided in part:

> (1) Any estate, inheritance, or other death tax levied or assessed under the provisions of the tax laws of this or any other state or political subdivision thereof, or country or of any United States revenue act, with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, shall be apportioned in the following manner:
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> (a) If any portion of the estate passed under the will of a decedent as a specific bequest or devise, or general legacy, or in any other nonresiduary form (exclusive of property over which the decedent had a power of appointment as defined from time to time under the estate tax laws of the United States), the net amount of the tax attributable thereto shall, except as otherwise directed by the will, be charged to and paid from the residuary estate of the testator without requiring contribution from persons receiving such interests. In the event the residuary estate is insufficient to pay the tax attributable to such interests, any balance of such tax shall, except as otherwise directed by the will, be equitably apportioned among the recipients of such interests in the proportions that the value of each such interest included in the measure of such tax bears to the total of all such interests so included.
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> . . . .
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> (c) If any portion of the property with respect to which such tax is levied or assessed is held under the terms of any trust created inter vivos or is subject to such a power of appointment, the net amount of the tax attributable thereto shall, except as otherwise directed by the trust instrument with respect to the fund established thereby, or by the decedent's will, be charged to and paid from that portion of the corpus of the trust property or the property subject to such power of appointment included in the measure of such tax, as the case may be, and shall not be apportioned between temporary and remainder estates.
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> . . . .
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> (e) The balance of the net amount of the tax, including, but not limited to, any tax imposed with respect to gifts in contemplation of death, jointly held properties passing by survivorship, property passing by intestacy, or insurance, shall, except as otherwise directed by the decedent's will, be equitably apportioned among and charged to and paid by the recipients and beneficiaries of such properties or interests in the proportion that the value of the property or interest of each included in the measure of such tax bears to the total value of all such properties and interests included in the measure of such tax; provided, that where any such property interest is an interest in income or an estate for years or for life or other temporary interest, the amount so charged to such recipients or beneficiaries shall not be

was not included in the will but was unequivocally expressed in the trust instrument, strict application of the statute would defeat the express terms of the trust.

The trial court granted summary judgment for Pinellas Bank on the theory that the trust instrument was controlling, thus avoiding application of the apportionment statute. The Second District Court of Appeal reversed, ruling that the statute controls unless the decedent specifically directs otherwise in the will.[10] The court reasoned that the apportionment statute "declares that the policy of the state is for death taxes to be apportioned equitably among the recipients and beneficiaries of a decedent's property."[11] A testator may provide for payment in another manner, but he must direct such payment in his will. Judge Boardman dissented; he reasoned that, since decedent's intention was expressed clearly and unmistakably, it was unnecessary to apply the statute.[12]

The rule established by the decision is clear: an uncontradicted direction in a trust instrument that the trust shall bear the entire estate tax burden, allowing the testamentary beneficiaries to take undiminished by the taxes, will not be given effect to avoid application of the apportionment statute. However, neither the history of apportionment statutes in general nor of Florida's in particular mandate such a literal interpretation of Florida's statute.

State apportionment statutes have long been recognized as a means of effectuating the decedent's presumed intent.[13] Prior to the enactment of such statutes, when the intent of the decedent as to the payment of estate taxes had not been clearly expressed, the entire tax on probate and nonprobate assets was deducted from the residue.[14]

> apportioned between temporary and remainder estates but shall be charged to and paid out of the corpus of such property or fund.

The provisions of the statute quoted in *Guidry* are essentially unchanged in the current version. FLA. STAT. § 733.817 (1975).

10. 310 So. 2d at 389.

The *Guidry* decision is cited in two recent annotations dealing with this general area: Annot., 70 A.L.R.3d 691, 700 n.45 (1976) (Construction and Effect of Provisions in Nontestamentary Instrument Relied Upon as Affecting the Burden of Estate or Inheritance Taxes); Annot., 71 A.L.R.3d 247, 307 n.50 (1976) (Construction and Application of Statutes Apportioning or Prorating Estate Taxes).

11. *Id.* "[S]tate law should determine the ultimate thrust of the tax [federal and state transfer taxes on property includable in the taxable estate]." Riggs v. Del Drago, 317 U.S. 95, 98 (1942). *See* Myers v. Sinkler, 110 S.E.2d 241 (S.C. 1959); *In re* Will of Hallinan, 347 N.Y.S.2d 157 (Sur. Ct. 1973).

12. 310 So. 2d at 390.

13. *See* Lindsay, *Florida's Estate Tax Laws—The Need for Compromise*, 35 FLA. B.J. 164 (1961); Note, *Statutory Apportionment of Federal Estate Taxes*, 62 HARV. L. REV. 1022 (1949); Legislative Notes, *New Florida Apportionment of Estate Taxes*, 3 U. FLA. L. REV. 83, 93 (1950).

14. *See* YMCA of Columbus v. Davis, 264 U.S. 47 (1924); Wells v. Menn, 28 So. 2d

Decedents commonly made specific bequests to family friends and collateral relatives, leaving the residue to their families. The result was that the estate tax inequitably burdened "the residuary legatees who [were], under most wills, the widow and children of decedent."[15]

To alleviate this injustice, New York in 1930 passed the first apportionment statute to provide for the ratable distribution of the tax burden among the recipients of those assets which gave rise to the tax.[16] In 1949, Florida passed an apportionment statute substantially the same as that enacted by New York.[17] The purpose of this statute was to place the tax burden on the interests that created the tax.[18] However, collecting these taxes from the individual beneficiaries led to substantial administrative difficulties,[19] and in 1957, the statute was amended to provide for the deduction of all "estate, inheritance, succession, and death taxes" from the residuary estate.[20] This amendment basically reinstated the common law as it existed before the 1949 statute.[21] But in 1963, the legislature enacted an apportionment statute that has remained essentially unchanged to the present.[22] Under its provisions, the personal representative may pay all estate taxes out of the residuary estate with the right to be reimbursed for taxes paid on nonprobate assets.[23] Thus, the apportionment statute directs the deduction of taxes on probate assets from the residue, with taxes on nonprobate assets borne by the beneficiaries of such assets.

By enacting the apportionment statute, the legislature provided an equitable means of distributing the burden of estate taxes when the decedent failed to do so.[24] Since the will is the instrument which generally contains directions as to payment of expenses and debts arising

881, 884 (Fla. 1946); *In re* Bernays' Estate, 7 So. 2d 444 (Fla. 1942); Lindsay, *supra* note 13, at 164; Note, *Statutory Apportionment of Federal Estate Taxes, supra* note 13.

15. Note, *Virginia Statute on Apportionment of Federal Estate Taxes*, 34 VA. L. REV. 370 (1948).

16. Act of April 23, 1930, ch. 709, § 1, 1930 N.Y. Laws 1283 (current version at N.Y. EST., POWERS & TRUSTS LAW § 2-1.8 (Consol. 1976)). For further history and development of New York's apportionment statute *see* Lindsay, *supra* note 13; Legislative Notes, *New Florida Apportionment of Estate Taxes, supra* note 13; 52 N.C. L. REV. 737, 740 (1974).

17. Act of June 13, 1949, ch. 25435, §§ 1-5, 1949 Fla. Laws 1049 (current version at FLA. STAT. § 733.817 (1975)).

18. *See* Riggs, *Florida Estate Tax Apportionment*, 25 U. FLA. L. REV. 719, 720 (1973).

19. *See* Lindsay, *supra* note 13, at 167-68.

20. Act of May 13, 1957, 1957 Fla. Laws 134, ch. 57-87, § 1 (current version at FLA. STAT. § 733.817 (1975)).

21. *See* Lindsay, *supra* note 13, at 164.

22. Act of May 20, 1963, ch. 63-106, §§ 1-3, 1963 Fla. Laws 180 (current version at FLA. STAT. § 733.817(3)-(5) (1975)).

23. *Id. See* Riggs, *supra* note 18, at 733.

24. *See* Riggs, *supra* note 18; Legislative Notes, *New Florida Apportionment of Estate Taxes, supra* note 13, at 86.

because of decedent's death, it was the logical instrument to negate the application of the apportionment statute. Additionally, inter vivos trusts were not widely used in estate planning when the statutes were initially enacted.[25] The district court of appeal pointed out that there is a "dearth of decisional law in Florida" on the specific point raised by this case, though one Florida court has held that where provisions of a trust and a will conflict, the will prevails.[26]

The district court of appeal in *Guidry* took the view that the apportionment statute should be narrowly construed to require apportionment in all cases "unless the decedent's will directs otherwise."[27] One conceivable alternative would have been to read the word "will" in the statutory phrase "except as otherwise directed by the decedent's will"[28] to include an inter vivos trust—like Ovesen's—containing testamentary provisions. Such an interpretation would have given express recognition to the special status of inter vivos trusts in estate planning.[29] The court did not discuss such an alternative; it considered the meaning of the statute "plain."[30]

In many instances, such a narrow interpretation may actually defeat rather than effectuate a decedent's clearly expressed intent. Ovesen obviously intended that his wife receive his probate assets undiminished by estate taxes; he created a trust instrument that provided for the payment of his estate taxes for the express purpose that "all devisees, legatees and beneficiaries under the Donor's Will or otherwise, and beneficiaries of insurance or other contracts with insurance companies may receive their respective interests without diminution by reason of any of said taxes . . . ."[31] But since his sole testamentary beneficiary predeceased him, his intent as to who should bear the burden of the taxes—the trust beneficiaries or his heirs at law—was unclear. The court may have reached the equitable result of effectuating the decedent's intent as they interpreted it.

The precedent established by the court's narrow interpretation of the word "will" in the statute could have been avoided. The same

25. For a discussion of the increasing popularity of inter vivos trusts, see Polasky, *"Pour-Over Wills"—And the Statutory Blessing*, 98 TRUSTS AND ESTATES 949 (1959).

26. 310 So. 2d at 389, *citing In re* Estate of Strohm, 241 So. 2d 167 (Fla. 4th Dist. Ct. App. 1970).

27. 310 So. 2d at 389.

28. *See* note 9 *supra* for the text of the statute.

29. *See* FLA. STAT. § 689.075 (1975).

30. 310 So. 2d at 388. The court construed the statute (full text in note 9 *supra*) to limit "the effectiveness of [Ovesen's] direction under the trust to the trust assets." 310 So. 2d at 389. However, § 734.041(1)(c) (current version at FLA. STAT. § 733.817 (1975)) dealt only with property "held under the terms of any trust created inter vivos"; it did not deal with the entire gross estate.

31. 310 So. 2d at 387.

result could have been reached on the theory of effectuating decedent's intent by reasoning as follows. Since Ovesen designated the beneficiaries of the trust, while the probate beneficiaries were determined by the intestacy statute, he would have preferred his designated beneficiaries to receive a larger share undiminished by estate taxes. By apportioning the taxes under the statute, the trust corpus is preserved so that the trust beneficiaries receive the intended benefit. If the taxes had been paid from the trust, the corpus would have been exhausted and the settlor's intent frustrated. Thus, by using the apportionment statute, the specifically named beneficiaries (the trust beneficiaries) receive a larger proportion of the estate by application of the statute. The court did not, however, adopt this rationale; it adopted instead a narrow interpretation of section 734.041—an interpretation that calls for statutory apportionment whenever the decedent fails to make testamentary provisions in a will for the payment of taxes.[32]

The rationale behind a narrow construction is two-fold: to avoid usurpation of the legislative function[33] and to avoid unnecessary litigation.[34] The *Guidry* court could, however, have given effect to Ovesen's dispositive plan without incurring either of these risks. A decision in harmony with legislative intent would not have resulted in judicial usurpation.[35] Nothing in the legislative history of Florida's apportionment statute indicates that the legislature considered this particular conflict when they specified that the statutory apportionment scheme could be avoided only by will.[36] When the apportionment provision was originally enacted, trust instruments were not widely utilized in estate planning. Since that time, however, Florida has recognized the trust as an instrument used in major dispositive schemes both in giving

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32. New York's courts, operating under a provision similar to Florida's, have consistently emphasized that apportionment pursuant to the statute will be directed whenever there is no clear direction to the contrary in the will. *In re* Schneider's Estate, 267 N.Y.S.2d 852 (Sur. Ct. 1966); *In re* Bayne's Will, 102 N.Y.S.2d 525 (Sur. Ct. 1950); *In re* Blumenthal's Estate, 42 N.Y.S.2d 898 (Sur. Ct. 1943).

33. *In re* Barret, 137 So. 2d 587 (Fla. 1st Dist. Ct. App. 1962). *See In re* Blumenthal's Estate, 42 N.Y.S.2d at 898.

34. The desire to avoid litigation leads most courts to seek some clear declaration of intent as to the payment of taxes. Where only a testamentary declaration will suffice, this problem is obviated. *See* 62 HARV. L. REV. at 1025 n.31.

35. Legislative Notes, *New Florida Apportionment of Estate Taxes, supra* note 13, at 86.

36. The author reviewed documents on file in the Legislative Library Services, Joint Legislative Management Committee, Florida Legislature. No committee reports prior to 1959 were available. Documents for the period after 1959 did not indicate that the committees had considered a situation in which a trust instrument provided for apportionment of taxes while the testator's will did not.

effect to pourover provisions,[37] and in allowing the retention of powers by the settlor of the trust.[38]

In addition, since a trust is a relatively sophisticated instrument, it is rarely drawn without the assistance of an attorney; therefore, the functions of the Statute of Wills—ritual, evidentiary, and protective—are satisfied.[39] The process of consultation between attorney and client and the resulting formulation of a trust instrument assures that the benefactor is aware of the consequences of his act, that perjury or forgery are absent, and that the benefactor is free from undue influence. The ritualistic and evidentiary functions are satisfied by the writing of the instrument and the delivery of it to the trustee. Therefore, it is difficult to understand a policy behind the legislature's intentionally leaving only the apportionment of estate taxes as the one area of estate planning that must be specifically designated in the will. The ease of changing the burden of estate taxes does not increase the possibility of undue influence or fraud. The provision in the trust would tend to be as explicit as in a will. Therefore, in view of the recent advent of popularity of the inter vivos trust and considering the lack of any express policy in designating only the will for avoidance of the statute, the acknowledgment of a nontestamentary plan for the purpose of tax apportionment would not result in judicial usurpation of a legislative function.

The *Guidry* court's fears that giving effect to uncontradicted trust provisions would spawn unnecessary litigation is unfounded. Only in

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37. FLA. STAT. § 733.808 (1975).

38. FLA. STAT. § 689.075(1) (1975) provides:

> A trust which is otherwise valid . . . shall not be held invalid or an attempted testamentary disposition for any one or more of the following reasons:
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> (a) Because the settlor or another person or both possess the power to revoke, amend, alter, or modify the trust in whole or in part;
>
> (b) Because the settlor or another person or both possess the power to appoint by deed or will the persons and organizations to whom the income shall be paid or the principal distributed;
>
> (c) Because the settlor or another person or both possess the power to add or withdraw from, the trust all or any part of the principal or income at one time or at different times;
>
> (d) Because the settlor or another person or both possess the power to remove the trustee or trustees and appoint a successor trustee or trustees;
>
> (e) Because the settlor or another person or both possess the power to control the trustee or trustees in the administration of the trust;
>
> (f) Because the settlor has retained the right to receive all or part of the income of the trust during his life or for any part thereof;
>
> (g) Because the settlor is, at the time of the execution of the instrument, or thereafter becomes, sole trustee; provided that at the time the trust instrument is executed it is either valid under the laws of the jurisdiction in which it is executed or it is executed in accordance with the formalities for the execution of wills required in such jurisdiction.

situations where the decedent has incorporated a clear mandate in a trust instrument for the payment of estate taxes should statutory apportionment be avoided. Furthermore, no additional litigation would result if courts formulate rules to give effect to trust provisions that conflict with will provisions dependent on which is later in time, again following the latest expression of decedent's intent. The equity of following the decedent's clear intent should offset the slight potential of additional litigation. The Virginia legislature has proved this to be true by codifying such a provision in its apportionment statute which gives maximum effect to the testator's intent, and it has not proved the cause of troublesome litigation.[40] Such a statutory revision in Florida would clearly obviate the *Guidry* court's dilemma.

For the present, only a testamentary provision for the apportionment of estate taxes will avoid the application of the apportionment statute in Florida.[41] Even a clearly expressed, uncontradicted provision in a trust instrument will not avoid such application. This construction must inevitably thwart the intent of many deceased benefactors. This undesirable result may be resolved in either of two ways: first, by more liberal interpretation and application of the apportionment statute; or

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39. *See id.*; Farkas v. Williams, 125 N.E.2d 600 (Ill. 1955) (allowing a revocable inter vivos trust which did not comply with the Statute of Wills). *See also* Flickinger, *The 'Pour-Over' Trust and the Wills Statutes; Uneasy Bedfellows*, 52 KY. L.J. 731 (1964):

> The basic format of the wills statute is to require the testator to describe the subjects, objects, and conditions of his testamentary bounty by means of a written document executed with certain formalities. The purpose behind these requirements is to provide adequate safeguards to prevent fraud and ensure the accurate fulfillment of the testator's desires.

40. VA. CODE ANN. § 64.1-165 (1950) provides:

> But it is expressly provided that the foregoing provisions of this article are subject to the following qualification, that none of such provisions shall in any way impair the right or power of any person *by will or by written instrument executed inter vivos* to make direction from [*sic*] the payment of such estate or inheritance taxes and to designate the fund or funds or property out of which such payment shall be made; and in every such case the provisions of the will or of such written instrument executed inter vivos shall be given effect to the same extent as if this article had not been enacted. (Emphasis added.)

To date few cases involving this statute have been reported. *See, e.g.*, Alexandria Nat'l Bank v. Thomas, 194 S.E.2d 723 (Va. 1973).

41. Failure to explain to the client the importance of including a provision in the will to avoid the application of the Florida apportionment statute may expose an attorney who drafts such a trust to malpractice liability. The potential problems have been discussed in the professional literature: "[t]he equitable and statutory requirement that estate taxes must be apportioned is controlling even though the decedent has created an inter vivos trust providing for the payment of all estate taxes from such trust fund." *Legal Questions Under Florida Apportionment Statute*, 31 FLA. B.J. 190, 190 (1957). *See also* THE FLORIDA BAR, FLORIDA WILL DRAFTING AND ESTATE PLANNING 793 (2d ed. 1972); Payne, *Apportionment of Federal and State Estate Taxes Under Florida Law*, 11 MIAMI L.Q. 265 (1956).

second, by statutory revision to include apportionment by trust provision when the will contains no provision for payment of estate taxes or when the trust provision is the more recent provision. In either event, the intent of the testator will be better effectuated.

Carol E. Gilmore