

REAL PROPERTY, PROBATE AND TRUST LAW SECTION  
THE FLORIDA BAR  
TRUST LAW COMMITTEE MEETING  
(Sponsored by Northern Trust Bank)

Friday, September 19, 2008  
2 p.m. to 4 p.m.

Ritz-Carlton, Key Biscayne  
Miami, Florida  
Salon 2, 3, and 4  
(Conference Call info at page 3)

**AGENDA**

- I. Call Meeting to Order
- II. Administrative Matters:
  - A. Appoint secretary for minutes
  - B. Introduction of new members
  - C. Introduction of members present
  - D. Approve minutes for July 24, 2008, meeting at The Breakers (**pgs. 4-7**)
  - E. Announcements (See **page 7**)
- III. Specific Agenda Items:
  - A. Subcommittee report on proposed statute on amendment of FTC §§736.0703 and 736.0807 regarding delegation of duties by a Trustee. **See pages 8-9.** (Bill Hennessey)
  - B. Subcommittee report on whether subsections (7) and (9) of FTC §736.1007 should be deleted as duplicative of subsections (4) and (5) of FTC §736.0206. (Wm. Fletcher Belcher)
  - C. Report of joint committee (Trust Law Committee and Probate Law Committee) on inconsistency between Probate Code §733.607(2) and FTC §736.0503(1). (Pam Price)
  - D. Subcommittee report on whether there should be any procedural difference in the treatment of homestead property held in a trust as opposed to the same property held by an individual owner and whether

the Trust Code should be amended to include provisions similar to those in the Florida Probate Code. **See pgs. 10-11.** (Rex Moule)

- E. Discuss whether §736.0107 (Governing Law) of the Florida Trust Code should be made a mandatory provision. The mandatory provision in FTC §736.0108(1) for the designation of a principal place of administration of a trust requires a “sufficient connection” with the designated jurisdiction. At the same time, FTC §736.0107, which states that the “meaning and effect” of trust terms is controlled by the law of the jurisdiction designated in the terms of the trust provided that there is a “sufficient nexus” to the designated jurisdiction, is not mandatory. Therefore, it appears that the terms of a trust could provide that FTC §736.0107 does not apply to the trust, and that the law of any jurisdiction could be selected as governing law, regardless of nexus.

Consider adoption of proposed statutory amendment to 736.0105(2)(f) at **page 12.** (Bob Goldman)

- F. Consideration of glitch created by legislative amendment of FTC § 736.0703(9) **See pages 12-13.** (Diana Zeydel)
- G. Liaison report on status of proposed statute being considered by the Problems Study committee tentatively titled: “689.07\_ Real estate interests transferred to a trust by name absent any reference to an entity followed by the identifier “trustee” or “as trustee.” **See page 14.** (Bob Arlen)
- H. Proposed joint seminar with Land Trusts & REITs Committee on land trust issues affecting estate planners and real estate practitioners. (Katherine Frazier/Wilhelmina Kightlinger).
- I. Asset Preservation Committee Liaison report (Boyett/Wolf)

IV. Open Discussion:

**RPPTL Trust Law Committee Conference Call Information**

**Friday, September 19, 2008 @ 2:00 p.m.**

**Conference Call Dial-In Phone Number: 1-866-411-5140**

**PARTICIPANTS - Trust Law Committee**

When conference call participants dial into the conference call system, they will be prompted for the Conference Code (**69655328**). Participants should enter this number followed by the # sign. They will then be connected to the call.

**Trust Law Committee  
Minutes of Meeting**

Thursday, July 24, 2008  
The Breakers  
Palm Beach, Florida

**Call to Order.** The Chair, Barry Spivey, called the meeting to order at approximately 1:05 p.m.

**Administrative Matters.** The Chair appointed John Moran as secretary for the meeting. An introduction of members, new members, and guests followed.

**Attendance.** The following members and guests were in attendance:

**Members**

Barry F. Spivey (Chair)  
Laura P. Stephenson (Co-Vice Chair)  
Christopher W. Boyett (Co-Vice Chair)  
Angela McClendon Adams  
David Akins  
Juan C. Antunez  
Robert M. Arlen  
Carlos A. Battle  
Wm. Fletcher Belcher  
Neil Chrystal  
Tasha K. Dickinson  
John P. Cole  
Jack A. Falk  
David M. Garten  
Deborah Packer Goodall  
Starling N. Hendricks  
Stephen Paul Heuston  
William T. Hennessey  
Mitchell A. Hipsman  
Honorable Maria Marinello Korvick  
Elisa F. Lucchi (via telephone)  
Bruce Marger  
Stewart A. Marshall, III  
Mark T. Middlebrook  
John C. Moran  
William Torbert Muir

Rex E. Moule  
Marina Nice  
Cristina Papanikos  
Pamela O. Price  
Jon Scuderi  
William E. Sherman  
David Silberstein  
Robert Spallina  
Michael P. Stafford  
Deborah Russell  
Laura K. Sundberg  
Robert C. Wilkins  
Charles Wohlust  
Marjorie E. Wolasky  
Diana S.C. Zeydel

**Guests**

Tae Bronner  
Fabienne E. Fahnestock  
Steve Kotler  
Lester Law  
David Rockwood  
Joel Sharp  
The Honorable Winifred Sharp  
David Sennett  
Patricia Thomas  
Thomas H. Thurlow, III  
Eric Virgil

**Approval of Minutes.** The minutes of the May 22, 2008 meeting at the Hyatt Coconut Point, Bonita Springs, Florida were approved as read.

**Announcements.** Barry Spivey announced that a CLE seminar will take place in December in connection with the Executive Council's Tallahassee meeting. The working title is, "Advising the Trustee."

**Report on Delegation of Investment Functions Between Cotrustees.** Bill Hennessey discussed his Subcommittee's Report on the delegation of certain functions, including investment functions, between cotrustees. Under the common law and the current Florida Statutes, cotrustees cannot delegate the performance of functions that a settlor reasonably expects them to perform jointly. The Subcommittee presented a proposed amendment to F.S. § 736.0703, which would permit cotrustees to delegate investment functions, as well as other functions that may otherwise be delegated to an agent, between themselves. The Committee discussed the pros and cons of expanding the scope of cotrustees' abilities to delegate duties beyond investment functions between themselves. Upon a motion, all but one member of the Committee voted to refer this matter back to the Subcommittee to prepare a proposal specifically addressing the delegation of investment functions between cotrustees. Further, the Subcommittee was directed to prepare an alternate proposal dealing with the issue of permitting cotrustees to delegate other duties and functions amongst themselves.

**Discussion Regarding Glitch in F.S. § 736.0703(9).** Diana Zeydel raised an issue regarding a glitch in the language recently added to F.S. § 736.0703(9) by House Bill 435. The language in the statute creates confusion in identifying the excluded trustee. A straw vote revealed that a majority of the Committee agreed that the word, "directed," in subsection 9 should be replaced with "directing." A proposal addressing this issue will be presented at the next meeting.

**Report on Whether F.S. § 736.1007(7) and (9) Should Be Deleted as Being Duplicative of F.S. § 736.0206(4) and (5).** Wm. Fletcher Belcher reported that his Subcommittee is continuing to study this issue and work on a proposal.

**Report on Inconsistency between F.S. §§ 733.607 and 736.0503.** Pamela Price reported on the status of the Joint Subcommittee formed to study a potential inconsistency between F.S. §§ 733.607 (Probate Code) and 736.0503 (Florida Trust Code) regarding the payment of pre-residuary devises. The Joint Subcommittee is still studying the topic at this time.

**Report on Treatment Protected Homestead Property Held in a Trust.** Rex Moule discussed his Joint Subcommittee's preliminary report on the treatment of homestead property held in a trust as opposed to the same property held by an individual owner, and whether the Florida Trust Code should address the same. The discussion focused on three issues:

Issue 1 – Should probate statutes and rules be applied to determine homestead status of real property owned by a decedent’s revocable trust at the time of death? The Committee discussed this issue and focused on whether F.S. § 736.0201 should be revised to allow a determination of protected homestead property owned by a decedent’s trust in a probate proceeding. Several members of the Committee cited the goal of uniformity in support of such a change. Others opposed revisions based on fact that trust actions are governed by the Florida Rules of Civil Procedure and require actual service of process as opposed to formal notice. Upon a straw vote, all but 3 members of the Committee were in support of revising F.S. § 736.0201 to allow a determination of protected homestead property owned by a decedent’s trust in a probate proceeding.

Issue 2 – Does protected homestead vest immediately in the protected heirs if such property is owned in a revocable trust at the decedent’s death? The Committee focused on the meaning of the phrase, “initial trust administration stage,” and agreed to continue studying this topic.

Issue 3 – Should the Florida Trust Code be changed to make it clear that if homestead is devised through a trust to an exempt heir that the decedent’s protection from creditors inures to the decedent’s heirs? After discussion, the Committee agreed to continue studying this topic.

**Discussion Regarding Whether F.S. § 736.0107 (Governing Law) Should be a Mandatory Provision.** An issue was raised regarding a potential discrepancy in the Florida Trust Code regarding the connection or nexus to the designated jurisdiction. In particular, the mandatory provision in F.S. § 736.0108(1) for the designation of a principal place of administration of a trust requires a “sufficient connection” with the designated jurisdiction. At the same time, F.S. § 736.0107, which requires that the law of the jurisdiction designated in the terms of the trust controls provided that there is a “sufficient nexus” to the designated jurisdiction, is not mandatory. A Subcommittee chaired by Bob Goldman was formed to study this issue. Christopher Boyett, Barry Spivey, and John Moran agreed to serve on the Subcommittee. This issue will be added to the agenda for a future meeting.

**Proposed Amendment to F.S. § 736.0103(20) to Clarify the Meaning of “Complete Copy of a Trust.”** At the Bonita Springs meeting, the Committee approved an amendment to F.S. § 736.0813(1)(b) and (c) to clarify the meaning of “complete copy of a trust.” Jon Scuderi presented a proposed amendment to the Florida Trust Code’s definition section consistent with his Subcommittee’s earlier proposal. Upon Motion, the Committee unanimously approved the following proposed amendment to F.S. § 736.0103(20):

(20) “Trust instrument” means an instrument executed by a settlor that contains the currently effective terms of the trust, including any amendments to the trust.

**Adjournment.** The meeting was adjourned at approximately 3:00 p.m.

John C. Moran  
Secretary for the Meeting

Advising the Trustee Seminar  
Sponsored by the Trust Law Committee  
December 5, 2008.

- 1) Challenges to the Trust: Advising the Trustee When the Validity of the Trust is Challenged.  
Speaker, Jack Arnold Falk, Jr., Coral Gables, FL
- 2) Helping the Trustee Avoid Liability Through Adequate Disclosure.  
Speakers, Wm. Fletcher Belcher and Angela M. Adams, St. Petersburg, FL
- 3) Directed Trusts and Delegation of Duties to Agents and Trustees.  
Speaker, Mary E. Clarke, Miami, FL
- 4) Good Intentions Gone Bad: Investment Issues in Charitable Trusts.  
Speaker, Tami Foley Conetta, Sarasota, FL
- 5) A Potpourri of Tax Issues Your Trustee May or May Not Recognize  
Speaker, Laird A. Lile, Naples, FL
- 6) Investing in Uncertain Times: What Your Trustee Needs to Know!  
Speakers, Gentry B. Byrnes, St. Petersburg, FL, and Alex H. Hamrick, Orlando, FL

### 736.0703. Cotrustees

(1) Cotrustees who are unable to reach a unanimous decision may act by majority decision.

(2) If a vacancy occurs in a cotrusteeship, the remaining cotrustees or a majority of the remaining cotrustees may act for the trust.

(3) A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other provision of law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another cotrustee.

(4) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

(5) A cotrustee may not delegate to another cotrustee the performance of a function the settlor reasonably expected the cotrustees to perform jointly. A cotrustee may revoke a delegation previously made. Nothing contained herein shall prevent cotrustees from delegating investments function to one or more of the cotrustees as an investment agent in accordance with the provisions of s. 518.112 or other duties and powers to one or more of the cotrustees as an agent in accordance with the provisions of s. 736.0807.

(6) Except as otherwise provided in subsection (7), a cotrustee who does not join in an action of another cotrustee is not liable for the action.

(7) Except as otherwise provided in subsection (9), each cotrustee shall exercise reasonable care to:

(a) Prevent a cotrustee from committing a breach of trust.

(b) Compel a cotrustee to redress a breach of trust.

(8) A dissenting cotrustee who joins in an action at the direction of the majority of the cotrustees and who notifies any cotrustee of the dissent at or before the time of the action is not liable for the action.

(9) If the terms of a trust instrument provide for the appointment of more than one trustee but confer upon one or more of the trustees, to the exclusion of the others, the power to direct or prevent specified actions of the trustees, the excluded trustees shall act in accordance with the exercise of the power. Except in cases of willful misconduct on the part of the directed trustee of which the excluded trustee has actual knowledge, an excluded trustee is not liable, individually or as a fiduciary, for any consequence that results from compliance with the exercise of the power, regardless of the information available to the excluded trustees. The excluded trustees are relieved of any obligation to

review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of the power. The trustee or trustees having the power to direct or prevent actions of the trustee shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power.

### **736.0807. Delegation by trustee**

(1) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(a) Selecting an agent.

(b) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust.

(c) Reviewing the agent's actions periodically, in order to monitor the agent's performance and compliance with the terms of the delegation.

(2) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(3) A trustee who complies with subsection (1) is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

(4) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

(5) When delegating investment functions, a trustee must comply with the requirements of s. 518.112.

## Proposed Statutory Changes 9/10/08

**731.201 (32) “Protected homestead”** means the property described in s. 4(a) (1), Art. X of the State Constitution on which at the death of the owner the exemption inures to the owner’s surviving spouse or heirs under s. 4(b), Art. X of the State Constitution. For purposes of the code (i) real property owned by tenants by the entirety is not protected homestead, and (ii) “owner” includes the grantor of a trust pursuant to s. 732.4015 (2).

### Probate Rule 5.405

(a) **Petition.** An interested person may file a petition to determine protected homestead real property owned by the decedent, or deemed to be owned by the decedent pursuant s. 732.4015 (2).

(b) **Contents.** Same

(1) Same

(2) Same

(3) Same

(4) Same

(5) if the decedent was the deemed owner of the property pursuant to s. 732.4015 (2) a complete copy of the trust instrument shall be attached to the petition.

(6) Same

**I Order.** Same

**736.0103 (14) “Protected homestead held in trust”** means that portion of the trust estate described in s. 4(a) (1), Art. X of the State Constitution on which at the death of the settlor the exemption inures to the settlor’s spouse or heirs under s. 4(b), Art. X of the State Constitution.

### 736.0201 Role of court in trust proceedings

(1) Except as provided in subsection (5) and s. 736.0206, proceedings concerning trusts shall be commenced by filing a complaint and shall be governed by the Florida Rules of Civil Procedure.

- (2) Same
- (3) Same
- (4) Same
- (5) A proceeding for (i) the construction of a testamentary trust, (ii) a determination of protected homestead held in trust, or (iii) a determination of the descent or devise of protected homestead held in trust under s. 732.401 and s. 732.4015 may be filed in the probate proceeding for the testator's estate. The proceeding shall be governed by the Florida Probate Rules.

**736.0605 Disposition of homestead**

- (1) As provided by the Florida Constitution, that portion of the trust estate of a trust described in s. 733.707(3) that is evidenced by a written instrument in existence at the time of the settlor's death, which, if titled in the name of the settlor would be the settlor's protected homestead, shall not be subject to disposition by the terms of the trust if the settlor is survived by a spouse or a minor child or minor children, except that the homestead may be distributed to the settlor's spouse if there is no minor child or minor children.<sup>1</sup>
- (2) If not disposed of by the terms of the trust as permitted by law and the Florida Constitution, protected homestead shall descend pursuant to s. 732.401.

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<sup>1</sup> I also think we need a *Johnson* reference in the FTC. This section (1) is the exact wording of s. 732.4015(1) using the definitions of "owner" and "devise" set forth in s. 732.4015(2), i.e. *Johnson*. SAR:279447:1

## **736.0105 Default and Mandatory Rules.**

(2) The terms of a trust prevail over any provision of this code except:

(f) The requirements under s. 736.0108(1) for the designation of a principal place of administration of the trust and the requirements under s. 736.0107 for the designation of a jurisdiction whose law determines the meaning and effect of the terms of a trust.

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### **Glitch in Directed Trustee Statute**

In the last legislative session, F.S. 736.0703(9) was added to the provisions of the Florida Trust Code to permit, in the case of the appointment of more than one trustee, for one trustee to be able to direct the actions of another trustee. The trustee required to following the direction of another trustee is called the “excluded trustee”. The excluded trustee is substantially exonerated from liability for following the directions of the trustee(s) with authority to direct. An exception to full exoneration was added to the statute in the case of willful misconduct. In most States that have enacted directed trustee legislation, the exception to full exoneration is for willful misconduct on the part of the excluded trustee. The exception in the Florida statute, however states, “Except in cases of willful misconduct on the part of the directed trustee [sic]of which the excluded trustee has actual knowledge.” Not only is there a glitch in the language because the “excluded trustee’ and the “directed trustee” are the same person, but the effect of the statute is to require the excluded trustee to determine whether the trustee with authority to direct is engaged in “willful misconduct.” This puts the excluded trustee in the awkward position of having the determine the mental state of the trustee with authority to direct to determine if he or she is engaged in “willful” misconduct.

There are two possible fixes. One is to align Florida with other States, such as Delaware, and hold the excluded trustee responsible only for his or her own willful misconduct -- Option 1. The other is to simply correct the drafting glitch -- Option 2. Both options are set forth below.

#### **Option 1 -- Hold Excluded Trustee Liable Only for His or Her Own Willful Misconduct**

#### **736.0703 Cotrustees.--**

(9) If the terms of a trust instrument provide for the appointment of more than one trustee but confer upon one or more of the trustees, to the exclusion of the others, the power to direct or prevent specified actions of the trustees, the excluded trustees shall act in accordance with the exercise of the power. Except in cases of willful misconduct on the part of the ~~directed~~ excluded trustee ~~of which the excluded trustee has actual~~  
SAR:279447:1

knowledge, an excluded trustee is not liable, individually or as a fiduciary, for any consequence that results from compliance with the exercise of the power, regardless of the information available to the excluded trustees. The excluded trustees are relieved of any obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of the power. The trustee or trustees having the power to direct or prevent actions of the trustees shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power.

## **Option 2 -- Fix Error in Reference Only**

### **736.0703 Cotrustees.--**

(9) If the terms of a trust instrument provide for the appointment of more than one trustee but confer upon one or more of the trustees, to the exclusion of the others, the power to direct or prevent specified actions of the trustees, the excluded trustees shall act in accordance with the exercise of the power. Except in cases of willful misconduct on the part of the ~~directed~~ trustee with the authority to direct or prevent actions of the trustees of which the excluded trustee has actual knowledge, an excluded trustee is not liable, individually or as a fiduciary, for any consequence that results from compliance with the exercise of the power, regardless of the information available to the excluded trustees. The excluded trustees are relieved of any obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of the power. The trustee or trustees having the power to direct or prevent actions of the trustees shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power.

*MIA 180192872v1 9/3/2008*

**689.07\_ Real estate interests transferred to a trust by name absent any reference to an entity followed by the identifier “trustee” or “as trustee”**

(1) For the purposes of this section the term “instrument with undisclosed trustees” shall mean a conveyance, deed, mortgage, lease assignment, or other recorded instrument that created or transferred any interest in real property in this state to a trust by name and not to the named trustee(s) of said trust.

(2) An instrument with undisclosed trustees shall be deemed to have created, conveyed, or transferred that interest to the undisclosed trustee or trustees of the named trust.

(3) Prior to any subsequent transaction the trustee or trustees must be disclosed by recording a trust certificate as set out in §736.1017, together with copies of the pertinent parts of the trust including any amendments or modifications thereto reflecting the trust identity, identifying the named trustee(s) and their successors, granting the trustee(s) power to act and any limitations of the power, and the execution by the settlor(s) of said trust.

(4) Notwithstanding any language contained in the body of the instrument with undisclosed trustees, the provisions of §689.071(4) regarding the duty to inquire as to the identity, status or authority of the trustee or trustees is not applicable to an instrument with undisclosed trustees.

(5) Any person or entity that could claim an interest adversely affected by subsection (2) must bring suit to affirm said interest within one calendar year from the passing of this section or be forever barred from asserting any claim or interest.