

Chapter 13

PARTIAL DISTRIBUTIONS

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§ 13.1. INTRODUCTION

The term “partial distribution” is sometimes used in the sense of distributing a portion of a beneficiary’s devise or intestate share before the final distribution. In other instances it is used in the sense of a total distribution to a beneficiary before the final distribution to all beneficiaries. As used in this chapter, it contemplates any distribution made before final distribution.

Authority for partial distribution is derived from *F.S.* 733.612(26) (permissive partial distribution) and *F.S.* 733.802 (compulsory partial distribution). See *Fla. Prob. R.* 5.380. There is very little case law on partial distributions in Florida. The problem with making partial distributions is that the remaining assets of the estate may be insufficient to pay all taxes, claims, and costs ultimately determined to be due, or the distributions may be made to persons who are not ultimately entitled to them. The personal representative is potentially liable if partial distributions turn out to be improper. The personal representative is personally liable to the taxing authorities for the payment of state and federal estate and income taxes. *F.S.* 198.23; 31 *U.S.C.* § 3713(b). See § 13.2.H.

F.S. 733.602(2) provides that “[a] personal representative shall not be liable for any act of administration or distribution if the act was authorized at the time.” However, the statute also provides that “[n]othing in this section affects the duty of the personal representative to administer and distribute the estate in accordance with the rights of interested persons.” *Id.* This has been explained in a special concurring opinion in *In re Estate of Wejanowski*, 920 So. 2d 190 (Fla. 2d DCA 2006).

Pursuant to section 733.612, Florida Statutes (2002), the personal representative “acting reasonably for the benefit of the interested persons” may perform the “transactions authorized” “without court order.” If done, then the personal representative is entitled to the protection afforded by section 733.602(2). Obtaining court approval for actions already authorized by statute does not insulate the personal representative from personal liability, nor does it eliminate the requirements of section 733.612 that the personal representative act reasonably and for the benefit of the interested persons.

Wejanowski, 920 So. 2d at 192 (Villanti, J., specially concurring).

Despite the potential liability, circumstances may justify a distribution before entry of the final order of distribution. The personal representative in each instance must determine whether the distribution is in order on the merits as they exist in that particular situation.

The discussion in this chapter is limited to the peculiar problems and procedures relating to partial distribution. Chapter 14 covers in detail the subject of final distribution, and the potential problems discussed in § 14.3.A (concerning, for example, abatement, advancements, and apportionment of taxes) are equally applicable to partial distributions and must be considered as well.

§ 13.2. PRELIMINARY CONSIDERATIONS

A. Restrictions On Compulsory Payment

F.S. 733.801(1) provides: “No personal representative shall be required to pay or deliver any devise or distributive share or to surrender possession of any land to any beneficiary until the expiration of 5 months from the granting of letters.”

Under *F.S.* 733.802(1), a personal representative cannot be compelled to make distribution before final distribution “unless the beneficiary establishes that the property will not be required for the payment of debts, family allowance, estate and inheritance taxes, claims, elective share . . . , or expenses of administration or . . . for contribution or to enforce equalization in case of advancements.” The petition for compulsory payment of the beneficiary’s devise or distributive share must allege the facts that entitle the beneficiary to relief. *Fla. Prob. R.* 5.380(a). See § 13.3.B.1.

The two statutes and the rule, together, appear to indicate that under no circumstances is the personal representative required to distribute until final distribution except on a petition for compulsory distribution, and no petition should be considered until at least five months after letters have been granted.

In spite of the restrictions on compulsory payment, the personal representative may make partial distributions at any time unless restricted by the will or court order or unless the property is needed to satisfy claims, funeral expenses, expenses of administration, taxes, family allowance, exempt property, the elective share, or for contribution or to enforce equalization in the case of advancements. *F.S.* 733.612(26), 733.802.

B. The Risk Period

A personal representative desiring to make a partial distribution before the expiration of the five-month period set out in *F.S.* 733.801(1) or before the approval of the final accounting should consider, at a minimum, the possibilities mentioned in the following list. When a petition for compulsory partial distribution is filed, the personal representative may consider the list in deciding how to respond to the petition:

- The personal representative may be personally liable if for some reason sufficient funds are not available to pay all items of higher priority, including state and federal estate and inheritance taxes, debts and claims against the estate, administration costs, family allowances, and specific devises.
- A petition for equalization of advancements may be filed. See *F.S.* 733.805(2), 733.806.
- A petition for exempt property may be filed. *F.S.* 732.402.
- The surviving spouse may elect to take an elective share. *F.S.* 732.201 *et seq.*
- An antenuptial or postnuptial agreement may surface that affects the interest of the surviving spouse and may affect claims against the estate if found valid since it controls the disposition of property. See *Williams-Paris v. Joseph*, 329 So. 3d 775 (Fla. 4th DCA 2021).
- The personal representative should be sure that all known or reasonably ascertainable creditors have been served with notice to creditors and that the claims period has expired with respect to the creditors given notice.
- The claims period may not have expired as to unknown creditors.
- The period for amending claims by the Agency for Health Care Administration may not have expired. *F.S.* 409.9101(2)–(4).
- A petition for revocation of the will may be filed. *F.S.* 733.109.
- A pretermitted spouse unknown to the personal representative may appear. See *F.S.* 732.301, whose enactment evidenced Florida’s strong public policy to protect a surviving spouse of a marriage in existence at the time of a decedent’s death. *Via v. Putnam*, 656 So. 2d 460 (Fla. 1995). For clarification of the share of a pretermitted spouse, see *Solomon v. Dunlap*, 372 So. 2d 218 (Fla. 1st DCA 1979).
- A pretermitted child is revealed to the personal representative after administration has begun. See *F.S.* 732.302.
- A dissolution of marriage may have occurred that would affect the right to receive estate assets. See *F.S.* 732.507(2).
- A common-law marriage may have occurred that would affect the right to receive assets. The 1967 Legislature abolished common-law marriages purportedly entered into in Florida after January 1, 1968; however, a common-law marriage entered into in another state or country where they are considered valid would be recognized. *F.S.* 741.211. See *Cohen v. Shushan*, 212 So. 3d 1113 (Fla. 2d DCA 2017); *Johnson v. Lincoln Square Properties, Inc.*, 571 So. 2d 541 (Fla. 2d DCA 1990).
- A same-sex marriage may have occurred that may affect the entitlement to estate assets.

- A later will or codicil may be found whose validity must be scrutinized to ensure its strict compliance with Florida law on the date of a domiciliary decedent's death. See *Caveglia v. Heinen*, 359 So. 3d 745 (Fla. 4th DCA 2023). See also §§ 11.2.F and 14.3.D.4 for discussion of wills discovered after administration.
- An unknown beneficiary may appear. However, the personal representative is protected if beneficiaries have been determined under *F.S.* 733.105. See §§ 11.8.A–11.8.E of this manual.
- Property may prove to be protected homestead property. See generally *Public Health Trust of Dade County v. Lopez*, 531 So. 2d 946 (Fla. 1988); *Williams-Parish*. See also § 19.2 of this manual.
- If the partial distribution consists of the proceeds of an insurance policy, all of the implications of *F.S.* 222.13 (disposition of life insurance proceeds) and 733.808 (disposition of death benefit proceeds) should be taken into account. See also § 13.2.G.7 of this manual.
- If the beneficiary is a minor, a proper guardian must execute a receipt for the minor. If the amount involved is \$15,000 or less, the minor's natural guardians may receive the money. See *F.S.* 744.301(2). If the amount is over \$15,000, a court-appointed guardian of the property must act unless the transfer is made to a custodian for the benefit of the minor under *F.S.* 710.106 or 710.107.
- All income, estate, and gift tax implications should be considered fully.
- The personal representative should consider requiring the beneficiary to agree to refund or return all or any part of the property distributed to that beneficiary if needed by the estate for any lawful purpose.
- The personal representative should consider requiring the beneficiary to provide a bond with adequate sureties in a sum sufficient to cover the value of the partial distribution.
- All or part of a will may violate the rule against perpetuities and, using the doctrine of dependent relative revocation, it is possible for the court to consider a petition on that subject after the statutory time for filing a petition to revoke a will has expired. *In re Estate of Jones*, 352 So. 2d 1182 (Fla. 2d DCA 1977).
- Distributions of currency, securities, precious metals, and other assets to non-favored countries and citizens may be prohibited. For example, when Cuba or Cuban nationals are involved, Title 31, Chapter V, United States Code, and 31 C.F.R. Part 515—the Cuban Assets Control Regulations—may prohibit the transfer or exportation of United States currency, securities, precious metals, or other assets to Cuba or to certain Cuban nationals. These regulations permit blocked United States trust accounts to be set up for distributions intended for certain Cuban nationals. See *Lieberman v. Golden*, 545 So. 2d 304 (Fla. 3d DCA 1989). Beginning in

2015, the Cuban Assets Control Regulations have been relaxed somewhat. For restrictions applicable to other countries, organizations, or property, see 31 C.F.R. Chapter V. See also § 11.2.B.5 of this manual.

C. Circumstances Justifying Distribution Before Expiration Of Risk Period

One of the more obvious circumstances that might justify a partial distribution is the existence of a wasting asset. For example, if an automobile is among the estate assets, it generally is worth more at the time of the decedent's death than it would be several months later. The mere passage of time depresses its value.

A desire to reduce the personal representative's responsibility and liability in connection with certain high-risk assets may justify partial distribution. For example, Florida's "dangerous instrumentality" doctrine makes the retention of automobiles by the estate risky if the vehicles are used at all. See § 13.2.G.5.

Another circumstance may be that a beneficiary is in great present need of the assets to be distributed. This may be the case when the recipient is elderly or ill, or when the beneficiary's economic situation is so desperate as to require immediate relief. Some consideration may also be in order as to the beneficiary's business needs.

It may be desirable to make a partial distribution of assets having a relatively small value. Those assets may actually be a nuisance for the personal representative to keep on hand. Examples are furniture and personal effects.

Another motivating factor may be the cost of storage and insurance, and the risk of loss of jewelry, coin, and stamp collections, works of art, antiques, and other similar kinds of assets. See § 13.2.G.4.

If the estate is comfortably solvent, it may be convenient for the personal representative to distribute items devised, other than residuary devises. This type of partial distribution leaves the residuary beneficiaries in a position to settle future matters by agreement without having to get the agreement of the nonresiduary beneficiaries.

There may be less risk to the personal representative if the beneficiary signs a receipt for the partial distribution that contains an agreement to refund immediately upon determination by the personal representative of a need for refund, or if the beneficiary provides a bond with a surety satisfactory to the personal representative. A form for the receipt is set out in § 13.3.C.2.b and for the bond

in § 13.3.B.2.c. If it is the beneficiary (rather than the personal representative) who desires that the partial distribution be made, the court may require the beneficiary to provide a bond. *F.S.* 733.802(3).

It may be that a partial distribution is desirable for income tax reasons. Partial distribution shortly following death in a taxable estate in which estate tax is not eliminated through use of the applicable exclusion amount and the marital or charitable deduction may also reduce estate taxes. For example, if it appears that a majority of the estate assets will decrease in value over the six-month period from the date of death to the alternate valuation date, but a portion of the estate assets will show a sharp increase in value over that same period, the personal representative who wishes to minimize the taxable estate may distribute the property that is likely to increase in value. The value of property for estate tax purposes under the alternate valuation date rules is fixed at the earlier of the date of distribution, sale, exchange, or other disposition, or the date that is six months after the decedent's death. If the forecast of the decrease in value of the remaining assets was correct, the gross estate would be less on the alternate valuation date. Of course, there are other factors to consider. For example, a partial distribution of an asset that is increasing in value will leave the asset with a lower tax basis than if the alternate valuation date is elected, and the income tax consequences to the beneficiary upon his or her later sale of the appreciating asset may overcome any estate tax advantage. Relative tax brackets of the estate and beneficiary should be considered, as well as the likelihood of immediate sale. The estate tax is discussed further in §§ 13.4.A–13.4.B. The practitioner should note that *IRC* § 2032(c) allows use of the alternate valuation rules only if two conditions are met: (1) the value of the gross estate must decrease, and (2) the amount of tax payable after all credits must be lower than would result from computing the tax on date-of-death values. The election is on an all-or-nothing basis.

Finally, the need for continuation of the decedent's business may prompt partial distribution if the personal representative does not wish to operate the business. See § 13.2.G.6.

D. Recovery Of Assets Or Their Value

If a personal representative makes a voluntary partial distribution and later discovers that the remaining assets of the estate are insufficient to pay estate debts, taxes, expenses, statutory entitlements, or other obligations having priority over the distribution to the beneficiary, the personal representative may bring an action to recover the assets and income on the assets from the beneficiary to whom partial distribution was made, unless the distribution cannot be questioned because of adjudication, estoppel, or limitations. If the beneficiary does not have the property, the beneficiary is liable to return the value of the property and its income and gain. For this purpose, the value appears to be the value at the date

of disposition by the beneficiary. *F.S.* 733.811, 733.812. The right to recover the property itself ends at the time the distributee transfers the property to an innocent third-party purchaser for value. See *F.S.* 733.813.

A court order authorizing a distribution would not necessarily bar recovery if the basis for the distribution was erroneous.

The four-year statute of limitations under *F.S.* 95.11(3) does not begin to run until the discovery of the deficiency of assets to pay debts. *Clifton v. Clifton*, 54 Fla. 535, 45 So. 458 (1907); *In re Estate of Vernon*, 637 So. 2d 365 (Fla. 4th DCA 1994).

Creditors likewise are required to return improper payments. *F.S.* 733.812; *Vernon*.

E. Income Tax Consequences Of Partial Distribution

1. In General

Generally speaking, distributions from an estate to a beneficiary, except in satisfaction of a specific bequest, will have income tax consequences to the beneficiary. The Internal Revenue Code regards all distributions, except those made in satisfaction of a specific bequest (as defined in *IRC* § 663), as if made out of income to the extent of the estate's income, and then made from principal. Income for this purpose is not fiduciary accounting income but is "distributable net income" (DNI). The amount and characterization of DNI is determined under *IRC* § 643 and the regulations thereunder. This effectively results in a shift of the income tax from the estate to the beneficiary. Distributions in excess of the estate's DNI generally have no income tax consequences to the beneficiary. Distributions in satisfaction of specific devises are discussed in § 13.2.E.2.e.

If the estate distributes property, *IRC* § 643(e) must be considered. The estate will generally have no gain or loss on the distribution of property to a beneficiary unless (1) it is in satisfaction of a specific amount, (2) it is in lieu of specific property, or (3) the *IRC* § 643(e) election is made. *Treas. Reg.* § 1.661(a)-2(f). Furthermore, the estate will have realized gain on encumbered property proportionate to the outstanding amount of the mortgage which exceeds the fair market value of the property at the decedent's date of death. See *Commissioner v. Tufts*, 461 U.S. 300, 103 S. Ct. 1826, 75 L. Ed. 2d 863 (1983); *Crane v. Commissioner*, 331 U.S. 1, 67 S. Ct. 1047, 91 L. Ed. 1301 (1947).

The beneficiary's basis in distributed property is its basis in the hands of the

estate increased or decreased by any gain or loss recognized to the estate upon its distribution. See *IRC* § 1014(a); *Reg.* § 1.1014-4(a). *IRC* § 643(e)(2) provides that the amount of the distribution for purposes of the general rules allowing the estate's deduction under *IRC* § 661 and the beneficiary's inclusion of income under *IRC* § 662 is the lesser of (1) the adjusted basis of the property to the beneficiary, or (2) the fair market value of the property when distributed. The *IRC* § 643(e) election is effective for all assets distributed in kind during the taxable year in which the election is made. *IRC* § 643(e)(3)(B). In other words, the election is an all-or-nothing election for assets distributed in kind during a taxable year.

The personal representative may make an election under *IRC* § 643(e)(3) to treat the distribution as a sale or exchange of property to the beneficiary. If the election is made, gain or loss would be recognized to the estate as if the property had been sold to the beneficiary at its fair market value. The beneficiary's basis will then be stepped up to fair market value. The tax effect on both the estate and the beneficiary must be considered. As a result of requiring an all-or-nothing election for distributions in a taxable year, the fiduciary will have to be careful to segregate distributions, making some in one year when the election is made and making others in another year when no election is made, to achieve the desired result. The *IRC* § 643(e) election may be particularly desirable if the estate has excess deductions due to administrative expenses.

Generally, capital gains and losses are not included in DNI. *IRC* § 643(a)(3). See *Rev. Rul.* 68-392, 1968-2 C.B. 284. This means that capital gain will generally not be passed through to the beneficiary as a result of the distribution but will be taxed to the estate, except in the final year of the estate. *Reg.* § 1.643(a)-3. However, there are exceptions to this general rule.

Quarterly estimated tax payments are required by an estate after its first two taxable years. *IRC* § 6654(l). Accordingly, the penalties for underpayment of income tax are applicable to the estate. The personal representative of an estate may now elect to treat distributions made within the first 65 days of the estate's fiscal year as made for the preceding year. *IRC* § 663(b). The personal representative should consider the effect, if any, on the beneficiary in making this election. Because distributions carrying out DNI will reduce the estate's taxable income, there are both planning opportunities and pitfalls.

The personal representative may elect, on Form 1041-T (Allocation of Estimated Tax Payments to Beneficiaries), to treat any portion of a payment of estimated tax made by the estate as made by the beneficiary during the tax year of the estate, if made on or before the 65th day after the close of the estate's fiscal year, provided it is reasonably expected to be the last taxable year of the estate. *IRC* § 643(g). The amount allocated to the beneficiary will be treated as paid to

the beneficiary by the estate (and the estimated payment made by the beneficiary).

2. Determining Overall Benefit

a. Distribution To One Beneficiary

A partial distribution may work to the overall benefit of the parties from an income tax standpoint, or it may work to their detriment, depending on the facts in each situation. For example, if during its first taxable year, the estate has taxable income of \$5,000 and the personal representative makes a partial distribution of \$4,700 cash to a beneficiary, the beneficiary must report as taxable income the full \$4,700 and the estate reports only \$300 (the portion of the taxable income not distributed). This may be undesirable if the beneficiary is in a considerably higher tax bracket than the estate; furthermore, the estate would be wasting a portion of its \$600 annual exemption. However, if the distribution was of a specific devise (as defined for tax purposes) instead of a distribution out of the residuary estate, the estate would remain taxable on the entire \$5,000 of income. See § 13.2.E.2.e.

On the other hand, a partial distribution may work as a tax advantage. For example, if the personal representative elected a “short” taxable year as the initial fiscal year, and within that “short” year distributed \$55,000 to a beneficiary, but the estate had received only \$1,500 in taxable income during that time, the beneficiary in effect would receive \$53,500 without it being subject to income tax. The beneficiary would then pay income tax only on the \$1,500 income of the estate for that fiscal year. Income later received from the property that was distributed to the beneficiary will be taxed to the beneficiary rather than the estate. Whether this early distribution would have an overall tax advantage would depend on the relative tax brackets of the beneficiary and the estate. This method may be especially helpful when distribution is being made to a testamentary trust that at the outset would have no income from sources other than the sums distributed to it. However, if the testamentary trust is a mere conduit for income to the ultimate beneficiaries, that income may be taxed to the trust beneficiaries rather than the trust. See *F.S.* 738.601. The income and distribution deduction rules for trusts are similar to those for estates. See *IRC* §§ 643, 661–662.

b. Distribution To Several Beneficiaries; Separate Share Rule

IRC § 663(c) applies the “separate share rule” to estates. The separate share rule limits the amount of DNI that is carried over to each beneficiary to be in proportion to such beneficiary’s share. If the estate beneficiaries have substantially separate and independent shares of the estate, each separate share calculates its DNI based on its portion of gross income that is includable in DNI and its portion of deductions and losses. The purpose is to prevent a beneficiary who receives a

principal distribution from being unfairly taxed on income that is actually being accumulated for another beneficiary. *Id.* DNI is taxable to the beneficiary under *IRC* § 662(a) and deductible by the estate under *IRC* § 661(a). *Reg.* § 1.663(c)-1. Examples are found in *Reg.* § 1.663(c)-5.

If the separate share rule does not apply, each beneficiary is required to include in his or her individual return the portion of the estate's taxable income represented by the value of the property received by that beneficiary from the estate divided by the total value of property distributed (excluding specifically devised property). *IRC* § 662(a)(2)(B). In *Harkness v. United States*, 469 F.2d 310 (Ct. Cl. 1973), the testator intended that his widow receive 50% of the income of the estate and the remaining 50% to be further divided into four trusts for the testator's children, with all estate and inheritance taxes to be paid out of the children's share. In one year, distributions made from the estate consisted of payments to the widow that were equivalent to the payments to the children and taxes together. Accordingly, the widow's distribution consisted of 76% of the property distributed. The court held that the widow must include 76% of the estate's income in her income tax return. (This case was decided before *IRC* § 663(c) was modified to apply the separate share rule to estates.) If the same facts applied to the current separate share rule, the widow's income tax liability would be limited to her 50% share of the estate's DNI.

Distributions should be planned carefully so that no beneficiary bears an unfair share of the income tax liability. A slightly different rule applies when part of the income is required to be distributed currently, and other amounts are in fact paid or distributed during the same year. This rarely occurs with estates, although it frequently occurs with trusts. See *IRC* § 662(a) and the regulations within.

c. Installment Sale Obligations

The general rule is that installment sale obligations of a decedent that are distributed to the beneficiaries from an estate are not accelerated by reason of that distribution. *IRC* §§ 453B(c), 691(a)(5). However, if the installment sale obligation is transferred by the decedent's estate to the obligor (whether by devise or otherwise), or if the obligation is canceled, the obligation is deemed "transferred" and the gain inherent in the obligation is accelerated. *IRC* § 691(a)(5). The gain inherent in the obligation is also accelerated if the obligation is transferred in satisfaction of a devise of a specific amount. A pecuniary formula marital deduction bequest is a specific amount for purposes of acceleration of gain if satisfied by distribution of an installment obligation, but not a specific devise for purposes of the exclusion from carrying out DNI. *Reg.* § 1.663(a)-1(b)(1).

The income inherent in installment sale obligations acquired from a decedent is

treated as income in respect of a decedent. The estate's basis in installment obligations of the decedent is the same as the decedent's. *IRC* §§ 691, 1014(c). The estate does not get a stepped-up basis at death for either the installment obligations or the income in respect of a decedent.

If the personal representative sells estate property on the installment basis and then distributes the installment sale obligation to the beneficiaries, any gain inherent in the installment obligation will be accelerated. However, because the property sold received a new basis because of the decedent's death, there may be little or no gain to recognize on distribution. Basis generally will be based on fair market value as of the date of death unless the alternate valuation date applies. *IRC* § 1014.

Finally, if the personal representative is considering a sale to a family member or other related party within the meaning of *IRC* § 318(a), provisions in the installment sale rules concerning sales of property to related parties should not be overlooked. See *IRC* §§ 453, 453B. See § 10.4.C of this manual. See also *IRC* § 267 dealing with nonrecognition of losses.

d. Depreciable Property

Early distribution of depreciable property should be considered. If the property is *IRC* § 1245 or § 1250 property and the excess depreciation is subject to recapture on the property's subsequent sale, an inequitable tax result may occur. For example, assume property remains in the estate for several years, during which time a number of beneficiaries benefit from the depreciation deduction. If that property subsequently is distributed to only one beneficiary, that beneficiary assumes all of the ordinary income recapture of depreciation. Early distribution of that property, however, will give the beneficiary both the benefit of the depreciation and the burden of the recapture provisions. This result may be different if the separate share rule applies. See § 13.2.E.2.b.

e. Specific Devise

If a distribution is made in fulfillment of a specific devise, it generally does not carry out an income taint. *IRC* §§ 102(a), 663(a)(1); *Reg.* §§ 1.102-1(d), 1.663(a)-1(b). See *Rev. Rul.* 68-49, 1968-1 C.B. 304. The beneficiary's basis is the fair market value of the property as of the date of the decedent's death (or the alternate valuation date, if applicable) unless the property is an installment sale obligation held by the decedent. *IRC* §§ 1014(b)(1), (c). Except for decedents dying in 2010 when the *IRC* § 1022 election was made, the holding period is deemed to be more than one year for any subsequent sale or disposition by the beneficiary. *IRC* § 1223(9); *Rev. Proc.* 2011-41, § 4.01. A personal representative should be certain

that a devise is a specific “bequest” within the meaning of the tax law if the personal representative is relying on this rule. *IRC* § 663. A distribution of depreciable property that qualifies as a specific bequest avoids the recapture rules. This is a mixed blessing for the transferee because the recapture rules come into play on the transferee’s subsequent disposition of the property.

However, a disposition of property in satisfaction of a specific devise of an amount (or in satisfaction of other specific property) will be treated as a sale or exchange of the asset by the estate and will cause the estate to recognize gain, if any. See § 13.2.E.2.c regarding installment obligations.

f. Distribution Within First Six Months

If the personal representative chooses to distribute property within the first six months following the decedent’s date of death, the date of distribution sets the alternate value for alternate valuation date purposes if the alternate valuation election is made in a taxable estate. Thus, an early distribution may affect the subsequent income tax basis of the property. Future income tax considerations should be taken into account before making distributions within this time period.

F. Distribution To Testamentary Trustee

Under former probate law, qualification of a testamentary trustee was a prerequisite to the right to receive any part of the property devised to that person as trustee. Under the Florida Probate Code, the qualification requirement was removed except for one limited provision in former *F.S.* 733.808(2). That requirement was removed in 1977. Ch. 77-87, § 38, Laws of Fla. Currently, there is no need to qualify a testamentary trustee before an asset is distributed to the trustee.

G. Distribution Of Specific Assets

1. Tangible Personal Property

a. Worthless Personalty

Worthless property may be abandoned by the personal representative, provided it is not the subject of a specific devise. *F.S.* 733.612(9). However, before abandoning personalty that may constitute exempt property, the personal representative should obtain a waiver and consent from those entitled to elect exempt property. See § 13.2.G.3. Furthermore, some items of personalty that appear to be worthless may in fact be valuable antiques or priceless family mementos.

In any event, it would be prudent to obtain waivers and consents from those persons entitled to the worthless personalty. Frequently, charitable organizations will have use for used clothing and other personalty that has no value to anyone else. If the assets truly are worthless, the personal representative would be unwise to assume responsibility for the storage and care of them. A sample waiver follows in § 13.2.G.1.b.

b. Sample Waiver And Consent To Distribution To Charitable Institution

**IN THE CIRCUIT COURT FOR
BLANK COUNTY, FLORIDA
PROBATE DIVISION
File No. 24-1234
Division 01**

**IN RE: ESTATE OF
JOHN DOE,
Deceased**

WAIVER AND CONSENT

The undersigned, Jane Doe, being the widow and sole beneficiary under the Last Will and Testament of John Doe, waives all of her rights to the clothing owned by the decedent at the time of his death and consents to the donation and delivery, at the present time and before the expiration of the time for filing of claims against the above estate, by the First National Bank of Baywater, as personal representative of the estate, of the clothing to the Salvation Army, Baywater, Florida, to be its property absolutely and to be used as it deems fit.

DATED at Baywater, Blank County, Florida, on January 3, 2024.

**Witnesses:
/s/ Jane Doe
Jane Doe**

**/s/ O.D. Robertson
O.D. Robertson
/s/ Irene M. Black
Irene M. Black**

COMMENT: Neither witnesses nor an acknowledgment are necessary to the validity of the waiver and consent.

2. Clothing And Personal Effects Of Decedent

In the ordinary case, clothing and personal effects are without great value.

Nonetheless, a beneficiary may desire an early distribution. Because of the relatively small value of those assets, the risk to the personal representative is slight. A problem may arise when there is more than one beneficiary entitled to receive the property. In that case, a waiver of interest and consent in favor of the party who is to receive the assets should be obtained. As the value of clothing and personal effects increases, however, problems increase. Furs and diamonds rarely elicit waivers and consents. If there is more than one beneficiary entitled to receive these assets and there is no written agreement among them, partial distribution to one of them often causes more problems than it solves.

3. Exempt Property

Exempt property is exempt from the claims of creditors. *F.S.* 732.402 provides in relevant part:

(1) If a decedent was domiciled in this state at the time of death, the surviving spouse, or, if there is no surviving spouse, the children of the decedent shall have the right to a share of the estate of the decedent as provided in this section, to be designated “exempt property.”

(2) Exempt property shall consist of:

(a) Household furniture, furnishings, and appliances in the decedent’s usual place of abode up to a net value of \$20,000 as of the date of death.

(b) Two motor vehicles as defined in s. 316.003, which do not, individually as to either such motor vehicle, have a gross vehicle weight in excess of 15,000 pounds, held in the decedent’s name and regularly used by the decedent or members of the decedent’s immediate family as their personal motor vehicles.

(c) All qualified tuition programs authorized by s. 529 of the Internal Revenue Code of 1986, as amended, including, but not limited to, the Florida Prepaid College Trust Fund advance payment contracts under s. 1009.98 and the Florida Prepaid College Trust Fund participation agreements under s. 1009.981.

(d) All benefits paid pursuant to s. 112.1915.

* * *

(5) Property specifically or demonstratively devised by the decedent’s will to any devisee shall not be included in exempt property. However, persons to whom property has been specifically or demonstratively devised and who would otherwise be entitled to it as exempt property under this section may have the court determine the property to be exempt from claims, except for perfected security interests thereon, after complying with the provisions of subsection (6).

(6) Persons entitled to exempt property shall be deemed to have waived their rights under this section unless a petition for determination

of exempt property is filed by or on behalf of the persons entitled to the exempt property on or before the later of the date that is 4 months after the date of service of the notice of administration or the date that is 40 days after the date of termination of any proceeding involving the construction, admission to probate, or validity of the will or involving any other matter affecting any part of the estate subject to this section.

(7) Property determined as exempt under this section shall be excluded from the value of the estate before residuary, intestate, or pretermitted or elective shares are determined.

Thus, after court authorization, the exempt property may be distributed to the surviving spouse or children with impunity (subject to estate tax considerations). See *F.S.* 733.817 and § 13.4.A of this manual. See also §§ 1.2.E.1 and 7.6.D of this manual regarding exempt property.

4. Storage And Shipping

F.S. 733.801(2) provides that, “[e]xcept as otherwise provided in the will, the personal representative shall pay as an expense of administration the reasonable expenses of storage, insurance, packing, and delivery of tangible personal property to a beneficiary.”

5. Automobiles

If an automobile is a part of the probate estate, the Division of Motor Vehicles (DMV) in the subject county will permit the transfer of the automobile, on execution by the personal representative of Form 1 on the reverse side of the certificate of title, if the division is furnished a certified copy of letters of administration, HSMV Form 82040 (Application for Certificate of Title With/Without Registration), and lien satisfaction if applicable. Under the Florida Probate Code, a court order is not required to enable the personal representative to transfer or distribute any personal property, provided that the property is not needed “to satisfy claims, expenses of administration, taxes, family allowance, exempt property, and an elective share, in accordance with the decedent’s will or as authorized by operation of law.” *F.S.* 733.612(26).

If the estate is not being administered and is not indebted, the beneficiary should submit Form 82040, a copy of the death certificate, and a copy of the will if one exists. The “Release of Spouse or Heirs Interest” on Form 82040 will have to be signed by any other heirs or beneficiaries. For additional information, see Procedure No. TL-18 in Section 1 of the DMV Procedures Manual (available at www.flhsmv.gov/pdf/proc/tl/tl-18.pdf). See also *F.S.* 319.28.

As noted in § 13.2.C, an automobile is frequently an asset that the personal

representative may desire to distribute promptly. It is an asset whose value generally depreciates rapidly, and, under Florida law, it is a “dangerous instrumentality.” The liability factor should not be overlooked by the personal representative. Strict vicarious liability is imposed upon the owner of a motor vehicle who allows an individual to operate said vehicle and that individual’s negligent acts cause damage to another under Florida’s dangerous instrumentality doctrine. *Depriest v. Greeson*, 213 So. 3d 1022 (Fla. 1st DCA 2017).

The personal representative should search for any existing insurance on the automobile. If some casualty to the automobile occurs, the beneficiary may be entitled to the proceeds of the policy. *F.S.* 732.606. See *In re Estate of Sacks*, 267 So. 2d 888 (Fla. 3d DCA 1972). Where the will leaves a beneficiary all tangible personal property, including any automobiles and all policies of insurance thereon, that beneficiary is entitled to proceeds of the policy. *Id.*

The personal representative should determine whether the automobile might be exempt property under *F.S.* 732.402 before making it the subject of a partial distribution. See § 13.2.G.3. If the automobile appears to be exempt property, a court determination should be made after a timely petition is filed.

See §§ 18.4.A–18.4.B of this manual for further discussion of the procedure to transfer title to the automobile in summary proceedings.

Care must be taken when distributing an automobile from an estate to be certain it does not carry out ordinary income taint. If the automobile passes to the beneficiaries as a part of a residuary devise (or as exempt property) rather than as a specific devise, it may be ordinary income to the beneficiary receiving it. *IRC* § 662; *Reg.* § 1.662(a)-3. This problem should be addressed early in the administration of the estate. See §§ 13.2.E.1–13.2.E.2.f for a general discussion of the income tax consequences of early distribution.

6. Business Of Decedent

a. In General

Unless the power to continue the decedent’s unincorporated trade or business is given to the personal representative by will, the personal representative must obtain an order from the court if continuance for more than four months is desired. It must appear that the continuance is in the best interest of the estate. *F.S.* 733.612(22); *Fla. Prob. R.* 5.350. The petition, which may be filed by any interested person, must contain, among other things, a statement of the period for which the continuation is desired. *Rules* 5.350(b), (d). The court may require

periodic reports. Rather than continue a business with which the personal representative may be unfamiliar, the personal representative may prefer to distribute the business to the person who ultimately would be entitled to it. Personal representatives are rarely in a position to operate businesses. If the sale of the business is necessary for liquidity for the payment of debts and expenses of administration, the personal representative may be required to operate the business until it can be sold.

b. Partnerships And S Corporations

Effective January 1, 1996, the Florida Legislature amended Florida's partnership law to adopt in substantial part the Florida Revised Uniform Partnership Act, *F.S.* Chapter 620. Prior to this adoption, the Florida Supreme Court viewed that a dissolution of a partnership occurred upon the death of a partner. *Hirsch v. Bartels*, 49 So. 2d 531 (Fla. 1950). The adoption included that "[a] partnership is a[] [separate] entity distinct from its partners." *F.S.* 620.8201(1). Under the Act, the death of a general partner causes the dissociation of the general partner. *F.S.* 620.8601(7)(a). However, the death of a general partner does not necessarily cause the dissolution of the partnership. *F.S.* 620.8801(2) provides that a majority of the other partners may elect to dissolve the partnership within 90 days of the death of a partner. The personal representative would look to the surviving partners for an accounting and buyout of the deceased partner's interest in the partnership. See *F.S.* 620.8701.

The Florida Revised Uniform Limited Partnership Act provides guidance to personal representatives with respect to limited partnership interests. Unless otherwise provided in the partnership agreement, a person is dissociated from the partnership upon the person's death. *F.S.* 620.1601(2)(f). The deceased limited partner's rights become those of a transferee except as embellished by the rights of the personal representative under *F.S.* 620.1602 and 620.1704. The terms of the partnership agreement may override some or all of these provisions. *F.S.* 620.1110.

The death of a partner terminates the tax year for the deceased partner but generally does not terminate the partnership's tax year. *IRC* § 706(c). The deceased partner's final income tax return will include all pass-through items for the decedent's short taxable year ending at death. The determination is made either by a pro rata allocation based on the number of days elapsed in the partnership year, or by the interim closing of the partnership books. The partnership agreement may or may not specify the method to be used. *Reg.* § 1.706-1(c)(2).

S corporations may have as shareholders only individuals (other than nonresi-

dent aliens), estates, limited types of trusts, and certain exempt organizations. The decedent's former revocable inter vivos trust may qualify as a shareholder, but only for the two-year period beginning with the date of the decedent's death. However, this may not apply to any trust created by the former revocable trust after the decedent's death. See *IRC* §§ 1361(b), (c)(2). Trusts that are permissible shareholders include Qualified Subchapter S Trusts (QSSTs) and Electing Small Business Trusts (ESBTs), but only if appropriate elections are timely made. The rules regarding the timing of the election and the requirements of the trust are very complex and should be consulted, and in some cases the elections need to be made immediately. See *Reg.* §§ 1.1361-1(j)(6), (m)(2). The attorney should be careful to avoid disqualification of Subchapter S status because of an excessive number of shareholders, ineligible shareholders, or failure to make timely elections. See *IRC* § 1361. Additionally, the attorney should consider the effect of the *IRC* § 645 election. See also 9.4.C.1 of this manual.

7. Life Insurance Proceeds

Life insurance proceeds that are payable to an individual beneficiary do not pass through the estate of the deceased. *Gartley v. Gartley*, 622 So. 2d 77 (Fla. 2d DCA 1993); *F.S.* 222.13(1). However, insurance proceeds that are payable to the insured or the insured's estate become part of the estate and are subject to creditors' claims, taxes, and expenses of administration. *Id.* Practitioners should note the importance of the beneficiary designation to determine whether life insurance proceeds may be used to pay the expenses of the administration and obligations of the decedent's estate. *F.S.* 733.808(4).

F.S. 733.808 provides that insurance proceeds and other types of death benefits payable to trustees of either inter vivos or testamentary trusts are not estate assets and are not subject to claims, taxes, and expenses of administration, if there is a trustee to receive the proceeds and if the trustee makes a proper claim to the insurance company within six months of the decedent's death. If one of those conditions is not met, the insurance company must make payment to the personal representative unless otherwise provided by agreement with the insured during the lifetime of the decedent. This exemption from claims of creditors may be waived only if the decedent's will or trust expressly refers to *F.S.* 733.808(4) and directs that it does not apply. See *F.S.* 736.05053(1).

In clarifying the requirements for a waiver of this exemption in Chapter 2014-127, Laws of Florida, the legislature overruled *Morey v. Everbank*, 93 So. 3d 482 (Fla. 1st DCA 2012), in which insurance proceeds payable to an intervivos trust were not exempt due to a general provision in the trust to pay all debts before determining the residue of the trust, notwithstanding *F.S.* 733.808(4). The revised language of *F.S.* 733.808(4) prevents an inadvertent waiver of the statutory exemption provided to life insurance proceeds payable to a trust by requiring the

trust agreement, declaration of trust, or will to expressly refer to *F.S.* 733.808(4) and direct that it does not apply in order to effectuate a valid waiver. Ch. 2014-127, § 5, Laws of Fla. Practitioners should note that when an inter vivos or testamentary trust is the designated beneficiary of a life insurance policy, those proceeds are not subject to administration expenses and obligations of the estate unless the trust or will precisely cite *F.S.* 733.808(4) and make it emphatically clear that it does not apply. Life insurance proceeds as assets of the decedent's estate are discussed further in § 1.2.E.4.b.ii of this manual.

8. Interest And Income On Specific Devises

Except as otherwise provided by will, the net income and net principal receipts received from property specifically given to a beneficiary must be distributed to the beneficiary who is to receive the specific property. *F.S.* 738.201(1), 738.601(2). Pecuniary devises not in trust are not entitled to an allocation of income unless the will so provides. *F.S.* 738.601(4). Pecuniary devises in trust will share in the remaining net income, if any, with successor beneficiaries. *F.S.* 738.601(5), 738.602. Practitioners should note that the Florida Uniform Principal and Income Act was adopted by Chapter 2002-42, Laws of Florida, and codified at *F.S.* Chapter 738, effective January 1, 2003. The Act was further modified by Chapter 2024-216, Laws of Florida, effective January 1, 2025. It applies to any receipt or expense received or incurred after January 1, 2025, and any “[r]eceipts or expenses received or incurred and disbursements made before [then], must be governed by the law of this state in effect at the time of the event, except as otherwise expressly provided in the terms of the trust or in this chapter.” *F.S.* 738.804.

F.S. 733.608(1) provides that all property of the decedent (except protected homestead), and the income from that property, must be assets in the hands of the personal representative to be used

(a) For the payment of devises, family allowance, elective share, estate and inheritance taxes, claims, charges, and expenses of the administration and obligations of the decedent's estate.

(b) To enforce contribution and equalize advancement.

(c) For distribution.

However, see *F.S.* 733.805, 733.817, and Chapter 738. See also § 14.3.C.6.g of this manual.

H. Personal Liability Of Personal Representative For Taxes

A personal representative who pays any part of a debt of the deceased or the estate or makes distributions to beneficiaries before paying federal taxes or other government claim is personally liable to the government for the payment of the taxes and claims. 31 *U.S.C.* § 3713(b). This would include liability for payment of social security payments collected by the decedent if the decedent was not entitled to receive them. This personal liability is generally limited to the value of the assets in the estate and any amounts paid or payable to the personal representative from the decedent's revocable trust under *F.S.* 733.607(2).

The personal representative should consider potential liability for claims and taxes when making partial distributions. If the personal representative transfers assets and subsequently learns that the total of all debts owing to the United States, including taxes, exceeds the remaining value of property in the estate, the personal representative may be personally liable for the difference. The personal representative may have the right to recover from the transferee.

IRC § 6324(a)(2) also imposes personal liability for the payment of tax on transferees of property, whether they are distributees from an estate, creditors who have received payment, or otherwise. See also *IRC* § 6901(h).

A transferee's personal liability for unpaid estate tax is limited by the value (at the time of the decedent's death) of the property the transferee received from the decedent's gross estate. *Baptiste v. Commissioner*, 29 F.3d 433 (8th Cir. 1994); *Baptiste v. Commissioner*, 29 F.3d 1533 (11th Cir. 1994). Moreover, the transferee is liable for interest on the transferee's personal liability for the unpaid estate tax. A split of authority exists (on basically the same facts) between the Eighth and Eleventh circuits on whether *IRC* § 6324(a)(2) imposes a limitation on the transferee's liability for interest. Under the Eighth Circuit's interpretation, *IRC* § 6324(a)(2), which imposes a limitation on a transferee's liability for tax, also imposes a limitation on a transferee's liability for interest. Hence, the IRS cannot collect from the transferee more than the value of the property received from the decedent. Conversely, the Eleventh Circuit held that *IRC* § 6324(a)(2) does not impose a limitation on the transferee's liability for interest. Thus, the IRS could recover more than the value of the property received from the decedent to the extent of the interest on the tax.

This liability is not limited to the transferee's proportionate share of the tax liability. The full amount of the gift tax owed by the transferor can become owed by the transferee regardless of the portion of the gift the particular transferee received of the total amount distributed. *United States v. Marshall*, 798 F.3d 296 (5th Cir. 2015). The term "transferee" is very broad and includes a beneficiary

under a will or trust, a surviving joint tenant, and the beneficiary of insurance, among others. See *IRC* § 6324(a)(2).

The personal liability of the personal representative may be discharged as early as nine months after the filing of the estate tax return upon proper application. *IRC* §§ 2204 (for estate taxes), 6905 (for decedent's income taxes and gift taxes). IRS Form 5495, Request for Discharge from Personal Liability under Internal Revenue Code Section 2204 or 6905, must be used in making a discharge. No discharge is available for fiduciary income taxes payable from the estate, but prompt assessment may be requested to shorten the period of assessment to 18 months after filing the return. *IRC* § 6501(d). IRS Form 4810, Request for Prompt Assessment Under Internal Revenue Code Section 6501(d), must be used in making a prompt assessment request.

§ 13.3. PROCEDURE

A. General Considerations

The personal representative's final accounting and petition for discharge must account for any partial distributions. *Fla. Prob. R.* 5.400(b)(5)(A).

When it is impractical to distribute undivided interests in residuary property, the property may be sold to provide the funds necessary to make the final distribution. *F.S.* 733.810(3); *In re Estate of Slater*, 437 So. 2d 1110 (Fla. 5th DCA 1983).

When joint personal representatives are appointed, the concurrence of a majority of the personal representatives controls (unless otherwise provided by will or codicil). However, when their appointment was pursuant to a will or codicil executed before October 1, 1987, or if they were appointed before October 1, 1987, to administer an intestate estate, the concurrence of all is required (unless otherwise provided by will or codicil). *F.S.* 733.615.

B. Compulsory Partial Distribution

1. In General

A beneficiary may be able to compel the personal representative to make a partial distribution. See *F.S.* 733.802; *Fla. Prob. R.* 5.380. The beneficiary must file a petition alleging the facts that support the relief requested. The facts alleged must include allegations "that the property will not be required for the payment of debts, family allowance, spouse's elective share, estate and inheritance taxes,

claims, charges, and expenses of administration, or for providing funds for contribution or enforcing equalization in case of advancements.” *Rule 5.380(a)*.

The failure to make these allegations is fatal to the pleading. *In re Estate of Lieberman*, 356 So. 2d 17 (Fla. 4th DCA 1978). The petition should also state the name of the petitioner and the petitioner’s interest in the property of the estate, and describe the particular property or fund being sought. A sample petition is set forth at § 13.3.B.2.a.

Rules 5.040 and 5.041 require service on the personal representative and all other interested persons. Informal notice to all interested persons is permitted; if formal notice is given, it must be given to all interested persons entitled to notice. *Rule 5.040(d)*.

F.S. 733.802(3) provides that the person entitled to partial distribution may be required by the court to give a bond with sureties, conditioned to make due contribution for the payment of devises, family allowance, estate and inheritance taxes, claims, the elective share of the spouse, charges, expenses of administration, and equalization in case of advancements, plus interest. If there is any doubt as to the propriety of making a distribution, therefore, the prudent personal representative should file an answer to a petition for partial distribution brought by a beneficiary. The answer should include a request that the court require the beneficiary to give a bond. A sample answer is set forth in § 13.3.B.2.b; a form for the bond appears in § 13.3.B.2.c. If the petition is filed and the court considers it before the expiration of the five-month period under *F.S. 733.801*, the personal representative should insist on the bond even if the personal representative believes that the partial distribution is appropriate. It may be error in that instance for the court not to require a bond.

F.S. 733.817(5) may provide some help to the personal representative who, for example, is administering a taxable estate and is asked to make a substantial partial distribution. That statute provides that a personal representative cannot be required to distribute assets that are “reasonably anticipated to be necessary” to pay any state or federal taxes. Furthermore, the personal representative is not required to transfer any property to a recipient “until the amount of the tax due from the recipient is paid by the recipient.” *Id.*

The personal representative may request that the court require the person receiving the partial distribution to give a receipt that contains an agreement to redeliver the assets on the request of the personal representative. See §§ 13.2.C, 13.3.C.2.b. The considerations raised in §§ 14.3.A.2.4 of this manual (concerning ademption, abatement and contribution), as well as apportionment of taxes are equally applicable to partial distributions and must be considered as well.

2. Forms Relating To Compulsory Distribution

a. Sample Petition For Compulsory Partial Distribution

**IN THE CIRCUIT COURT FOR
BLANK COUNTY, FLORIDA
PROBATE DIVISION
File No. 24-2345
Division 01**

**IN RE: ESTATE OF
JOHN DOE,
Deceased**

**BENEFICIARY'S PETITION
FOR PARTIAL DISTRIBUTION**

Petitioner, Jane Doe, alleges:

1. The First National Bank of Baywater is the duly qualified and acting personal representative of the above estate.

2. The Last Will and Testament of John Doe, admitted to probate on January 3, 2024, contains the following devise:

I devise to my wife, JANE DOE, my three-carat diamond ring set in 14-karat yellow gold with Kiwanis emblem.

3. Petitioner is the beneficiary of the above devise and desires distribution of it at this time.

4. The property sought to be distributed at this time will not be required for the payment of debts, devises, family allowance, estate and inheritance taxes, claims, elective share of the spouse, charges, expenses of administration, or equalization in case of advancements, or any interest on them. The estate contains more than ample assets to pay all of those items that may be or become due.

5. Petitioner is the principal beneficiary under the will.

6. The decedent had no known debts, and no claims have been filed against the estate, nor are any anticipated.

7. Petitioner is the widow of the decedent and specifically elects to take under the provisions of his will and waives her right to take an elective share.

WHEREFORE Petitioner asks that an order be entered authorizing The First National Bank of Baywater, as personal representative, to distribute the three-carat diamond ring set in 14-karat yellow gold with Kiwanis emblem, as specifically devised under the Last Will and Testament of John Doe, deceased, to her, upon obtaining from her a proper receipt.

Under penalties of perjury, I declare that I have read the foregoing, and the facts alleged are true, to the best of my knowledge and belief.

/s/ Jane Doe

**Jane Doe
Petitioner**

The undersigned certifies that a copy hereof has been furnished to A, B & C, P.A.,
by mail on April 4, 2024.

X, Y & Z

/s/ George W. Sharpman

George W. Sharpman

Attorney for Petitioner

210 Main Street

Baywater, FL 30000

813/012-3456

George@sharpmanpa.com

Florida Bar No. 654321

b. Sample Answer To Petition For Partial Distribution

**IN THE CIRCUIT COURT FOR
BLANK COUNTY, FLORIDA
PROBATE DIVISION**

File No. 24-2345

Division 01

IN RE: ESTATE OF
JOHN DOE,
Deceased

**PERSONAL REPRESENTATIVE'S ANSWER
TO PETITION FOR PARTIAL DISTRIBUTION**

The First National Bank of Baywater, as personal representative of the above estate, answers the petition of Jane Doe for partial distribution and alleges:

1. It admits the allegations contained in paragraphs 1, 2, 3, 5, 6, and 7 of the petition.
2. It is without sufficient information either to admit or deny the allegations contained in paragraph 4 and therefore denies them.
3. As a further defense to the petition for partial distribution, The First National Bank of Baywater alleges that five months have not elapsed since the granting of letters.

WHEREFORE The First National Bank of Baywater, as personal representative of the estate of John Doe, asks that this court enter an order concerning the petition of Jane Doe for partial distribution as it may deem proper and, should an order be entered authorizing the requested distribution, that this court require Jane Doe to give a bond with adequate sureties, to be approved by this court, conditioned to make due contribution for the payment of debts, devises or distributive interests, family allowance, estate and inheritance taxes, claims, elective share of the spouse, charges, expenses of administration, and equalization in case of advancements, plus any interest.

**THE FIRST NATIONAL BANK
OF BAYWATER,
as Personal Representative
of the Estate of John Doe
By: /s/ Jack Careful
Jack Careful, Trust Officer**

The undersigned certifies that a copy hereof has been furnished to X, Y & Z by mail on April 12, 2024.

A, B & C, P.A.

/s/ John Read

John Read

Attorney for The First
National Bank of Baywater
100 Main Street
Baywater, FL 30000
813/654-3210
jread@baywater.com
Florida Bar No. 123456

c. Sample Partial Distribution Bond

**IN THE CIRCUIT COURT FOR
BLANK COUNTY, FLORIDA
PROBATE DIVISION
File No. 24-2345
Division 01**

**IN RE: ESTATE OF
JOHN DOE,
Deceased**

PARTIAL DISTRIBUTION BOND

We, Jane Doe as principal and L, M & N Surety Company as surety, are held and firmly bound to the personal representative of the estate of John Doe, and its successors in office, in the sum of \$2,000 for the payment of which we bind ourselves, our beneficiaries, personal representatives, and assigns, jointly and severally, by these presents.

The condition of this bond is that if Jane Doe makes due contribution in an amount not to exceed \$2,000 for the payment of devises, family allowance, estate and inheritance taxes, claims, elective share of the spouse, charges, expenses of administration, and equalization in case of advancements, plus any interest on them, should it be lawfully required as a result of partial distribution to her of the decedent’s three-carat diamond ring set in 14-karat yellow gold with Kiwanis emblem, then this bond will be void; otherwise, it shall remain in full force and effect.

IN WITNESS WHEREOF, we have subscribed our names on May 1, 2024.

/s/ Jane Doe
Jane Doe
L, M & N SURETY COMPANY
By: */s/ John Graspy*
John Graspy, President
(Seal)

Approved by me on May 1, 2024
/s/ Ira G. Todd
Ira G. Todd
Circuit Judge

COMMENT: The bond set out above also could be used for a voluntary partial distribution. The practitioner should note that the court is allowed to require a bond with sureties defined by *F.S. 45.011*. The bond is to be conditioned on “the making of due contribution for the payment of devises, family allowance, estate and inheritance taxes, claims, elective share of the spouse, charges, expenses of administration, and equalization in case of advancements, plus any interest on them.” *F.S. 733.802(3)*. *F.S. 45.011* provides that, unless a cash deposit is furnished, two sureties having a net worth in excess of the bond are required

unless one licensed surety company is used.

d. Sample Order For Partial Distribution

IN THE CIRCUIT COURT FOR
BLANK COUNTY, FLORIDA
PROBATE DIVISION
File No. 24-2345
Division 01

IN RE: ESTATE OF
JOHN DOE,
Deceased

ORDER AUTHORIZING PARTIAL DISTRIBUTION

This cause was heard on petition of Jane Doe, widow of John Doe, for partial distribution of the ring specifically devised to her under the Last Will and Testament of the decedent, and the answer of The First National Bank of Baywater, as personal representative of the estate, and the court finding that the ring was appraised at a value of \$2,000,

IT IS ADJUDGED that The First National Bank of Baywater, as personal representative of the estate of John Doe, is authorized to distribute to Jane Doe the three-carat diamond ring set in 14-karat yellow gold with Kiwanis emblem, specifically devised to her under the Last Will and Testament of John Doe, upon Jane Doe giving a \$2,000 bond with adequate sureties to be approved by this court, conditioned to make due contribution, if lawfully required to do so, for the payment of devises, family allowance, estate and inheritance taxes, claims, elective share of the spouse, charges, expenses of administration, and equalization in case of advancement, plus any interest on them.

ORDERED at Baywater, Blank County, Florida, on May 5, 2024.

/s/ Ira G. Todd
Ira G. Todd
Circuit Judge

Copies furnished to: A, B & C, P.A., and X, Y & Z

COMMENT: The requirement of the bond set out in the above order is discretionary with the judge. *F.S. 733.802(3); Fla. Prob. R. 5.380(c)*. The order directing the distribution must describe the property to be distributed. *Rule 5.380(b)*. Full and complete descriptions are recommended. If the distribution is made in accordance with the order, provided the order is effective, it is considered conclusive in favor of bona fide purchasers for value. *F.S. 733.802(2), 733.813*. The purchaser is not required to ascertain whether the partial distribution was made properly by the personal representative. *Id.*

C. Voluntary Partial Distribution

1. In General

A personal representative must “proceed expeditiously” with the distribution of a decedent’s estate and, except as provided in the Probate Code or as ordered by the court, must do so without court order. *F.S.* 733.603. The personal representative, therefore, may make partial distribution if it is desirable to do so. See *F.S.* 733.607, 733.612(26).

As noted at § 13.2.D, *F.S.* 733.812 provides that a distributee or claimant who was improperly paid is liable to return the property distributed and income received thereon unless the distribution or payment cannot be questioned because of adjudication, estoppel, or limitations. If the distributee or claimant disposed of the property, the amount recoverable is the property’s value at the date of disposition, the income thereon, and gain received. Because *F.S.* 733.812 does not provide an absolute right of recovery, the personal representative should consider requesting a bond or, at a minimum, a repayment agreement from the beneficiary for a voluntary distribution. See § 13.2.C. See also §§ 13.3.B.2.b–13.3.B.2.c.

F.S. 733.607(1) provides that the personal representative may leave any real property or tangible personal property with, or surrender it to, the person presumptively entitled to it unless possession of the property by the personal representative will be necessary for purposes of administration.

F.S. 733.612(26) provides that a personal representative, acting reasonably for the benefit of the interested persons, may properly make partial distribution if the property distributed is not needed to satisfy claims, expenses of administration, taxes, family allowance, exempt property, or the elective share. Notwithstanding this authority, it is not proper to make a partial distribution if the assets to be distributed may be needed to satisfy any of these items.

To determine the propriety of making a voluntary distribution, the following statutory provisions should be considered:

- *F.S.* 733.109(2) provides that, “[p]ending the determination of any petition for revocation of probate, . . . no distribution [of property] may be made to beneficiaries in contravention of the rights of those who, but for the will, would be entitled to the property.” Thus, if a petition for revocation of probate has been filed or if there is a possibility that one might be filed, no distribution should be made.
- *F.S.* 733.602(2) provides that “[a] personal representative shall not be liable for any act of . . . distribution if the act was authorized at the time.”

The statute goes on to provide that “[n]othing in this section affects the duty of the personal representative to administer and distribute the estate in accordance with the rights of interested persons.” *Id.* Notwithstanding the authority to make partial distributions, the personal representative may incur liability if the distribution was not in accordance with the rights of interested persons.

- *F.S. 733.609(1)* provides that “[a] personal representative’s fiduciary duty is the same as the fiduciary duty of a trustee of an express trust.” In actions for breach of fiduciary duty or challenging the exercise or failure of the personal representative to exercise its powers, the court “shall award” attorneys’ fees and costs “as in chancery actions.” *Id.*
- *F.S. 733.805(2)* provides that contribution may be required to a devisee whose devise has been sold or used. Before distribution, the court must determine the amounts of the respective contributions, and they must be paid or withheld before distribution is made. If there is any possibility of contribution being required, therefore, this prohibition against distribution should be considered.

A personal representative who decides to make a voluntary partial distribution despite these statutory admonitions might find it prudent to require the partial distribution bond. A sample bond is provided in § 13.3.B.2.c.

2. Forms Relating To Voluntary Distribution

a. Sample Petition For Voluntary Partial Distribution

IN THE CIRCUIT COURT FOR
BLANK COUNTY, FLORIDA
PROBATE DIVISION
File No. 24-3456
Division 01

IN RE: ESTATE OF
JOHN DOE,
Deceased

PERSONAL REPRESENTATIVE’S PETITION FOR PARTIAL DISTRIBUTION

Petitioner, The First National Bank of Baywater, as personal representative of the above estate, alleges:

1. The Last Will and Testament of John Doe, admitted to probate on January 3, 2024, contains the following devise:

I devise to my wife, JANE DOE, my three-carat diamond ring set in 14-karat yellow gold with Kiwanis emblem.

2. Jane Doe has asked petitioner to distribute the ring described above in paragraph 1 to her at this time.

3. The time for filing claims against the estate has expired and all debts, claims, estate and inheritance taxes, family allowance, charges, and expenses of administration have been paid or provision has been made for their payment.

WHEREFORE Petitioner asks that an order be entered authorizing it, as personal representative, to distribute the decedent’s three-carat diamond ring set in 14-karat yellow gold with Kiwanis emblem to Jane Doe [upon her executing an agreement to deliver to the personal representative any or all of the assets received from the personal representative, or their value, together with any income or gain earned thereon, upon demand, and] upon her giving a proper receipt.

Under penalties of perjury, I declare that I have read the foregoing, and the facts alleged are true, to the best of my knowledge and belief.

THE FIRST NATIONAL BANK
OF BAYWATER,
as Personal Representative
of the Estate of John Doe
By: /s/ Jack Careful
Jack Careful, Trust Officer

The undersigned certifies that a copy hereof has been furnished to Jane Doe by mail on April 4, 2024.

A, B & C, P.A.

By: /s/ John Read
John Read
Attorney for The First
National Bank of Baywater
100 Main Street
Baywater, FL 30000
813/654-3210
jread@baywater.com
Florida Bar No. 123456

COMMENT: This petition may be served by informal notice. *Fla. Prob. R.* 5.040(b), 5.041.

b. Sample Receipt For Partial Distribution Of Assets Of Estate

IN THE CIRCUIT COURT FOR
BLANK COUNTY, FLORIDA
PROBATE DIVISION
File No. 24-3456
Division 01

IN RE: ESTATE OF

JOHN DOE,
Deceased

RECEIPT

The First National Bank of Baywater, the trustee of the trust created in the Last Will and Testament of John Doe, whose address is 100 Main Street, Baywater, Florida, and whose federal tax identification number is 59-1234567, acknowledges that it has received from Jane Doe, personal representative of the estate of John Doe, the sum of \$50,000 cash, representing a partial distribution to it under the provisions of paragraph 4 of the decedent's Last Will and Testament. A condition of this distribution is the agreement by the beneficiary to return to the personal representative, on demand, any property received and its income since distribution or, if the beneficiary does not have the property, to return to the personal representative the value of the property at the date of disposition and its income and gain received. The beneficiary shall have no obligation to return the property unless it was improperly distributed.

Dated at Baywater, Blank County, Florida, on May 5, 2024.

Witnesses:

**THE FIRST NATIONAL BANK
 OF BAYWATER, as Trustee**

/s/ Jean R. Bartel
 Jean R. Bartel

By: /s/ Jack Careful
 Jack Careful, Trust Officer

/s/ Mary S. Stone
 Mary Stone

COMMENT: This receipt may also be used in connection with proceedings for compulsory distribution. Witnesses are not required.

D. Repayment Of Partial Distribution

In the event the distribution is determined to be improper because the basis for the distribution was incorrect and the distribution can still be questioned, either the assets or their value may be recovered. *F.S.* 733.812 provides:

A distributee or a claimant who was paid improperly must return the assets or funds received, and the income from those assets or interest on the funds since distribution or payment, unless the distribution or payment cannot be questioned because of adjudication, estoppel, or limitations. If the distributee or claimant does not have the property, its value at the date of disposition, income thereon, and gain received by the distributee or claimant must be returned.

See § 13.2.D of this manual.

§ 13.4. EFFECT OF ESTATE TAX

A. In General

Ensuring that estate taxes are shared on a ratable basis by the beneficiaries receiving property subject to the estate taxes is the purpose of *F.S. 733.817. Tarbox v. Palmer*, 564 So. 2d 1106 (Fla. 4th DCA 1991). As noted at § 13.3.B.1, *F.S. 733.817(5)* provides that the personal representative is not required to distribute assets that the personal representative reasonably anticipates may be necessary to pay any state or federal taxes. In addition, the personal representative is not required to transfer any property in the personal representative's possession until the amount of any tax due from the transferee is paid or, if the apportionment of tax has not been determined, until the transferee furnishes adequate security for the payment. This applies to the tax due with respect to assets passing under or outside of the will. See *F.S. 733.817(3), (4)*.

The personal representative would be wise to require a devisee to pay the devisee's portion of death taxes on assets received by the devisee outside the terms of the will, before permitting distributions to the devisee.

For a discussion of the apportionment of estate taxes to property included in the decedent's gross estate, see Chapter 11 of this manual.

B. Securing Partial Estate Tax Releases

If no Florida estate tax is due and no return is required to be filed, the personal representative may execute an affidavit attesting that the estate is not taxable in the form prescribed by the Department of Revenue. DR-312 (Affidavit of No Florida Estate Tax Due) is to be used when no federal estate tax return will be filed, and Form DR-313 (Affidavit of No Florida Estate Tax Due When Federal Return is Required) when a federal estate tax return will be filed.

If the gross estate exceeds the nontaxable amount and the personal representative desires to obtain a federal estate tax release of assets that are the subject of partial distribution before the estate tax return is filed or full releases are obtained, the personal representative should file IRS Form 4422 (Application for Certificate Discharging Property Subject to Estate Tax Lien) in duplicate with all required attachments, including legal descriptions when appropriate. If the lien is released, the IRS will issue a certificate discharging property subject to the estate tax lien. Form 4422 and its instructions may be obtained from the IRS website at

www.irs.gov. The IRS may require that estate taxes be prepaid or the funds necessary to pay the estate taxes be escrowed under the IRS escrow agreement, or that a bond be furnished or such other security provided under *IRC* § 6325.

The federal release procedure should also be followed in the case of personal property. See *Reg.* § 20.2031-6(c) if personal property is to be distributed or sold before estate tax clearance.

The IRS will not issue a release of lien on any real property jointly owned with a right of survivorship. A release is unnecessary in that case because any lien on that property is automatically divested by its sale for full consideration. *Rev. Rul.* 56-144, 1956-1 C.B. 563.

As noted at § 13.2.H, in making partial distributions, the personal representative should be aware of his or her personal liability for the payment of federal taxes other than federal claims under 31 *U.S.C.* § 3713(b). 31 *U.S.C.* § 3713(b) does not contain an exception for payment of charges against the estate or estate administrative expenses and supersedes the priority of payment in *F.S.* 733.707(1). This liability is generally limited to the value of assets contained in the estate. As also noted at § 13.2.H, liability for payment of tax is also imposed on any transferees of property whether they are distributees from the estate, creditors who have received payment, or otherwise. *IRC* § 6324. After partial distribution, if total estate assets are less than taxes payable from the estate, either the personal representative or individual transferees may be called on to pay the difference.

§ 13.5. ELECTIVE SHARE

The elective share statutes were extensively amended, effective October 1, 1999, for decedents dying on or after October 1, 2001. Ch. 99-343, Laws of Fla. Additional changes were made in 2001, also effective October 1, 2001. Ch. 2001-226, §§ 19–30, Laws of Fla. Further amendments have since been made, including, most recently, revisions to the statutes in 2024.

In concept, the elective share now consists of two parts. Part 1 is property interests included in the elective estate that pass or have passed to the spouse without regard to the election as described in *F.S.* 732.2075(1). Part 2 is contribution from other sources. The total of the parts equals the elective share amount. *F.S.* 732.2075. The elective share does not reduce or eliminate what the spouse would receive if the election were not made, and the spouse is not treated as having predeceased the decedent. *F.S.* 732.201. Under the old elective share statute, the spouse was treated as having predeceased the decedent, so, in effect, the entire elective share amount was the contribution.

Unless the will or trust provides otherwise, the Florida Uniform Principal and Income Act applies to determine the net income of an estate or trust and the distribution of that income. *F.S.* 738.201.

The spouse is not entitled to any income of the estate or trust on the amount of contribution to the elective share, because it is a pecuniary amount not in trust and is not entitled to income under the Florida Uniform Principal and Income Act. However, interest is payable on any unsatisfied contribution to the elective share at the statutory rate provided in *F.S.* 55.03(1) beginning on the earlier of 90 days after the date of the order of contribution or two years after the date of the decedent's death. *F.S.* 732.2145(1). The interest is a nondeductible personal expense. See *Reg.* § 1.663(c)-5, Ex. 7. Under the old elective share statute, interest at the statutory rate was payable after the date of the order directing the personal representative to make payment of the elective share. *Price v. Florida National Bank of Miami*, 419 So. 2d 389 (Fla. 3d DCA 1982).

The spouse may or may not be entitled to net income of the estate or trust with respect to the property interests passing to the spouse, depending on the nature of the property interests. See *F.S.* Chapter 738.

The payment of the contribution to the elective share does not carry out "distributable net income" under the "separate share" rules. See *Reg.* § 1.663(c)-5, Ex. 7. Before the implementation of these regulations, the issue was in doubt. See *Williams v. Harrington*, 460 So. 2d 533 (Fla. 2d DCA 1984) (parties just assumed that elective share payments carried out DNI); *Brigham v. United States*, 160 F.3d 759 (1st Cir. 1998) (payment of elective share carried out DNI); *Deutsch v. Commissioner*, ¶ 97,470 T.C.M. (RIA), 74 T.C.M. (CCH) 935 (1997) (payment of elective share did not carry out DNI).

The distribution of the property interests passing to the surviving spouse may or may not carry out "distributable net income" under the separate share rules, depending on the nature of the property interest. A detailed discussion of the elective share is provided in Chapter 7 of this manual.