

IN THE DISTRICT COURT OF APPEAL OF FLORIDA  
THIRD DISTRICT

CASE NO. 3D07-1367  
LT NO. 05-2298

CECILIA REID, ETC.,  
appellants,

v.

TEMPLE JUDEA and  
HEBREW UNION COLLEGE, ETC.,  
appellees.

ON APPEAL FROM THE CIRCUIT COURT OF FLORIDA  
ELEVENTH JUDICIAL CIRCUIT

BRIEF OF  
THE REAL PROPERTY PROBATE & TRUST LAW SECTION  
OF THE FLORIDA BAR

*AMICUS CURIAE*

GOLDMAN FELCOSKI & STONE, P.A.  
Robert W. Goldman, FBN339180  
The 745 Building  
745 12<sup>th</sup> Avenue South  
Suite 101  
Naples, FL 34102  
239-436-1988

BRIGHAM AND MOORE, LLP  
John W. Little III, FBN 384798  
One Clearlake Centre, Suite 1601  
250 South Australian Avenue  
West Palm Beach, Florida 33401  
561-832.7862

## **TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	3
IDENTITY AND INTEREST .....	5
QUESTION PRESENTED .....	6
SUMMARY OF ARGUMENT .....	6
ARGUMENT .....	7
CONCLUSION.....	13
CERTIFICATE OF SERVICE .....	14
CERTIFICATE OF FONT COMPLIANCE .....	14

## TABLE OF AUTHORITIES

### Cases

<i>Bailey v. Leatherman</i> , 615 So. 2d 810 (Fla. 3d DCA 1993).....	10
<i>Barnett v. Barnett</i> , 340 So.2d 548 (Fla. 1st DCA 1976).....	11
<i>Bitterman v. Bitterman</i> , 714 So.2d 356 (Fla.1998).....	11
<i>Brigham v. Brigham</i> , 934 So. 2d 544 (Fla. 3d DCA 2006) .....	10
<i>Estate of Robinson</i> , 720 So. 2d 540 (Fla. 4 <sup>th</sup> DCA 1998).....	6, 9, 10
<i>Estate of Simons</i> , 86 P.3d 1021 (Kan. 2004) .....	6
<i>Fifth Third Bank v. Simpson</i> , 134 Ohio App.3d 71, 730 NE.2d 406 (Oh. Ct. App. 1999). 7	
<i>Gilpatric v. Cabour</i> , 450 Mass. 1025, 879 N.E.2d 1236 (Mass. 2008).....	6
<i>Griffin v. Griffin</i> , 832 P.2d 810 (Ok. 1992) .....	7
<i>Moakley v. Smallwood</i> , 826 So.2d 221 (Fla. 2002) .....	11
<i>NC Illinois Trust Company v. Madigan</i> , 351 Ill. App.3d 311, 812 N.E.2d 1038 (Ill. App. Ct. 2004) .....	6
<i>Schroeder v. Gebhart</i> , 825 So. 2d 442 (Fla. 5 <sup>th</sup> DCA 2002) .....	10

### Statutes

§86.041, Fla. Sta. ....	5, 8
§731.201, Fla. Stat. ....	5, 8
§736.0106, Fla. Stat. ....	6
§736.0415, Fla. Stat. ....	5, 7
§736.0708, Fla. Stat. ....	11
§736.0709, Fla. Stat. ....	11
§736.0801, Fla. Stat. ....	6, 8

§736.0804, Fla. Stat. .... 6, 8  
§736.0816(23), Fla. Stat. .... 9  
§736.1004, Fla. Stat. .... 11  
§736.1005, Fla. Stat. .... 11  
§736.1007(6), Fla. Stat. .... 11

## IDENTITY AND INTEREST

The Real Property Probate & Trust Law Section of The Florida Bar (“Section”) is a group of Florida lawyers who practice in the areas of real estate, trust and estate law, and who are dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public *pro bono*, draft legislation, draft rules of procedure, and occasionally befriend courts to assist on issues related to our fields of practice.<sup>1</sup> Our Section has over 10,000 members.

Our interest in this case stems from our expertise with the trust issue presented to us by the Court. Further, and equally important, this Court invited us to participate in this case and we believe it is our professional duty to assist the Court if we are able.

---

<sup>1</sup> For example, see *McKean v. Warburton*, 919 So. 2d 341 (Fla. 2005); *May v. Illinois Nat. Ins. Co.*, 771 So. 2d 1143 (Fla. 2000); *Bitterman v. Bitterman*, 714 So. 2d 356, 365 (Fla.1998); *Friedberg v. SunBank/Miami*, 648 So. 2d 204 (Fla. 3d DCA 1994).

## **QUESTION PRESENTED**

On February 20, 2008, this Court entered an order inviting us to address the following issue of standing:

Whether acting solely in his capacity as trustee, a trustee/beneficiary has standing to bring an action for reformation of a trust, based on a claim that a mistake has occurred and that the trust as written does not reflect the settlor's intent, where reformation may or will advance the trustee/beneficiary's interests, and where such action is not specifically prohibited under the terms of the trust.

We accept the invitation and we address the issue in a vacuum, without review of the facts of the case, the decision below or the terms of the trust.

## **SUMMARY OF ARGUMENT**

A trustee is obligated to follow the settlor's true intent and purposes. Therefore, in cases involving a determination of the settlor's true intent, a trustee is an "interested person" as defined in 731.201(23), Florida Statutes. As an interested person, a trustee has standing to seek reformation of a trust. §736.0415, Fla. Stat. Further, a trustee has standing to seek reformation of a trust pursuant to section 86.041, Florida Statutes.

The fact that a trustee is also a beneficiary of the trust and will benefit from the reformation does not impact his or her standing. Under certain

circumstances, however, the trustee's interest as a beneficiary may impact his or her trustee's fees and the extent to which the trustee may pay his or her attorneys' fees with trust assets.

## **ARGUMENT**

Reformation is a civilized society's recognition that humans, including estate planning attorneys, can make mistakes. If a mistake occurs in the drafting of a trust, the court, wearing its equity robe, has a duty to correct the mistake. *Estate of Robinson*, 720 So. 2d 540, 542 (Fla. 4<sup>th</sup> DCA 1998). Further, a trustee is duty bound to follow the settlor's intent and purposes. §§736.0801, 736.0804, Fla. Stat. If the trustee is aware that a mistake was made, it follows that he or she must at least make certain the issue is fully considered by the court.

Historically, trustees have presented reformation issues to the courts.<sup>2</sup> See, for example, *Estate of Robinson*, id.; *Gilpatric v. Cabour*, 450 Mass. 1025, 879 N.E.2d 1236 (Mass. 2008); *Estate of Simons*, 86 P.3d 1021 (Kan. 2004); *NC Illinois Trust Company v. Madigan*, 351 Ill. App.3d 311, 812 N.E.2d 1038 (Ill. App. Ct. 2004); *Fifth Third Bank v. Simpson*, 134 Ohio

---

<sup>2</sup> The Florida Trust Code expressly adopts the common law and principles of equity to the extent they are not modified by the Code. §736.0106, Fla. Stat.

App.3d 71, 730 NE.2d 406 (Oh. Ct. App. 1999); *Griffin v. Griffin*, 832 P.2d 810 (Ok. 1992)

While Florida has retained the common law and equitable principles, including reformation, it now has a statute specifically addressing trust reformation. Section 736.0415, Florida Statutes, provides:

Upon application of a settlor *or any interested person*, the court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intent if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intent even though the evidence contradicts an apparent plain meaning of the trust instrument.

(Emphasis supplied.). Interestingly, the inclusion of language giving interested persons standing is not part of the Uniform Trust Code from which much of Florida's Trust Code was modeled. The drafters of the Florida Trust Code (a committee made up of members of the RPP&TL Section, Florida Association of CPAs, the Elder Law Section, and the Florida Bankers Association) and the Legislature specifically included the language in order to give standing to trustees, trust protectors (§736.0306, Fla. Stat.), animal trust enforcers (§736.0408(2), Fla. Stat.), persons with powers to direct (§736.0808, Fla. Stat.) and others who might be affected by a reformation proceeding.



The term “interested person” is defined in section 731.201, Florida Statutes, which expressly applies to chapter 736, Florida Statutes. Section 731.201(23) provides:

*“Interested person” means any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved. In any proceeding affecting the estate or the rights of a beneficiary in the estate, the personal representative of the estate shall be deemed to be an interested person. In any proceeding affecting the expenses of the administration and obligations of a decedent's estate, or any claims described in s. 733.702(1), the trustee of a trust described in s. 733.707(3) is an interested person in the administration of the grantor's estate. The term does not include a beneficiary who has received complete distribution. The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings.*

(Emphasis supplied.)

As we previously noted, a trustee is required to follow the settlor’s intent and purposes. §§736.0801, 736.0804, Fla. Stat. It is, therefore, apodictic that a trustee is an “interested person” in any proceeding involving a determination of the settlor’s intent and purposes.

Further, section 86.041, Florida Statutes, expressly gives a trustee standing to seek declaratory relief for any issue involving the administration of the trust under which the trustee is serving. It provides:

*Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a*

*trust*, a guardianship, or of the estate of a decedent, an infant, a mental incompetent, or insolvent may have a declaration of rights or equitable or legal relations in respect thereto:

(1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; or

(2) To direct the executor, administrator, or trustee to refrain from doing any particular act in his or her fiduciary capacity; or

(3) *To determine any question arising in the administration of the guardianship, estate, or trust, including questions of construction of wills and other writings.*

(Emphasis supplied.)

A trustee might also bring a reformation case when the trustee knows a mistake was made and wants to avoid improperly distributing assets in accordance with an erroneously drafted trust and avoid the attendant liability. A trustee has the power to bring a suit under that circumstance pursuant to section 736.0816(23), Florida Statutes.

That a trustee is also a beneficiary and may benefit from the reformation of the trust should not impact his or her standing to bring the action. Indeed, if, by virtue of doing his or her duty and raising the issue of a mistake, qua trustee, he or she benefits, that will only be due to the trial court's determination that reformation is warranted and is supported by clear and convincing evidence. For example, in *Estate of Robinson*, cited above, the trustee brought the reformation action. If correct regarding the mistake

she alleged (which she was), she would (and did) benefit personally by not having to pay taxes from her share of the estate. *Id.*

If the trustee in that case, **qua trustee**, were making the decision to reform, then her conflict might warrant the appointment of a trustee ad litem. *See Bailey v. Leatherman*, 615 So. 2d 810 (Fla. 3d DCA 1993).

Alternatively, a trustee in a conflict situation involving a trust transaction has a safe harbor of obtaining court approval of her actions.

§736.0802(2)(b), Fla. Stat. Similarly, under former section 737.403(2), Florida Statutes (2005), a trustee in conflict had to obtain court approval before taking action. *See Brigham v. Brigham*, 934 So. 2d 544 (Fla. 3d DCA 2006). But, in reformation cases like *Estate of Robinson*, **the court** determines whether reformation is appropriate after hearing from all interested parties who participate in the action. And, the fact that a resulting reformation may have winners and losers is appropriate as long as the reformation does not frustrate the settlor's intent. 720 So. 2d at 543; *Schroeder v. Gebhart*, 825 So. 2d 442, 446, fn 2 (Fla. 5<sup>th</sup> DCA 2002). The court, in essence, cleanses any conflict that might otherwise exist by making the decision to reform or not to reform instead of the trustee.

As a final point, we note that a trustee, *qua trustee*, particularly one with a beneficial interest in the outcome of a reformation, may have his or

her fees and costs or those of his or her attorney (related to the reformation) reduced or substantially eliminated (to the extent requested from the trust). For example, if the reformation proceeding is not successful and the court determines that the action was instigated in bad faith and to satisfy the trustee's personal interests, a fee reduction (from trust assets) and a fee award to the other beneficiaries (from the trustee's personal assets) may result. *See* §§736.0708, 736.0709, 736.1004, 736.1007(6), Fla. Stat.; *Bitterman v. Bitterman*, 714 So.2d 356, 365 (Fla.1998); *Moakley v. Smallwood*, 826 So.2d 221 (Fla. 2002)

Further, even if successful in obtaining the reformation, a court might later determine that the trustee, qua trustee, was right to bring the action and to make certain the court had all of the salient facts before it, but then should have stepped back into a less partisan role and let the beneficiaries litigate against each other beyond that point. *See Barnett v. Barnett*, 340 So.2d 548 (Fla. 1st DCA 1976). The facts of each case will vary on the issue of how involved a trustee should be. Of course if the trustee, in his or her capacity as a beneficiary retains counsel and is also successful in the reformation proceeding, his or her attorney may have benefitted the trust, thereby earning attorneys' fees and costs pursuant to §736.1005, Florida Statutes.

## CONCLUSION

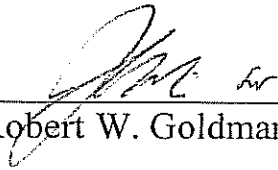
For these reasons, the trustee described in the Court's question to the RPP&TL Section has standing to bring an action for reformation of a trust.

Respectfully submitted,

GOLDMAN FELCOSKI & STONE, P.A.  
Robert W. Goldman, FBN339180  
The 745 Building  
745 12<sup>th</sup> Avenue South  
Suite 101  
Naples, FL 34102  
239-436-1988

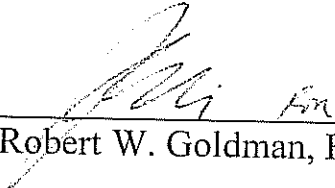
and

BRIGHAM AND MOORE, LLP  
John W. Little III, FBN 384798  
One Clearlake Centre, Suite 1601  
250 South Australian Avenue  
West Palm Beach, Florida 33401  
561-832.7862

  
\_\_\_\_\_  
Robert W. Goldman, FBN339180

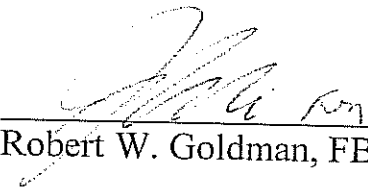
## CERTIFICATE OF SERVICE

I CERTIFY that a true copy of this document was served by U.P.S. Next Day Air on Kenneth Bloom, 1110 Brickell Avenue, F1 7, Miami, FL 33131; William J. Palmer, 1500 Miami Center, 201 S. Biscayne Boulevard, Miami, FL 33131; Gary P. Simon, 9500 S. Dadeland Boulevard, Suite 708, Miami, FL 33156; Arnaldo Velez, 35 Almeria Avenue, Coral Gables, FL 33134-6118 this 10 day of March, 2008.

  
\_\_\_\_\_  
Robert W. Goldman, FBN339180

## CERTIFICATE OF FONT COMPLIANCE

I CERTIFY this response complies with the font requirements of rule 9.210(a) (2), Florida Rules of Appellate Procedure.

  
\_\_\_\_\_  
Robert W. Goldman, FBN 339180