

WHITE PAPER

PROPOSED STATUTES ON ACQUIRING JURISDICTION OVER TRUSTEES AND TRUST BENEFICIARIES AND REPEALING §736.0205

I. SUMMARY

This proposed legislation provides a means for Florida courts to acquire jurisdiction over nonresident trustees and trust beneficiaries in cases involving trusts administered in Florida through enactment of trust-related “long-arm” provisions. Such provisions specify the acts that will give a Florida court jurisdiction over nonresident trustees and trust beneficiaries who have sufficient contacts with Florida to be subject to jurisdiction of its courts under constitutional due process principles, but which are not covered by the existing long-arm provisions in Chapter 48, Florida Statutes. The proposal is also intended to clarify existing law relating to the application of the principle of *forum non conveniens* to trust litigation pending in Florida by repealing §736.0205 and allowing courts to rely on rule 1.061 of the Florida Rules of Civil Procedure to determine the most appropriate forum for litigation concerning a trust. The bill does not have a fiscal impact on state funds.

II. CURRENT SITUATION

Subsection 736.0202(1) of the Florida Trust Code (identical to Uniform Trust Code §202) states that a trustee, including a nonresident trustee, who accepts trusteeship of a trust having its principal place of administration in Florida, or who moves the principal place of administration of a trust to Florida, submits *personally* to the jurisdiction of the courts of Florida regarding any matter involving the trust. The acts of accepting trusteeship or moving a trust to Florida are hidden “long-arm” provisions, not contained in §48.193(1), Fla. Stat., designed to allow Florida courts to acquire personal jurisdiction over nonresidents who engage in those acts. Personal jurisdiction means that a monetary judgment, such as might result from a surcharge action, could be entered against a nonresident trustee and collected from the trustee’s personal assets, or that the court’s order can command the trustee to take some action, such as an order to account. Under decisions of the U.S. Supreme Court, followed in the leading Florida case of *Venetian Salami Co. v. Parthenais*, 554 So.2d 499 (Fla. 1989), a Florida court may exercise jurisdiction over a defendant who cannot be served with process within the state (and who does not appear voluntarily) only if Florida law authorizes it, and then only if the defendant has sufficient minimum contacts with Florida such that maintaining the suit does not offend traditional notions of fair play and substantial justice. That, in turn, depends on whether the relationship among the defendant, the forum, and the litigation is such that the defendant should reasonably expect to be sued in Florida. This “minimum contacts” requirement always requires a factual analysis. So-called “long-arm” statutes are intended to specify factual situations that are likely to satisfy a minimum contacts test, but falling within the statute’s parameters does not automatically satisfy that test. *Venetian Salami*, 554 So.2d at 502.

Many Florida trusts have trustees and beneficiaries who are not residents of the state, and it is often difficult under current laws to acquire jurisdiction over all necessary parties in a case

involving a trust. Florida's generic long-arm statute, §47.193(1), Fla. Stat., is far too limited to include the necessary parties in most actions involving trusts, and the first step in acquiring jurisdiction over a nonresident is that Florida law must authorize it.

Section 736.0205 is identical to former §737.203, which was enacted in 1974 before the Florida Supreme Court added rule 1.061 adopting the federal doctrine of *forum non conveniens* in 1996. Section 736.0205 on its face appears to provide a defendant in trust litigation an absolute right to object to allowing the trust litigation to proceed in Florida if the trust has its principal place of administration in another state (unless all interested parties could not be bound by litigation of the courts in the state where the trust is registered or has its principal place of administration). However, it has not been construed that way. Florida courts have held that §736.0205 is not jurisdictional but is rather a *forum non conveniens* statute which requires a court to determine the "most appropriate forum" in which the case should proceed. See, e.g., *Estate of McMillian*, 603 So. 2d 685 (Fla. 1st DCA 1992). Although §736.0205 has been labeled a statute of *forum non conveniens*, the wording of the statute suggests that courts have limited discretion in allowing litigation to proceed over the objection of a defendant. This has led to significant confusion and litigation over the standards and burdens of proof for Florida courts to apply in addressing objections raised under the statute. It has also been suggested that the statute shifts the burden to the plaintiff to prove that their choice of venue is appropriate. *McMillian*, 603 So. 2d at 688. This conflicts with Florida Rule of Civil Procedure 1.061 which provides specifically that the defendant has the burden of pleading and proving the facts necessary to obtain a change of venue, and provides for a balancing of interests before dismissing a lawsuit. Article V §2(a) of the Florida Constitution gives the Florida Supreme Court the exclusive authority to "adopt rules for the practice and procedure in all courts including... the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked." Since a rule now comprehensively addresses issues of *forum non conveniens*, §736.0205 has outlived its usefulness and is a source of confusion.

In addition to conflict with Rule 1.061, §736.0205, in providing for a seemingly automatic dismissal of a trust case in which the trust's principal place of administration is in another state, is misleading to attorneys and their clients and is contrary to the long-arm jurisdictional principle that nonresidents should be accountable in Florida courts for tortious actions by them that have consequences or repercussions within Florida. See *Wendt v. Horowitz*, 822 So.2d 1252 (Fla. 2002); *Canale v. Rubin*, 20 So.3d 463 (Fla. 2d DCA 2009).

III. EFFECT OF PROPOSED CHANGES

A. Section 1 of the proposal amends §736.0202 by moving the first sentence of existing subsection (2), slightly rewording it without making substantive change, and making it a standalone provision governing *in rem* jurisdiction over beneficiaries' interests in a trust.

B. Section 2 of the proposal creates a new §736.02023 that is a comprehensive long-arm statute for litigation involving a trust. It specifies acts or conduct that will allow Florida courts to acquire personal jurisdiction over a trustee or trust beneficiary, even if a nonresident of Florida, provided the constitutional due process requirements of minimum contacts with the state are otherwise met. Subsection (2) of the new statute is a "catchall" provision that is, in some

states, the sole statutory long-arm provision, and it is sanctioned by *Venetian Salami*. See 554 So.2d 499, fn. 2.

C. Section 3 of the proposal creates a new section §736.02025 that provides for service of process as provided in Chapter 48, the general statute on service of process. It also provides for service of process by mail or commercial delivery service when the case involves an interest in trust property but does not seek a personal judgment or an order compelling a trustee or trust beneficiary to take specific action (i.e., an *in rem* or *quasi in rem* action). Subsection (2) of the proposed section parallels existing service by mail provisions in §48.194, Fla. Stat. Subsection (3) of the proposed statute, allowing service by first-class mail in certain circumstances, is patterned after §4-303 of the Uniform Probate Code and contains elements of §48.194(3), Fla. Stat.

D. The Section 4 repeal of §736.0205 will require courts to conduct the four-part analysis contained in Civil Rule of Procedure 1.061 in deciding a motion to dismiss a case on the basis of *forum non conveniens*. The repeal will also provide clarity in that existing law provides little guidance on the factors for a court to consider in deciding a motion to dismiss under §736.0205.

E. Section 5 repeals subsection 736.0807(4), which is substantively replaced by subsection 736.02023(1)(d) of the proposed statute.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

None.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

None.

VI. CONSTITUTIONAL ISSUES

Long-arm statutes do not, in themselves, present issues of constitutionality. It is the application of those statutes to particular defendants that is subject to scrutiny to determine whether the defendant in question is afforded due process by reason of contacts with the state that suggest the defendant should reasonably expect to be subject to suit in the estate by reason of those contacts.

VII. OTHER INTERESTED PARTIES

Trial Lawyers Section of the Florida Bar

Florida Bankers Association