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INFORMATION MEMO
TRUST AND ESTATE

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Every spring, the Florida legislature meets in regular session, and seemingly in every session significant changes are made to Florida's trust and estate laws. Once again in 2015 changes were made to the Florida Uniform Transfers to Minors Act (Florida now has UTMAs that can last to age 25) and to Florida's health care surrogate statutes (providing new flexibility and choices).

Uniform Transfers to Minors Act

Florida's Uniform Transfers to Minors Act (UTMA) directs the process for the creation of custodial accounts for gifts, bequests or other transfers to minors. Under the UTMA, minors are defined as persons under the age of 21.

UTMA accounts may be created by gift or exercise of a power of appointment or by a transfer from an estate or trust via the governing instrument (e.g. a "postponement of possession" clause).

A number of states have modified their UTMA law to permit custodianships to last until the age of 25, and now Florida has done so as well. A custodianship under Florida law can be created if the transferor, the custodian or the minor resides in Florida, or if the custodial property (e.g. real property) is in Florida.

Creating an age 25 UTMA via will or trust should be relatively easy, as now the law allows for the designation of an age 25 termination date at the time of the creation of the UTMA account. Note, however, that while it is now possible to set the termination date at 25, this new option only applies if the minor is under age 21 at the time of death.

Generally gifts to an UTMA account qualify for the gift tax annual exclusion under Section 2503(b) of the Code as they are not treated as gifts of future interests under Section 2503(c) of the Code. However, Section 2503(c) of the Code only applies where the funds pass to the donee on attaining the age of 21.

To ensure gifts to the UTMA will qualify for the annual exclusion, the Florida legislature adopted a provision granting minor beneficiaries of an age 25 UTMA the right to withdraw the custodial funds at age 21, with such right of withdrawal limited in duration, so that if the beneficiary of the custodial assets fails to exercise the right to withdraw within a defined time period (generally 30 days from the age of 21), then the UTMA funds will remain in the UTMA account until the beneficiary reaches age 25 without further right to withdraw.

The custodian is required to give the minor written notice of this right to withdraw at least 30 days before and no later than 30 days after the minor's attaining the age of 21. The withdrawal period may not lapse prior to the later of 30 days after the notice is given or 30 days after the minor's 21st birthday.

The new UTMA statute is effective as of July 1, 2015.

Health Care Surrogates

New heath care surrogacy initiatives provide greater flexibility and more choices in drafting and implementing Florida designations of health care surrogates, including presently exercisable designations of health care surrogates (sometimes referred to as "durable" health care surrogates. The new act also codifies the ability of parents to name health care surrogates for their minor children, which is an extremely helpful tool for those who may be traveling without their children. Further, the new act defines "health information" and gives the surrogate express access to such information otherwise protected from disclosure by HIPAA.

As a result of the Act, after October 1, a client may designate a surrogate to make health care decisions even if the client is not determined to be incapacitated (i.e. the client may executed a durable health care surrogate). However, if the principal has capacity, the statute indicates the principal's decisions are to be controlling over those of the surrogate if the directions conflict. Further, even with a durable health care surrogate in place, treating physicians still must communicate treatment plans and/or changes in treatment plans to principals with capacity.

The Act provides that a principal with capacity may amend or revoke a durable health care surrogate in a variety of ways (including a written amendment, a written revocation, destroying the designation, and even oral/verbal expressions).

A client may still create an "old fashioned" health care surrogate document that only becomes operative upon a finding of incapacity. Many clients may still prefer that approach.

With respect to parents and guardians desiring to delegate decision-making for their minor children, there has been a very wanted change to the statutes added. Often clients wish to empower whoever is watching the minors with written authority to make health decisions in case a child gets injured. Previously, there was no clarity as to how a parent or guardian could delegate that authority to a third party.

Now, a statutory framework exists for parents and guardians to name health care surrogates for minors in case they are unavailable to provide informed consent themselves. As noted, this provision will be particularly helpful for parents who travel without their minor children.

These new statutory provisions are effective October 1, 2015. These changes to the health care surrogate statutes do not invalidate existing Florida designation of health care surrogate documents.

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