



PBCEPC: Roundtable Discussion Outline, November 6, 2014
Patrick Whitehead, Esq., Whitehead Law Offices

Modern-day estate planning challenges: What roles should effective advisors play in working with high-net worth families with difficult heirs?

It's more than simply holding the purse strings –but to be a change agent for positive growth for the beneficiaries utilizing creative legal strategies

- **You must understand the different tools to motivate certain beneficiaries. Sometimes it's legal action.**
- **Understanding the other professionals that you need to have in your planning**
- **Preamble: A Lawyer's Responsibilities:** *In the practice of law conflicting responsibilities are often encountered. Difficult ethical problems may arise from a conflict between a lawyer's responsibility to a client and the lawyer's own sense of personal honor, including obligations to society and the legal profession. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules*
 - Excerpt from the FL Bar
 - "I will employ, for the purpose of maintaining the causes confided in me such means only as are consistent with truth and honor"
- **Different fiduciary roles that people could have and governance**
 - Trustee, co-trustee, distribution committee member. Attorney in fact, trust protector, the settlor's intent
 - Client confidentiality (Bar Ethics rules) explained: if the clients don't talk to their attorney about exceptional issues with one or more beneficiaries, who will they talk about their issues with - - if anyone?
 - Attorneys shouldn't be adverse to taking the time to learn the inner workings of their client's family
- Improving the taxation picture and preservation of a client's estate treasures does not preclude the additional preservation of people's lives and an ethical and educated estate lawyer can be a key professional in this role.



Statutes and Rules referenced in today's seminar could include:

Florida Bar Rules of Professional Conduct	Florida Substance Abuse Services [Marchman] Act
Rule 4-1.14. Client under a disability	F.S. § 397.6951. Contents of petition for involuntary treatment
Rule 4-1.2. Objectives and Scope of Representation	F.S. § 397.697. Court determination; effect of court order for involuntary substance abuse treatment
Rule 4-1.6. Confidentiality of Information	Florida Trust Code
Rule 4-2.1. Adviser	F.S. § 736.0306. Designated representative
Rule 4-2.4. Lawyer Serving as Third-Party Neutral	F.S. § 736.0303. Representation by fiduciaries and parents
Guardianship Law	F.S. § 736.0806. Trustee's skills
F.S. § 744.331. Procedures to determine incapacity	F.S. § 736.0808. Powers to direct
Florida Durable Power of Attorney F.S. § 709.2114. Agent's duties	F.S. § 736.0703. Cotrustees
Florida Mental Health [Baker] Act	
F.S. § 394.467. Involuntary inpatient placement	

For the full text of the case law and statutes (6 pages): <http://bit.ly/1AjfAvo>

About Whitehead Law Offices

Whitehead Law Offices is a law firm focusing on trusts, estates, probate, and guardianship. We are committed to delivering the highest level of client service and personal attention. Our core values of honesty, compassion and excellence are at the foundation of all recommendations and actions we take on behalf of our clients. We are wholly invested in the lives and endeavors of our clients. We truly care about them and treat them as family.

The Wagg Building | 215 South Olive Avenue, Suite 400
 West Palm Beach, Florida 33401 | Main: 561.833.5553 | Fax: 561.833.5628
patrick@wlawoffices.com | www.wlawoffices.com

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 West Palm Beach, Florida 33401 | Main: 561.833.5553 | Fax: 561.833.5628
patrick@wlawoffices.com | www.wlawoffices.com

Florida Bar Rules of Professional Conduct

Rule 4-1.14. Client under a disability

“(a) Maintenance of Normal Relationship. When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) Appointment of Guardian. A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest”

Rule 4-1.2. Objectives and Scope of Representation

“(a) Lawyer to Abide by Client's Decisions. Subject to subdivisions (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by rule 4-1.4, shall reasonably consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify”

Rule 4-1.6. Confidentiality of Information

“(a) Consent Required to Reveal Information. A lawyer must not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

(b) When Lawyer Must Reveal Information. A lawyer must reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to prevent a client from committing a crime; or
- (2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed”

Rule 4-2.1. Adviser

“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.”

Rule 4-2.4. Lawyer Serving as Third-Party Neutral

“(a) Definition. A lawyer serves as a third-party neutral when the lawyer assists 2 or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.”

Preamble: A Lawyer's Responsibilities

“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As an adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others

In the practice of law conflicting responsibilities are often encountered. Difficult ethical problems may arise from a conflict between a lawyer's responsibility to a client and the lawyer's own sense of personal honor, including obligations to society and the legal profession. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system”

Guardianship Law

F.S. § 744.331. Procedures to determine incapacity

“(2) Attorney for the alleged incapacitated person

(b) The court shall appoint an attorney for each person alleged to be incapacitated in all cases involving a petition for adjudication of incapacity. The alleged incapacitated person may substitute her or his own attorney for the attorney appointed by the court.”

Florida Durable Power of Attorney

F.S. § 709.2114. Agent's duties

“(1) An agent is a fiduciary. Notwithstanding the provisions in the power of attorney, an agent who has accepted appointment:

(a) Must act only within the scope of authority granted in the power of attorney. In exercising that authority, the agent:

1. May not act contrary to the principal's reasonable expectations actually known by the agent;
2. Must act in good faith;
3. May not act in a manner that is contrary to the principal's best interest”

Florida Mental Health [Baker] Act

F.S. § 394.467. Involuntary inpatient placement

“(1) Criteria.--A person may be placed in involuntary inpatient placement for treatment upon a finding of the court by clear and convincing evidence that:

(a) He or she is mentally ill and because of his or her mental illness:

1. a. He or she has refused voluntary placement for treatment after sufficient and conscientious explanation and disclosure of the purpose of placement for treatment; or
b. He or she is unable to determine for himself or herself whether placement is necessary; and
2. a. He or she is manifestly incapable of surviving alone or with the help of willing and responsible family or friends, including available alternative services, and, without treatment, is likely to suffer from neglect or refuse to care for himself or herself, and such neglect or refusal poses a real and present threat of substantial harm to his or her well-being; or

- b. There is substantial likelihood that in the near future he or she will inflict serious bodily harm on himself or herself or another person, as evidenced by recent behavior causing, attempting, or threatening such harm; and
- (b) All available less restrictive treatment alternatives which would offer an opportunity for improvement of his or her condition have been judged to be inappropriate”

Florida Substance Abuse Services [Marchman] Act

F.S. § 397.6951. Contents of petition for involuntary treatment

A petition for involuntary treatment must contain the name of the respondent to be admitted; the name of the petitioner or petitioners; the relationship between the respondent and the petitioner; the name of the respondent's attorney, if known, and a statement of the petitioner's knowledge of the respondent's ability to afford an attorney; the findings and recommendations of the assessment performed by the qualified professional; and the factual allegations presented by the petitioner establishing the need for involuntary treatment, including:

- (1) The reason for the petitioner's belief that the respondent is substance abuse impaired; and
- (2) The reason for the petitioner's belief that because of such impairment the respondent has lost the power of self-control with respect to substance abuse; and either
- (3)(a) The reason the petitioner believes that the respondent has inflicted or is likely to inflict physical harm on himself or herself or others unless admitted; or
- (b) The reason the petitioner believes that the respondent's refusal to voluntarily receive care is based on judgment so impaired by reason of substance abuse that the respondent is incapable of appreciating his or her need for care and of making a rational decision regarding that need for care”

F.S. § 397.697. Court determination; effect of court order for involuntary substance abuse treatment

“(1) When the court finds that the conditions for involuntary substance abuse treatment have been proved by clear and convincing evidence, it may order the respondent to undergo involuntary treatment by a licensed service provider for a period not to exceed 60 days. If the court finds it necessary, it may direct the sheriff to take the respondent into custody and deliver him or her to the licensed service provider specified in the court order, or to the nearest appropriate licensed service provider, for involuntary treatment. When the conditions justifying involuntary treatment no longer exist, the individual must be released as provided in s. 397.6971. When the conditions justifying involuntary treatment are expected to exist after 60

days of treatment, a renewal of the involuntary treatment order may be requested pursuant to s. 397.6975 prior to the end of the 60-day period”

Florida Trust Code

F.S. § 736.0306. Designated representative

“(1) If specifically nominated in the trust instrument, one or more persons may be designated to represent and bind a beneficiary and receive any notice, information, accounting, or report. The trust instrument may also authorize any person or persons, other than a trustee of the trust, to designate one or more persons to represent and bind a beneficiary and receive any notice, information, accounting, or report.

(2) Except as otherwise provided in this code, a person designated, as provided in subsection (1) may not represent and bind a beneficiary while that person is serving as trustee.

(3) Except as otherwise provided in this code, a person designated, as provided in subsection (1) may not represent and bind another beneficiary if the person designated also is a beneficiary, unless:

(a) That person was named by the settlor; or

(b) That person is the beneficiary's spouse or a grandparent or descendant of a grandparent of the beneficiary or the beneficiary's spouse.

(4) No person designated, as provided in subsection (1), is liable to the beneficiary whose interests are represented, or to anyone claiming through that beneficiary, for any actions or omissions to act made in good faith.”

F.S. § 736.0303. Representation by fiduciaries and parents

“To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute

(2) An agent having authority to act with respect to the particular question or dispute may represent and bind the principal.”

F.S. § 736.0806. Trustee's skills

“A trustee who has special skills or expertise, or is named trustee in reliance on the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.”

F.S. § 736.0808. Powers to direct

“ . . . (4) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.”

F.S. § 736.0703. Cotrustees

“ . . . (5) A cotrustee may not delegate to another cotrustee the performance of a function the settlor reasonably expected the cotrustees to perform jointly

(9) If the terms of a trust provide for the appointment of more than one trustee but confer upon one or more of the trustees, to the exclusion of the others, the power to direct or prevent specified actions of the trustees, the excluded trustees shall act in accordance with the exercise of the power. Except in cases of willful misconduct on the part of the excluded trustee, an excluded trustee is not liable, individually or as a fiduciary, for any consequence that results from compliance with the exercise of the power. An excluded trustee does not have a duty or an obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of the power. The trustee or trustees having the power to direct or prevent actions of the excluded trustees shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power. The provisions of s. 736.0808(2) do not apply if the person entrusted with the power to direct the actions of the excluded trustee is also a cotrustee.”