



# Will Power

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## BENEFICIARY RIGHTS

A common concern that I hear in my conference room when meeting with clients involves the rights of beneficiaries. Clients are concerned that a beneficiary may somehow challenge the client's intent as expressed in the will or trust, that a beneficiary might somehow get access to copies of brokerage statements and other financial information while the client is still alive (and even thereafter) or that a beneficiary may somehow have rights or powers over assets before the administration is complete. These concerns are fair and should be planned for. In the past I have written columns on how a will or trust can be challenged. I may run one of those again in the near future. The short course is that there are a limited number of means to challenge a will or trust, and most challenges will not be entertained by a court until the grantor of the trust or the decedent of a will is dead.

A serious issue arises with respect to beneficiary's rights in a grantor's assets before the grantor is dead. In a normal revocable living trust situation, the grantor retains all rights to amend or even revoke the trust. Under the new Florida Trust Code that becomes effective July 1, 2007, the trustee is not responsible for giving any accountings to anyone other than the grantor while the grantor is alive and competent. This is due to the fact that the beneficiaries listed in the document are not "qualified beneficiaries" until their interests become certain under the terms of the new law.

This all changes, however, when the grantor is no longer serving as his own trustee and the grantor dies. At this point, the beneficiaries are entitled to copies of the trust instrument, to financial accountings, and to information related to the sale of real properties among other things. The beneficiaries have broad rights to receive information once the grantor of the trust dies.

The new Trust Code does provide a means to limit the information to the beneficiaries. You may name a "designated representative" to receive information on behalf of the beneficiary. The designated representative cannot be a trustee of the trust, and there are other requirements. If you have a rogue beneficiary named in

your documents who you do not want to receive all of the information that a beneficiary is entitled to, then you should consider amending your documents to include a designated representative for that beneficiary.

As for rights and powers over assets, this can become a tricky issue when a trustee is also a beneficiary. Many people name a child or other close family member as their successor trustee in their revocable trust. So when a client becomes incapacitated or dies, the successor trustee steps in. This can be troublesome in that a trustee/beneficiary is wearing two hats. An example might clarify:

Assume that "Jim" names his son, "Henry" to serve as his successor trustee. Assume further that Jim has two other children, "Betsy" and "Don". Henry, Betsy and Don are all equal beneficiaries under the terms of Jim's trust.

Jim dies. Henry is now the trustee of Jim's trust. Assume that one of Jim's assets is a real estate development firm. Henry decides to wind down his father's business, but continues his own real estate development firm. Under the new Florida Trust Code, if Henry takes a business opportunity that Jim's trust could have benefited from, Henry may have violated his "duty of loyalty" to the trust and could be liable to Betsy and Don. The Florida Trust Code's duty of loyalty may be broadly defined, so if you have a potential conflict of interest amongst your beneficiaries, you may want to consider adding an independent trustee into the fold to ensure that those problems are minimized.

In future columns I'll discuss other powers beneficiaries may have under the Florida Trust Code, including nonjudicial modification of the trust (thereby circumventing the grantor's intent), and what a grantor can do about it to ensure that his or her wishes are carried forward without interference.

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