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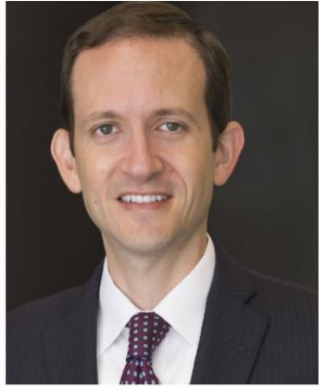
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**DELEGATION OF TRUSTEE
POWERS
UNDER
FLORIDA LAW
MAY 19, 2016**



Richard DeNapoli has over 14 years of experience in law and trust services. Prior to joining Coral Gables Trust he worked as a Trust and Investment Officer for more than five years at Northern Trust on a team with \$1.8 Billion assets under management providing services to high net worth individuals, and then as a Vice-President at MEMBERS Trust Company with over \$1.8 Billion in assets under management. Prior to joining Northern Trust, Richard practiced law successfully in his own practice working with clients primarily on estate planning and real estate matters. Richard is a graduate of the University of Miami School of Law (2008, LL.M., Estate Planning), Fordham Law School (2002, J.D.) and New York University (1999, B.A., Politics; B.A. Italian). He is licensed to practice law in Florida and the United States District Court for the Southern District of Florida. Richard has also been successful in obtaining his CERTIFIED FINANCIAL PLANNER(TM) certification. In 2007, Richard DeNapoli was appointed as a Commissioner to the Florida Real Estate Commission (“FREC”), and subsequently reappointed when that term was up. Both of his appointments to the FREC were confirmed by the Florida Senate. He was unanimously elected to serve as the Chairman of the Florida Real Estate Commission from 2010-2011, and he continued to serve on the Commission for two terms over six years through December 2013. Richard is also a longtime member of the Real Property Probate and Trust Law Section of the Florida Bar.

- Delegation v. Directed Trust (Powers to Direct Under Section 736.0808)
- Benefits of Delegation and Practical Considerations
- Florida Delegation Statute Section 736.0807
- Delegation of Investment Functions Under Section 518.112
- Notice of Delegation
- Ongoing Duties of Trustee After Delegation of One or More Powers

Delegation v. Direction

Delegated and Directed are two terms that are often confused in marketing

1. Directed Trust: 736.0808 (see in your packet)

Generally when the trust document itself splits the duties (i.e., investment functions from administrative trustee functions) between different fiduciaries

- (1) Trustee can take direction from the Settlor, even when contrary to the terms of the trust while a trust is revocable
- (2) The terms of the trust may provide a power to direct for someone other than the settlor, and the trustee shall act in accordance with this direction (and the trustee's liability is thus limited) *"unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of fiduciary duty."*
 - (a) Different standard from that set forth in the Florida delegation statute

2. Delegation:

When the trustee delegates duties and powers to another provider/fiduciary, including investment functions to a separate financial advisor.

Benefits of Delegation and Practical Considerations

1. Individual Trustees:

- I. May lack skills needed to perform required Trustee duties, such as day to day investment management

2. Corporate Trustee

- I. May have investment capabilities, but not with regard to all asset classes
- II. Settlor or beneficiaries may have a strong connection with an outside investment advisor and wish to continue that relationship
 - a) Outside Advisors often do not or cannot act as Trustee
 - b) Outside advisor might manage other investments on behalf of the settlor and/or beneficiaries

3. Pros and Cons:

Pros: 1) portability for the advisor as they move firms 2) revisions to estate planning documents. Pros and cons of Delegation by a trustee should be weighed when an investment portfolio contains special assets, such as non-marketable or closely held entities, real estate, asset concentrations. Does the trust document provide guidance?

Florida Delegation Statute Section 736.0807

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, including investment functions pursuant to s. 518.112. 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) and, when investment functions are delegated, s. 518.112 is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

History.—s. 8, ch. 2006-217; s. 6, ch. 2009-117; s. 13, ch. 2013-172.

Florida Delegation Statute Section 736.0807

Key Provisions:

(1) *A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances ...*

Actions of a “Prudent Trustee of Comparable Skills”

- Comparable skills suggests that a corporate trustee would be held to a higher standard than an individual trustee
- Both individual and corporate trustees can delegate powers, even if corporate trustee has its own investment capabilities

Florida Delegation Statute Section 736.0807

Key Provisions Continued:

Section (1) - ... *including investment functions pursuant to s. 518.112.*

- In the first section, it references investment functions.

The Trustee shall ...

“...exercise reasonable care, skill, and caution in:”

(1)(a) *Selecting an Agent*

What should be considered reasonable and best practices for these purposes?

- 1) Investigation of proposed agent
- 2) Other possible agents of similar skills—how many?
- 3) How much evidence should be obtained and on what specific topics for an investment agent?
 - i. Investment performance over time
 - ii. Reputation in business community (ex. Broker Check on Finra)
 - iii. Personnel
 - iv. Fees
- 4) Real estate agent
- 5) Valuation agent for closely held or other hard to value assets
- 6) Other agents a trustee might retain

Florida Delegation Statute Section 736.0807 continued

Key Provisions: “Exercise Reasonable Care, Skill, and Caution in:”

(1)(b) Establishing the Scope and Terms of Delegation

1. For investment agent
2. Risk profile of trust and its beneficiaries
3. Investment policy statement
4. Compliance with terms of trust
5. Limitations on the terms of the delegation

Florida Delegation Statute Section 736.0807 continued

Key Provisions: “Exercise Reasonable Care, Skill, and Caution in:”

(1)(c) Reviewing the agent’s actions periodically, in order to monitor the agent’s performance ...

Investment and Other Agents

- Periodic statements with holdings, purchases and sales and performance data
- Appropriate frequency
- Comparison to investment policy statement
- Non-performance issues

Florida Delegation Statute Section 736.0807

Key Provisions Continued:

(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.

Duties of Agent

1. Reasonable Care
2. Compliance With Terms of Delegation

Florida Delegation Statute Section 736.0807

Limitations on Liability of Trustee

(3) A trustee who complies with subsection (1) and, when investment functions are delegated, s. 518.112 is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

- Is Trustee the Client of the Agent or are the Beneficiaries of the Trust the clients of the Agent?
 - Who is Entitled to Sue?
1. Evidence supporting compliance with Fla. Stat. Sec. 736.0807 and Fla. Stat. Sec. 518.112, if applicable, will relieve trustee of liability to beneficiaries for actions of agent
 2. Good record keeping is critical to limit liability
 - a) Documents obtained at point of hire of agent
 - b) Documents obtained during course of delegation
 - c) Evidence of periodic review of agent's performance

Delegation of Investment Functions Under Section 518.112

- (1) Provisions for selection of investment agent, establishment of scope and terms of delegation and monitoring of performance and compliance parallel requirements set forth in Fla. Stat. Sec. 736.0807

- (2) Insurance Trusts and Delegation of Investment Responsibility for Insurance Contracts per Fla. Stat. Sec. 518.112(2)(a)
 1. Delegation can be to a variety of parties per the statute, depending on specific circumstances
 2. Typically delegation is to one or more of the beneficiaries of an irrevocable life insurance trust
 3. Wide range of insurance contract functions are delegable under the statute
 4. Statute relieves trustee of “any continuing obligation to review the agent’s actions” with regard to the insurance contract

Notice of Delegation

(3) A fiduciary may delegate investment functions to an investment agent under subsection (1) or subsection (2) if:

(a) Guardianships:

- Must first obtain Court Approval

(b) Trust or Estate:

STEPS:

1. Must give Written Notice within 30 days of delegation
2. All Beneficiaries or their Legal Representatives
 - Unclear since mentions “eligible” beneficiaries and references “beneficiaries eligible to receive income”
 - Notice, once given, remains in place until revoked

(b)(1) Future Beneficiaries Covered

Waiver of Notice—is this a wise choice?

Notice of Delegation

518.112(3)(b)(3) Methods of Notice
Part III of Section 731 for estates
736.0109 and Part III of 736 for trusts

The methods per 736.0109(1) (attached)

- a) First class mail
- b) Personal delivery

Other options for proof of delivery:

- Certified mail
- Express mail services

Subsection (3) details Electronic posting methods

- Complex requirements
- Evidence that notice has been sent
 - i. Copy of letter
 - ii. Certified mail receipt
 - iii. Express mail service acknowledgement of receipt
 - iv. Electronic posting receipt

Notice of Delegation cont.

518.112(4) If all the notice requirements of subsection 3 of this statute are satisfied, then the fiduciary shall not be responsible otherwise for the investment decisions nor actions or omissions of the investment agent to which the investment functions are delegated.

518.112(5) The investment agent, shall, by virtue of acceptance of its appointment, be subject to the jurisdiction of the courts of this state.

518.112(6) In performing a delegated function, the investment agent shall be subject to the same standards as the fiduciary.

So...in performing the investment functions, the investment agent takes on a fiduciary responsibility.

Practical Considerations

1. Communication Between and among Parties
 - a) Investment Agent is Hired by Trustee
 - b) Investment Reports to Settlor and/or Beneficiaries
 - c) Separate Reports from Trustee
 - d) Changes in Portfolio
 - i. Risk Analysis
 - ii. Asset allocation and Changes to Investment Policy Statement

2. Parameters for communication need to be established at onset of delegation so that all parties have reasonable expectations of how communication will occur and how and by whom decisions will be made.

Practical Considerations

Custody of Trust Assets

1. Under direct control and custody of trustee
 - i. Investment agent acts as third party and gives direction for trades which are executed by the trustee
 - ii. Record keeping and reporting simplified
2. Under control and custody of third party investment agent-so called “held away” accounts
 - i. Separate reporting from trustee and from investment agent
 - ii. To whom are reports sent?
 - iii. Who has the duty to report to the settlor and/or the beneficiaries of the trust?

Practical Considerations

Compensation issues

- a) Trustee Fees for Limited Duties generally lower
- b) Investment Agents' Fees generally lower
- c) Reasonableness of Overall Fee Structure

Ongoing Duties of Trustee After Delegation of One or More Powers

1. Trust Interpretation
2. Reporting to all Qualified Beneficiaries
3. Record Keeping
4. Income and Principal Distributions and Related Discretionary Actions
5. Tax Returns and Tax Reporting