

## c) Attorney Fees

Any attorney who has rendered services to an estate may be awarded reasonable compensation from the estate. *See Fla. Stat. ch. 733.106(3).*

## d) Charged Against Estate

When costs and attorney's fees are to be paid from the estate, the court may direct from what part of the estate they must be paid. *See Fla. Stat. ch. 733.106(4).*

**K. Non-Probate Transfers**1) INTER VIVOS GIFTS

A gift *inter vivos* means that the gift is given by a living person to a living person. A question may arise as to whether property was properly disposed of as an *inter vivos* gift. For example, assume that a testator's entire estate is devised "to mother." However, one week before the testator's death, he purchased a ring for his girlfriend. Whether the ring is given to the testator's girlfriend or mother will depend on if the ring was given to the girlfriend as a complete and valid *inter vivos* gift. If so, then the girlfriend may keep the ring. If not, the ring becomes a part of the estate and the mother will ultimately receive it.

a) Elements of *Inter Vivos* Gifts

An ***inter vivos*** gift requires 1) intent, 2) delivery and 3) acceptance.

## (1) Acceptance

Acceptance of a gift *inter vivos* is generally presumed, particularly when the subject matter of the gift is something of value.

## (2) Intent

In some instances, the issue is if a donor intended to immediately vest a donee with an interest in property or to do that only at some future time. In the latter event, then the donor has not made a gift. In the former event, the gift is completed only if the delivery is appropriate under the facts and circumstances.

Instances in which the transfer of physical possession of the subject matter of a gift is deferred to some time in the future presents a difficult issue. The deferral of the transfer until the future might suggest the absence of an intent to make an immediate gift. That deferral might suggest an intent to make an immediate gift of a "future interest" in the property because the donor wants to retain possession of the item for life. The common law recognizes both present and future interests in property as distinct property interests.

Thus, there is no reason why one cannot make an immediate gift of a future interest. In Gruen v. Gruen, 68 N.Y.2d 48, 505 N.Y.S.2d 849, 496 N.E.2d 869 (1986), the court held that a donor had made a gift to his son of a future interest in a painting where the donor wished to defer transferring possession of the painting to his son so that the donor could retain possession of the painting for the rest of his life. See *a/so* Innes v. Potter, 130 Minn. 320, 153 N.W. 604 (1915).

### (3) Delivery

Actual delivery of the property qualifies as valid delivery. In addition to actual delivery, courts have generally recognized that constructive or symbolic delivery of a gift is appropriate if the subject matter of the gift cannot be physically delivered to the donee at the time a donor wishes to complete the gift. See In re Cohn, 187 App. Div. 392, 176 N.Y.S. 225 (1919). If the subject matter of the gift is a future interest in property rather than the property itself, then the gift can only be evidenced by a constructive or symbolic delivery, since the subject matter of the gift has no physical shape. In such a case the best delivery would be a writing evidencing the gift that is signed and delivered to the donee. See Gruen v. Gruen, *supra*.

## 2) GIFT CAUSA MORTIS

A gift *causa mortis* is a gift that is made under an **immediate apprehension of death**, usually from a known peril, which is revocable if a donor does not die. Like an *inter vivos* gift, a gift *causa mortis* must be evidenced by intent, delivery, and acceptance. Some courts appear to require a **greater degree of proof** of intent, delivery, and acceptance in the case of a *causa mortis* gift because of a concern that such gifts are inconsistent with policies underlying statutes of wills in that they are often unwitnessed transfers. See, e.g., Foster v. Reiss, 18 N.J. 41, 112 A.2d 553 (1955). A gift *causa mortis* may be used to avoid the claims of creditors because the creditors generally cannot obtain property that is properly gifted.

## L. Powers and Duties of Personal Representatives

### 1) QUALIFICATIONS OF PERSONAL REPRESENTATIVES

Florida law includes many provisions regarding the appointment of, and necessary qualifications to be, a personal representative of a testate decedent.

#### a) Persons Not Qualified

A person is not qualified to act as a personal representative if the person:

- **Felon:** Has been convicted of a felony.
- **Inability:** Is mentally or physically unable to perform the duties.
- **Minor:** Is under the age of **18** years.

See Fla. Stat. ch. 733.303(1)(a)-(c).

If the person named as personal representative in the will is not qualified, then letters of administration must be granted based on statutory preferences. Fla. Stat. ch. 733.303(2).

b) Personal Representative Not Qualified

Any time a personal representative knows or should have known that he or she would not be qualified for appointment if an application for appointment were then made, the personal representative must promptly:

- file a notice in a Florida court setting forth the reasons for lack of qualifications ; and
- serve the notice upon the relevant parties.

See Fla. Stat. ch. 733.3101.

A personal representative who does not comply with the preceding rule will be personally liable for costs, including attorney's fees, incurred in any removal proceeding, if the personal representative is removed. *Id.* This liability will be cumulative to any other provided by law. *Id.*

c) Causes for Personal Representative's Removal

A personal representative may be removed and the letters of administration revoked for any of the following causes:

- **Incompetency** established by adjudication.
- **Incapacity**, physical or mental, preventing the discharge of duties.
- **Noncompliance** with a Florida court order not superseded on appeal.
- **Failure to account** for the sale of estate property when required.
- **Failure to produce** and exhibit the estate's assets when required.
- **Wasting** of the estate.
- **Maladministration** of the estate.
- **Failure** to give bond or security for any purpose.
- **Conviction** of felony.
- **Insolvency** of, or the appointment of a receiver or liquidator for, any corporate personal representative.
- **Holding or acquiring** conflicting or adverse interests against the estate that will or may interfere with the administration of the estate.
- **Revocation** of the probate of the decedent's will that authorized or designated the appointment of the personal representative.
- **Removal of domicile** from Florida, if domicile was a requirement of initial appointment.
- The personal representative would not now be entitled to appointment.