Navigating the Successful Transition of Fiduciaries

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Personal representatives and trustees, particularly corporate fiduciaries, are often eager to take on a new fiduciary position and jump in with zeal only to find that the estate or trust is teaming with trouble: *litigious* beneficiaries, unreasonable co-fiduciaries, and difficult to manage assets. Sometimes, the risk and headache just isn't worth the reward and the fiduciary is left searching for an exit. Other times, the beneficiaries themselves demand change. These materials focus on the procedural steps associated with the succession and discharge of both personal representatives and trustees. Topics include voluntary succession (resignation), as well as involuntary succession (removal), and the procedure for obtaining discharge under both scenarios.

I. RESIGNATION, REMOVAL, AND APPOINTMENT OF SUCCESSOR PERSONAL REPRESENTATIVES

A. Resignation of Personal Representatives

The primary authority as it relates to the rights and obligations of a personal representative concerning resignation is found in Florida Statutes § 733.502 and Florida Probate Rule 5.310. A personal representative *does not* have an unqualified right to resign. The resignation must be "accepted" by the court and will only be permitted if the interests of the estate will not be jeopardized. *F.S.* 733.502. Given the fact that court approval is required to resign, it is helpful to think of the resignation process in two main phases:

(1) The procedure that must be followed by a personal representative to have its resignation accepted; and

(2) The procedure that must be followed to obtain a discharge or release of liability.

1. Court Approval Process for Acceptance of Resignation (Petition for Resignation)

Florida Probate Rule 5.430(a)-(e) sets forth the procedure for obtaining court approval or "acceptance" of the resignation. The process begins with the filing of a Petition for Resignation. The Petition for Resignation must state that: (1) the personal representative desires to resign and be relieved of all powers, duties, and obligations as personal representative; (2) the status of the administration and that the interests of the estate will not be jeopardized if the resignation is accepted; (3) whether there are any proceedings pending against the personal representative; and (4) whether appointment of a successor is necessary. Fla. Prob. R. 5.430(b).

The petition must be served on all interested persons and the personal representative's surety, if any. Fla. Prob. R. 5.430(c).

Before accepting the resignation, the court must determine whether a successor personal representative is necessary. If there is no joint personal representative serving, the court must appoint a successor fiduciary. Fla. Prob. R. 5.430(d).

The court *may* accept the resignation and revoke the letters of the resigning personal representative if the interests of the estate are not jeopardized. Fla. Prob. R. 5.430(e); *F.S.* 733.502.

If the court accepts the resignation, the letters of administration issued to the resigning personal representative will be revoked. However, acceptance of the resignation does not exonerate the resigning personal representative or the personal representative's surety from liability. Fla. Prob. R. 5.430(e); *F.S.* 733.502.

A personal representative who was not qualified to act at the time of appointment or who later no longer meets the statutory requirements for qualification is required to immediately file and serve on all interested persons a notice stating that any interested persons may petition to remove the personal representative and describing: (a) the reason the personal representative was not qualified at the time of appointment; or (b) the reason the personal representative would not be qualified for appointment if application for appointment were then made, along with the date on which the disqualifying event occurred. Fla. Prob. R. 5.310; *F.S.* 733.3101. *But see* Hill v. Davis, 70 So. 3d 572 (Fla. 2011)(holding that § 733.212(3) bars an objection to the qualifications of a personal representative, including an objection that they were never qualified to serve, if the objection is not timely filed under the statute absent fraud, misrepresentation, or misconduct). A personal representative who fails to send the required notice is personally liable for attorneys' fees and costs incurred in any removal proceeding if the personal representative is removed. *F.S.* 733.3101. Commentators suggest that, in addition to sending the required notice, a personal representative who is not qualified should resign. *See* David T. Smith, FLORIDA PROBATE CODE MANUAL § 12.10 (Lexis-Nexis 2010). "The notification does not automatically affect the authority of personal representative to act, but in most situations prudence would dictate that the personal representative voluntarily resign, especially if a removal proceeding will be forthcoming." *See* Shane J. Kelley, Functions of Lawyers and Personal Representatives, PRACTICE UNDER FLORIDA PROBATE CODE §4.95 (Lexis-Nexis/Fla. Bar 7th ed. 2012)(citing In re Estate of Montanez, 687 So. 2d 943 (Fla. 3d DCA 1997) for the proposition that personal representative and attorney who are not qualified and have conflicts are not entitled to a fee).

2. Duties of Resigning Personal Representative upon Court Acceptance of Resignation and Proceedings for Discharge

After acceptance of the resignation, the personal representative is required to immediately deliver all records and property of the estate to either the remaining personal representative or to the successor fiduciary unless otherwise directed by the court. Fla. Prob. R. 5.430(f).

The personal representative has 30 days from the date of revocation of letters to file an accounting and a petition for discharge with the court. Fla. Prob. R. 5.430(g). The petition for discharge must be verified and must state: (1) that the letters of the resigning personal representative have been revoked; (2) that the resigning personal representative has surrendered

all undistributed estate assets, records, documents, papers, and other property of or concerning the estate to the remaining personal representative or successor fiduciary; and (3) the amount of compensation paid or to be paid to the resigning personal representative and the attorney and other persons employed by the resigning personal representative. Fla. Prob. R. 5.430(g).

The accounting for a resigning personal representative is governed by Florida Probate Rule 5.345, which is the general rule governing fiduciary accountings. *See* Fla. Prob. R. 5.430(h). The accounting must cover the period from date the letters of administration were issued until the date the letters are revoked. Fla. Prob. R. 5.345(a)(2). The accounting must also include all of the information required by Florida Probate Rule 5.346.

Notices of filing and a copy of the petition for discharge and accounting must be served on all interested persons. Fla. Prob. R. 5.430(h),(i); Fla. Prob. R. 5.345(b). The notice for the petition for discharge must state that objections to the petition for discharge must be filed within 30 days after the later of service of the petition for discharge or the accounting on that interested person. Fla. Prob. R. 5.430(i); Fla. Prob. R. 5.345(b). The notice for the accounting must state that objections to the accounting must be filed within 30 days from the date of service of the notice. Beneficiaries have 30 days from the date of service of the accounting to file their objections to the petition for discharge and accounting. Fla. Prob. R. 5.430(i); Fla. Prob. R. 5.345(c). Any objection not filed within 30 days is abandoned. Any objection must state with particularity the item or items to which the objection is directed and the grounds upon which the objection is based. Fla. Prob. R. 5.430(i); Fla. Prob. R. 5.345(c).

In many instances, beneficiaries will want to waive the right to an accounting and will consent to the discharge in order to save the cost and expense associated with having an accounting prepared and the delay associated with court proceedings. *See F.S.* 731.302. The waiver and consent must be signed by the person executing it and must state: (a) the person's interest in the estate; (b) whether the person is signing in a fiduciary or representative capacity and, if so, the nature of the capacity; and (c) that the waiving party has actual knowledge of the amount and manner of determining compensation and that either the party has agreed to the compensation and waives any objection to payment or that the party waives the right to have the court determine the compensation. Fla. Prob. R. 5.180(b).

Upon withdrawal, abandonment, or judicial resolution of all objections, the court may enter an order discharging the personal representative once it is satisfied that all records and property have been turned over to the remaining personal representative or fiduciary. Fla. Prob. R. 5.430(k). Once an order is entered, the personal representative and its surety are discharged and any bond is released. *F.S.* 733.508.

B. Removal of a Personal Representative

1. Grounds for Removal

Florida courts have made it clear that a testator has the right to name the person who shall administer his or her estate provided such person is not disqualified by law. *See* State v. North, 32 So. 2d 14, 18 (Fla. 1947); In re Estate of Miller, 568 So. 2d 487, 489 (Fla. 1st DCA 1990);

Pontrello v. Estate of Kepler, 528 So. 2d 441, 443 (Fla. 2d DCA 1988). In the words of the Second District Court of Appeal:

> A judge treads on sacred ground, not only when he overrides the testator's directions regarding the custody of his children, but also when he overrides the testator's directions regarding the appointment of the person in whom the decedent placed his trust to administer his estate according to the powers given in the will.

Pontrello, 528 So. 2d at 443.

Because the testator's intent is the overriding concern, courts have held that mere allegations of conflict of interest or potential wrongdoing are insufficient to prevent the appointment of the nominated person. Estate of Miller, 568 So. 2d at 489. Rather, if the fiduciary engages in wrongdoing during the administration of the estate, he or she can be removed. *See* Pontrello, 528 So. 2d at 444 (holding that although a court can remove a personal representative if cause arises, it cannot refuse to appoint the nominated personal representative on the grounds that he may be subject to removal later); Miller, 568 So. 2d at 489 (holding that the court should have appointed the nominated personal representative, but may later remove the personal representative if he interferes with the proper administration of the estate, causes a waste of assets, or meets any of the conditions set forth in the statute).

Florida Statutes § 733.504 lists the statutory grounds upon which a personal representative may be removed, including:

(a) adjudication of incompetency;
(b) physical or mental incapacity rendering the personal representative incapable of discharging his or her duties;
(c) failure to comply with an order of the probate court unless the order is superseded on appeal;
(d) failure to account for the sale of property or to produce the estate assets;
(e) wasting or other maladministration of the estate;
(f) failure to give bond or security;
(g) conviction of a felony;
(h) insolvency of a corporate personal representative;
(i) holding or acquiring conflicting or adverse interests against the estate that will or may interfere with the estate as a whole;
(j) revocation of probate of a will that designated the personal representative;
(k) removal of domicile from Florida if domicile was a requirement of initial appointment; and
(l) failure of the personal representative to presently qualify for appointment.

Further, Florida Statutes § 733.301(4) provides that a person who is entitled to preference in appointment may seek revocation of the letters of administration if they did not receive formal notice of the appointment or otherwise waive notice. A person who was qualified and entitled to preference may not be removed as personal representative simply because another person

entitled to a higher priority becomes qualified to serve. *See* In re Estate of Fisher, 503 So. 2d 962 (Fla. 1st DCA 1987).

Without more, hostility between a personal representative and beneficiaries does not constitute grounds for removal. *See* Gresham v. Strickland, 784 So. 2d 578, 581 (Fla. 4th DCA 2001). Irreconcilable conflicts between co-personal representatives which could lead to wasting and maladministration of an estate may, however, justify removal. Rand v. Giller, 489 So. 2d 796, 798 (Fla. 3d DCA 1986)(finding removal appropriate when two co-personal representatives had repeatedly resorted to court action to resolve conflicts between them). Letters of administration issued in error are voidable. *See* Jensen v. Estate of Gambidilla, 896 So. 2d 917 (Fla. 4th DCA 2005).

2. Procedure for Seeking Removal of a Personal Representative

A petition for removal must state the facts constituting removal and must be filed in the court having jurisdiction over the administration of the estate. *See* Fla. Prob. R. 5.440. An action for removal of a personal representative is an adversary proceeding under Florida Probate Rule 5.025(a). Accordingly, the petition for removal must be served by formal notice. Thereafter, the matter will be conducted like a civil lawsuit under the Florida Rules of Civil Procedure.

Because of apparent conflicts between several Florida Statutes, up until recently there was uncertainty in the law as to the timeframes within which a petition for removal must be filed based on grounds that the personal representative is not qualified to serve. Florida Statutes § 733.212(3) states:

> Any interested person on whom a copy of the notice of administration is served must object to the validity of the will, the qualifications of the personal representative, the venue, or the jurisdiction of the court by filing a petition or other pleading requesting relief in accordance with the Florida Probate Rules on or before the date that is 3 months after the date of service of a copy of the notice of administration on the objecting person, or those objections are forever barred.

If Florida Statutes § 733.212(3) were construed literally, an unqualified personal representative, such as a non-resident who is not a family member, would be permitted to serve so long as no objection is filed within the 3 month timeframe. However, as already explained above, Florida Statutes § 733.3101 provides that:

> Any time a personal representative knows or should have known that he or she would not be qualified for appointment if application for appointment were then made, the personal representative shall promptly file and serve a notice setting forth the reasons. A personal representative who fails to comply with this section shall be personally liable for costs, including attorney's fees, incurred in

any removal proceeding, if the personal representative is removed. This liability shall be cumulative to any other provided by law.

Florida Statutes § 733.3101 and Florida Probate Rule 5.310 clearly impose an obligation upon the personal representative to disclose any circumstances rendering the personal representative unqualified to serve, including circumstances that existed at the time of the personal representative's appointment. Further, Florida Statutes § 733.504 explicitly provides that a personal representative may be removed when "the personal representative would not now be entitled to appointment." Does this mean that, notwithstanding Florida Statutes § 733.212(3), a non-qualified personal representative can be removed at any time? Until the Florida Supreme Court weighed in with its decision in Hill v. Davis, 70 So.3d 572 (Fla. 2011), there was a split of authority between the First and Third District Courts of Appeal.

The Third DCA was the first to address this issue in Angelus v. Pass, 868 So. 2d 571 (Fla. 3d DCA 2004). There, the decedent's will nominated a non-resident attorney as co-personal representative. In his verified petition for administration, the co-personal representative acknowledged being a non-resident, but he also stated he was the decedent's nephew. In fact, the co-personal representative was the blood nephew of the decedent's former husband. After the three-month period under Florida Statutes § 733.212(3) had already expired, the decedent's daughter petitioned to remove the co-personal representative, alleging he was unqualified to serve. The trial court denied the daughter's claim for removal of the co-personal representative as untimely. The Third DCA reversed, concluding that Florida Statutes § 733.212 could not be applied to allow a legally unqualified personal representative to serve. The court noted that "Florida Probate Rule 5.310 places the burden on the personal representative, as a fiduciary, to provide notice in the event the personal representative is not qualified to serve". The court posited that, if the three-month limitations period were applicable to situations where a personal representative was not otherwise legally qualified to serve as personal representative, such a result "would render Rule 5.310 meaningless and would improperly shift the burden of discovery of an applicant's misrepresentations to the court and interested parties. Such a result would be antithetical to the policy of requiring personal representatives to hold specific qualifications and to be held to the highest standards of honesty and truthfulness." The Third DCA concluded that § 733.212(3) does not bar an action to remove an unqualified personal representative.

This same issue was addressed by the First DCA with a different result in Hill v. Davis, 31 So. 3d 921 (Fla. 1st DCA 2010). There, a New York resident asserted in his petition for administration that he was entitled to be appointed personal representative because he was the decedent's stepson and was nominated to serve as personal representative in the decedent's will. The stepson was appointed personal representative and his notice of administration was served upon the decedent's mother. After the time for objecting to qualifications ran under § 733.212(3), the decedent's mother filed a motion to remove on the grounds that the stepson was a non-resident and was not qualified to serve. The First DCA held that the objection was time barred and specifically disagreed "with the sweeping holding in *Angelus* because it effectively rendered § 733.212(3) meaningless." The court specifically noted that the factual basis for the removal was known to the petitioner and could have been raised within the 3 month time period. It was not a situation where the factual basis for the claim of disqualification was concealed or arose after the three-month period had expired. The First DCA certified a conflict with Angelus.

Ultimately, the Florida Supreme Court accepted jurisdiction and cleared up this conflict in Hill v. Davis, 70 So. 3d 572 (Fla. 2011). The precise issue before the Court was "whether an objection to the qualifications of a personal representative of an estate is barred by the three-month filing deadline set forth in section 733.212, Florida Statutes (2007), a provision of the Florida Probate Code, when the objection is not filed within that statutory timeframe." Id. at 573. The Florida Supreme Court sided with the First DCA and held that § 733.212(3) "bars an objection to the qualifications of a personal representative, including an objection that the personal representative was never qualified to serve, if the objection is not timely filed under the statute, except where fraud, misrepresentation, or misconduct with regard to the qualifications is not apparent on the face of the petition or discovered within the statutory time frame." Id. The Florida Supreme Court noted however, that "to the extent that the decision of the Third District in *Angelus* involved allegations of fraud and misrepresentation not revealed in the petition for administration, we approve the result in *Angelus.*" Id. The court went on to say, "[h]owever we disapprove *Angelus* to the extent that it holds section 733.212(3) does not bar objections that a personal representative was never qualified to serve." Id.

3. Fees and Costs in a Removal Action

Pursuant to Florida Statutes § 733.106(1), costs in a removal action will be awarded, as in chancery actions, to the prevailing party. The attorney representing a successful petitioner in a removal action will likely also be entitled to have his or her attorneys' fees paid from the estate because removal will be regarded as a benefit to the estate. *See F.S.* 733.106(3); In re Estate of Eisenberg, 433 So. 2d 542 (Fla. 4th DCA 1963); *but see* Feldheim v. Scott, 579 So. 2d 291 (Fla. 3d DCA 1991)(noting that the court must specifically find that the removal benefitted the estate). Florida Statutes § 733.609(1) may provide an alternative basis for the award of fees. *See* Anderson v. Anderson, 468 So.2d 528 (Fla. 3d DCA 1985). Florida Statutes § 733.609 provides that, in all actions for breach of fiduciary duty or challenging the exercise of personal representative's powers, the court shall award taxable costs as in chancery action, including attorneys' fees.

C. Appointment of a Successor Fiduciary for the Estate

The court, upon the removal or resignation of a personal representative, will appoint a successor fiduciary to administer the estate if no joint-representative is serving. *F.S.* 733.503; *F.S.* 733.5061. The successor fiduciary will likely be a successor personal representative or curator (if there is a dispute). When appointing a successor fiduciary, the court will give preference in the order set forth in Florida Statutes § 733.301. In testate estates, the first option is the successor nominated by the will or a power conferred by the will. *F.S.* 733.301(1)(a)(1). If the successor(s) selected do not agree to serve or alternatively fail to qualify, the court will instead appoint whoever is selected by a majority in interest of the persons entitled to the estate. *F.S.* 733.301(1)(a)(2). Finally, if the interested persons are not able to agree by majority, the court will appoint the most qualified devisee under the will. *F.S.* 733.301(1)(a)(3).

An interesting issue arises when it comes to a minor's vote regarding the appointment of a personal representative when applying the "majority in interest of the heirs" test. In Long v.

Willis, 100 So. 3d 4 (Fla. 2d DCA 2011), the court held that a minor's parents (i.e. a minor's "natural guardians" under § 744.301) are not authorized to vote on behalf of their child with respect to who gets appointed as personal representative. Instead, a court appointed guardian of the property is necessary to vote on behalf of the minor. Id. at 7; *see also F.S.* 733.301(2). Interestingly, the Second DCA held that although the natural parent had no right to select the personal representative on behalf of her child, she did have the right to file objections to the appointment of a personal representative on behalf of her minor child. Id. at 7-8.

One of the key questions from a probate litigation perspective is whether the court has discretion to appoint someone other than the personal representative nominated in the will if that person or entity meets the statutory qualifications. As set forth above, Florida courts have made it clear that a testator has the right to name the person who shall administer his or her estate provided such person is not disqualified by law. *See* State v. North, 32 So. 2d 14, 18 (Fla. 1947); In re Estate of Miller, 568 So. 2d 487, 489 (Fla. 1st DCA 1990); Pontrello v. Estate of Kepler, 528 So. 2d 441, 443 (Fla. 2d DCA 1988). Ordinarily, courts should issue letters to the person nominated in the will unless such person is expressly disqualified. North, 32 So. 2d at 18; Pontrello, 528 So. 2d at 443.

As reflected in the above cases, a testator's choice of a personal representative is entitled to great deference by the court. Schleider v. Estate of Schleider, 770 So. 2d 1252 (Fla. 4th DCA 2000). Further, the court should first consider the individuals with statutory preference when appointing fiduciaries. DeVaughn v. DeVaughn, 840 So. 2d 1128 (Fla. 5th DCA 2003). Nevertheless, Florida courts have recognized that the court is not bound by the testator's choice of personal representative and that a person with statutory preference is not necessarily entitled to appointment. Schleider, 770 So. 2d 1252; In re Estate of Snyder, 333 So. 2d 519 (Fla. 2d DCA 1976); Padgett v. Estate of Gilbert, 676 So. 2d 440 (Fla. 1st DCA 1996); DeVaughn, 840 So. 2d at 1128.

The appointment of a personal representative is a discretionary act of the court. In exercising its discretion, the court has the inherent right to consider a person's character, ability, and experience to serve as a personal representative. DeVaughn, 840 So. 2d at 1128. To that end, the Snyder court held as follows:

> Where the record supports the conclusion that a person occupying the position of statutory preference does not have the qualities and characteristics necessary to properly perform the duties of an administrator, it would be an anomaly to hold that a probate court, which has historically applied equitable principles in making its judgments, does not have the discretion to refuse to appoint him simply because he did not fall within the enumerated list of statutory disqualifications.

Snyder, 333 So. 2d at 521.

A person may be considered unsuitable to act as a personal representative because of an adverse interest of some kind, hostility to those immediately interested in the estate, or a direct

conflict with the estate itself. Schleider, 770 So. 2d at 1252. The Schleider court stated that a trial judge may refuse to appoint a person nominated in a will based on facts presented at the time of appointment that would, if presented after appointment, support removal of the personal representative. The court stated that "it would ... be absurd to force the appointing court to wait until the estate or persons interested in the estate had actually suffered the detriment that would occur." Id. at 1254, *quoting* Pontrello, 528 So. 2d at 445. The Court can also exercise its discretion to refuse to appoint a person named in the decedent's will if unforeseen circumstances arise which would have influenced the testator's decision. Schleider, 770 So. 2d at 1253.

Although a court has discretion to appoint someone other than the preferred person as personal representative, where a statutorily preferred individual is not appointed, the record must show that the preferred person is not fit to serve as personal representative. In several recent cases, the order removing a personal representative was reversed where the personal representative was removed without notice or evidentiary basis. *See e.g.* Zulon v. Peckins, 81 So. 3d 647 (Fla. 3d DCA 2012); Lezcano v. Estate of Hidalgo, 88 So. 3d 306 (Fla. 3d DCA 2012); Bowdoin v. Rinnier, 81 So. 3d 582 (Fla. 2d DCA 2012).

II. RESIGNATION, REMOVAL, AND APPOINTMENT OF SUCCESSOR TRUSTEES

A. Resignation of a Trustee

At common law, a trustee could resign unilaterally only in accordance with the terms of a trust. *See e.g.,* Sterns v. Fraleigh, 39 Fla. 603, 23 So. 18 (1897). Under common law, in the absence of a provision in the trust instrument, a trustee could only resign with the consent of all of the beneficiaries or with court approval. *See* Barry F. Spivey, Resignation, Removal, and Appointment of Successor Trustees, ADMINISTRATION OF TRUSTS IN FLORIDA § 3.2 (Lexis-Nexis/Fla. Bar 7th ed. 2012).

Under the Florida Trust Code, a trustee now has a right to resign. *F.S.* 736.0705. The right to resign cannot be restricted by the terms of the trust instrument. Florida Statutes § 736.0705 is a mandatory provision under the Florida Trust Code. *F.S.* 736.0105(2)(o). Florida Statutes § 736.0705 provides, in part, that a trust may resign: (a) upon at least 30 days' notice to the qualified beneficiaries, the settlor, if living, and all cotrustees; or (b) with approval of the court.

As a practical matter, a trustee will resign in one of two ways. The trustee will either be requested to resign or will notify the beneficiaries that the trustee intends to resign. At that point, the beneficiaries will have an option. They can either: (a) waive any objections to the accounts of the trustee and grant the trustee a release in exchange for the trustee immediately turning the assets over to the successor trustee; or (b) demand that the trustee prepare a final accounting.

The resigning trustee of an irrevocable trust has a duty to account to the trust beneficiaries. *F.S.* 736.0813(1)(d). If the beneficiaries demand an accounting, the resigning trustee will have a right to retain counsel to prepare a formal accounting and pay counsel from the assets of the trust. If the beneficiaries are unwilling to waive objections to the accounting

and grant the trustee a release, the trustee will likely want to obtain court approval of its accounting prior to the resignation. Alternatively, the trustee can turn over the assets to a successor trustee but hold back a reserve to pay attorneys' fees and costs associated with having its accounts approved by the court. *See* First Union Nat'l Bank v. Jones, 768 So. 2d 1213 (Fla. 4th DCA 2000)(holding that a trustee has a lien on trust assets to pay its expenses, including attorneys' fees and costs and cannot be compelled to relinquish control of trust assets until the lien is satisfied). A discussion of the time limitations on objecting to an accounting and the procedure for obtaining court approval of the accounting is discussed later in this outline.

In any event, prior to resigning and turning over all the assets to a successor fiduciary, a resigning trustee will want to make sure: (a) its resignation is effective under the Trust Code and the terms of the trust; (b) its accounts are approved either through an effective release or court approval; and (c) a successor fiduciary is in place.

1. Resignation Authorized by Trust Instrument

Under certain circumstances, there is an interesting interplay between § 736.0705 and the terms of trust concerning resignation and inheriting in light of the fact that § 736.0705 is a mandatory provision of the Trust Code. *See* Spivey, *supra* at § 3.3. One commentator has opined that "in matters of trustee resignation and succession, the settlor's intent, if expressed and if it conforms to the minimum requirements of Florida Statutes § 736.0705, will be given effect."(citing Douglas Properties v. Stix, 118 Fla. 354, 159 So. 1 (1935). Id. The commentator goes on to state:

> The mandatory nature of the statute means that a trust provision allowing resignation upon notice only to current income beneficiaries will not work, and notice should be given to those specified in *F.S.* 736.0705. However, a provision requiring notice to the settlor, all cotrustees, and all *beneficiaries* works because the class of 'beneficiaries' is broader than the class of 'qualified beneficiaries'. See *F.S.* 736.0103(4), (14) . . . Because *F.S.* 736.0705 requires not 30 day's notice but *at* least 30 days' notice of resignation, a trust term requiring 60 day's notice must be followed in order for a trustee to resign.

Id. Following this analysis, the terms of the trust instrument would have to be complied with so long as they are not inconsistent with the provisions of *F.S.* 736.0705.

2. Resignation Upon Notice to Beneficiaries

As explained above, the trustee has a statutory right to resign under Florida Statutes § 736.0705(a) upon notice to the qualified beneficiaries, the living settlor, and all cotrustees. Section 736.0103, Florida Statutes, defines a qualified beneficiary as a living beneficiary who is either: (a) a permissible distributee of trust income or principal; (b) a permissible distributee if all of the prior distributees interests terminated without causing the trust to terminate; or (c) would be a permissible distributee if the trust terminated according to its terms. Acceptable means of

notice include first-class mail, personal delivery, or electronic delivery. *F.S.* 736.0109.

Consent of the beneficiaries is not necessary under Florida Statutes § 736.0705 in order for the resignation to be effective. However, as a practical matter, without consent of beneficiaries and approval of accounts prior to resignation, most trustees will elect to obtain court approval of their accounts before turning over all of the trust assets to a successor trustee. Florida Statutes § 736.0111(4) provides that non-judicial settlements between trustees and beneficiaries concerning the resignation, appointment, and approval of accounts of trustees are enforceable.

3. Resignation by Court Approval

The procedure for resignation by court approval begins with the filing of a complaint in the circuit court. *F.S.* 736.0201(1). The circuit court has exclusive jurisdiction over all proceedings arising under the Florida Trust Code. *F.S.* 736.0203. The Florida Rules of Civil Procedure will govern in trust proceedings. *F.S.* 736.0201(1). Typically, a complaint for court approval with contain three main requests for: (1) approval of the resignation; (2) approval of the accountings (if accountings are filed); and (3) a request for appointment of a successor trustee.

It is important to remember that all interested persons must be served with the complaint in order to bind them in connection with the proceedings. A detailed discussion of the representation provisions found in Part III of the Trust Code, beginning with Florida Statutes § 736.0301, is beyond the scope of these materials. However, it is important to consider the impact of these representation provisions on contingent, minor, unborn, and unascertained beneficiaries in determining whether all interested persons are properly represented. A few general rules to keep in mind, absent conflicts of interest with respect to the particular question or dispute involved are: (a) contingent beneficiaries who take by virtue of the exercise or non-exercise of a power of appointment may typically be represented by the holder of the power of appointment (*F.S.* 736.0302)[1]; (b) a parent may typically represent and bind a unborn child or minor child if there is no guardian of the property for the minor child (*F.S.* 736.0303(5)); (c) a guardian may typically bind a ward, a personal representative may typically bind the beneficiaries of the estate, and a trustee may typically bind the beneficiaries of a trust (*F.S.* 736.0303(1)-(4)); and (d) a minor, incapacitated, or unborn person may be represented by other beneficiaries with a substantially identical interest (*F.S.* 736.0304). If a person is not otherwise adequately represented, the court may appoint a guardian ad litem or representative for that person. *F.S.* 736.0305.

The importance of making sure all interested persons are bound by the order of the court cannot be understated. A beneficiary who does not receive due process, and who is not otherwise bound by the representation provisions found in the Florida Trust Code, will not be bound by an order approving the trustee's account. A trustee who is uncertain as to whether minor, unborn, incapacitated, or unascertained beneficiaries are adequately represented should

[1] Florida Statute § 736.0302 does not expressly prohibit a holder of power of appointment with a conflict to bind the potential takers. However, the power to bind does not apply to a power of appointment held by a person while the person is sole trustee, a power to distribute trust property, or any matter determined by the court to involve fraud or bad faith by the trustee.

request that the court appoint a guardian ad litem or make a finding that the interests of these beneficiaries are represented under the virtual representation statutes.

In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of trust property. *F.S.* 736.0705(2).

Approval of the resignation does not discharge the resigning trustee from liability for acts or omissions by the trustee which occurred during the course of the administration. *F.S.* 736.0705(3). Issues associated with a discharge of a trustee are addressed in connection with the approval of a trustee's account later in these materials.

C. Approval of a Trustee's Final Accounting

1. Beneficiaries' Right to Accounting

A trustee has a mandatory duty to account to the beneficiaries of a trust at least annually, on termination of the trust, or upon the change of the trustee. *F.S.* 736.0813(1)(d). The accounting requirement may be waived by the beneficiaries. *F.S.* 736.0813(2). As a matter of public policy, however, this right to an accounting is not capable of being waived by the settlor in the trust instrument. *F.S.* 736.0105.

Florida Statutes § 736.08135 sets forth the information which must be included in a trust accounting. The fairly detailed requirements are set forth below:

(1) A trust accounting must be a reasonably understandable report from the date of the last accounting or, if none, from the date on which the trustee became accountable, that adequately discloses the information required in subsection (2).

(2)(a) The accounting must begin with a statement identifying the trust, the trustee furnishing the accounting, and the time period covered by the accounting.

(b) The accounting must show all cash and property transactions and all significant transactions affecting administration during the accounting period, including compensation paid to the trustee and the trustee's agents. Gains and losses realized during the accounting period and all receipts and disbursements must be shown.

(c) To the extent feasible, the accounting must identify and value trust assets on hand at the close of the accounting period. For each asset or class of assets reasonably capable of valuation, the accounting shall contain two values: the asset acquisition value or carrying value and the estimated current value. The accounting must identify each known noncontingent liability with an estimated current amount of the liability if known.

(d) To the extent feasible, the accounting must show significant transactions that do not affect the amount for which the trustee is accountable, including name changes in investment holdings, adjustments to carrying value, a change of custodial institutions, and stock splits.

(e) The accounting must reflect the allocation of receipts, disbursements, accruals, or allowances between income and principal when the allocation affects the interest of any beneficiary of the trust.

(f) The trustee shall include in the final accounting a plan of distribution for any undistributed assets shown on the final accounting.

2. Limitations of Trust Accounting Actions

For accounting periods beginning on or after July 1, 2007, Florida Statutes § 736.1008 governs the limitations period for proceedings against trustees. All claims by a beneficiary against a trustee for breach of trust are barred by the limitations periods set forth in Chapter 95 (generally 4 or 5 years). *See F.S.* 736.1008(1). For all matters adequately disclosed in a "trust disclosure document," the limitations period begins on the date of receipt of adequate disclosure. *See F.S.* 736.1008(1)(a). A "trust disclosure document" is a trust accounting or other written report of the trustee. *F.S.* 736.1008(4)(a). A trust disclosure document "adequately discloses" a matter if the document provides sufficient information so that a beneficiary knows of a claim or reasonably should have inquired into the existence of a claim with respect to that matter. *F.S.* 736.1008(4)(a).

For all matters not adequately disclosed in a trust disclosure document, the limitations period begins:

(a) when the beneficiary has actual knowledge of the trustee's repudiation of the trust or,

(b) on the date of receipt of the final accounting, if the trustee has given written notice of the availability of trust records for examination and that any claims with respect to matters not adequately disclosed may be barred unless an action is commenced within the applicable limitations period covered in chapter 95. *F.S.* 736.1008(1)(b),(3).

The trustee can obtain the benefit of a shortened 6 month statute of limitations by sending a limitations notice along with the trust disclosure document. Florida Statutes § 736.1008(2) provides that a beneficiary who receives a "trust disclosure document" adequately disclosing the matter is barred from bringing an action against the trustee unless a proceeding to assert the claim is commenced within 6 months after receipt of the "trust disclosure document" or the "limitation notice" that applies to the trust disclosure document, whichever is later. See *F.S.* 736.1008(2). The term "limitation notice" means a written statement of the trustee that an action by a beneficiary against the trustee for breach of trust based upon any matter adequately disclosed in a trust disclosure document may be barred unless the action is commenced within 6 months after receipt of the trust disclosure document or receipt of a limitation notice that applies to that trust disclosure document whichever is later. *F.S.* 736.1008(4)(c). A limitation notice may be contained as a part of the trust disclosure document, may be accompanied concurrently by the trust disclosure document, or may, under some circumstances, be delivered separately from the trust disclosure document. *F.S.* 736.1008(5).

In 2008, the statute was amended to include what amounts to a statute of nonclaim or

repose for acts and omissions occurring after July 1, 2008. Florida Statutes § 736.1008(6) provides that all claims by a beneficiary against a trustee are barred upon the later of:

(a) ten years after the date the trust terminates, the trustee resigns, or the fiduciary relationship between the trustee and the beneficiary otherwise ends if the beneficiary had actual knowledge of the existence of the trust and the beneficiary's status as a beneficiary throughout the 10-year period; or

(b) twenty years after the date of the act or omission of the trustee that is complained of if the beneficiary had actual knowledge of the existence of the trust and the beneficiary's status as a beneficiary throughout the 20-year period; or

(c) forty years after the date the trust terminates, the trustee resigns, or the fiduciary relationship between the trustee and the beneficiary otherwise ends.

When a beneficiary shows by clear and convincing evidence that a trustee actively concealed facts supporting a cause of action, any existing applicable statute of repose will be extended by 30 years. The failure of the trustee to take corrective action is not a separate act or omission and does not extend the period of repose established by the subsection (6) of Florida Statute § 736.1008.

3. Fees and Costs

Fees and costs may be awarded to a trust beneficiary who provides a benefit to the trust estate in connection with an accounting action pursuant to Florida Statutes §§ 736.1005 and 736.1006. Further, Florida Statutes § 736.1004 provides that, in all actions challenging the proper exercise of the trustee's powers, costs, including attorneys' fees, shall be awarded as in chancery actions. The court is permitted to direct payment of the attorneys' fees "from a party's interests, if any, in the estate or trust or enter a judgment which may be satisfied from other property of the party or both." See *F.S.* § 736.1004(2).

A trustee generally has the right to retain an attorney to assist in the administration of the trust and to pay that attorney from trust assets. However, can a trustee pay fees and costs associated with defending objections to their accountings?

In Shriner v. Dyer, 462 So. 2d 1122 (Fla. 4th DCA 1984), the Fourth DCA held that it was a conflict of interest for trustees to use estate funds to defend themselves from individual liability without court approval. The trustees in Shriner were originally sued for surcharge in their individual capacities. The trial court entered judgment in favor of the trustees. Following the initial suit, the trustees paid their attorneys' fees and costs from the assets of the trust without court approval.

The beneficiaries later filed a second suit against the trustees. In the second case, the beneficiaries sought to surcharge the trustees for paying their legal fees and costs associated with the previous action from the assets of the trust. Even though the trustees had prevailed in the first suit, the court held that the trustees had a conflict of interest in paying their legal fees from

trust assets. The court noted that since the trustees "defended against individual liability for trust mismanagement in the previous action, their personal interests conflicted with their position as trustees." The court held that the trustees should have obtained court approval prior to paying their fees and costs. The court cited Florida Statutes § 737.403(2) which provided that when "the duty of the trustee and his individual interest . . . conflict in the exercise of a trust power, the power may be exercised only by court authorization." The decision in Shriner appeared to imply that the Trustees could not seek subsequent court approval of their fees even though they had prevailed in the underlying litigation.

The Third DCA in Brigham v. Brigham, 934 So. 2d 544 (Fla. 3d DCA 2006) took a similar approach. The Brigham court affirmed the trial court's ruling that the trustee had a conflict of interest because of the allegations of breach of fiduciary duty and had no right to use trust funds to defend such allegations. The fees paid to trustee's counsel were ordered to be refunded and payment from trust assets was prohibited.

In recognition of the problem facing fiduciaries in litigation where a breach of trust is alleged, the Florida Bankers Association proposed an amendment to § 737.403(2), which was adopted by the Florida Legislature in 2005. Section 737.403(2)(e), Fla. Stat. (2005), provided that court authorization is not required for: "(e) Payment of costs or attorney's fees incurred in any trust proceeding from the assets of the trust unless an action has been filed or defense asserted against the trustee based upon a breach of trust. Court authorization is not required if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a breach of trust."

This amendment was also adopted as part of the Trust Code in Florida Statutes § 736.0802(10).

Interestingly, while this amendment was making its way through the legislative process, another case was working its way through the judicial system which had a significant impact of the scope of the Shriner decision. In JP Morgan Trust Company, N.A. v Siegel, 965 So. 2d 1193 (Fla. 4th DCA 2007), the court held that JP Morgan had a conflict of interest in paying its attorneys' fees in an action to approve its accounting, after it received detailed interrogatory answers alleging breaches of fiduciary duty, even though a formal pleading alleging those breaches had not been filed. The court noted that the 2005 amendment to Florida Statutes § 737.403(2) would have resolved the issue in favor of JP Morgan (because no pleading had been filed alleging a breach of trust) but that the new statute was not yet in effect. JP Morgan and its attorneys were required to disgorge all of the fees which had been paid.

For a number of years the Probate and Trust Litigation Committee for the RRPTL Section of the Florida Bar considered the application and practical effect of the Shriner decision and its progeny, including the amendment adopted by the Florida Bankers. The Committee was particularly concerned about the inconsistent application of Shriner by the trial courts and the scant guidance on how to address the payment of fees from trust assets in litigation where an allegation of breach of duty is made. The key questions were:

(a) Should the trustee have the burden of filing a motion for court authorization to pay

fees or should the beneficiaries have the burden of filing a motion to prevent the payment of fees;

(b) What standard should the court use in ruling upon such a motion; and

(c) What proof would be required?

The Committee's proposal, with several modifications by the Florida Justice Association, was adopted by the Florida legislature. Florida Statues § 736.0802(10) was amended in 2008 to read as follows:

736.0802 Duty of loyalty.—

(10) Payment of costs or attorney's fees incurred in any trust proceeding from the assets of the trust may be made by the trustee without the approval of any person and without court authorization, unless the court orders otherwise as provided in paragraph (b). except that court authorization shall be required if an action has been filed or defense asserted against the trustee based upon a breach of trust. Court authorization is not required if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a breach of trust.

(a) If a claim or defense based upon a breach of trust is made against a trustee in a proceeding, the trustee shall provide written notice to each qualified beneficiary of the trust whose share of the trust may be affected by the payment of attorney's fees and costs of the intention to pay costs or attorney's fees incurred in the proceeding from the trust prior to making payment. The written notice shall be delivered by sending a copy by any commercial delivery service requiring a signed receipt, by any form of mail requiring a signed receipt, or as provided in the Florida Rules of Civil Procedure for service of process. The written notice shall inform each qualified beneficiary of the trust, whose share of the trust may be affected by the payment of attorney's fees and costs, of the right to apply to the court for an order prohibiting the trustee from paying attorney's fees or costs from trust assets. If a trustee is served with a motion for an order prohibiting the trustee from paying attorney's fees or costs in the proceeding and the trustee pays attorney's fees or costs before an order is entered on the motion, then the trustee and the trustee's attorneys who have been paid attorneys' fees or costs from trust assets to defend against the claim or defense are subject to the remedies in paragraphs (b) and (c).

(b) If a claim or defense based upon breach of trust is made

against a trustee in a proceeding, a party must obtain a court order to prohibit the trustee from paying costs or attorney's fees from trust assets. To obtain an order prohibiting payment of costs or attorney's fees from trust assets, a party must make a reasonable showing by evidence in the record or by proffering evidence that provides a reasonable basis for a court to conclude that there has been a breach of trust. The trustee may proffer evidence to rebut the evidence submitted by a party. The court may, in its discretion, defer ruling on the motion pending discovery to be taken by the parties. If the court finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court finds good cause, the court shall enter an order prohibiting the payment of further attorney's fees and costs from the assets of the trust and shall order that attorney's fees or costs previously paid from assets of the trust be refunded. An order entered under this paragraph shall not limit a trustee's right to seek an order permitting the payment of some or all of the attorney's fees or costs incurred in the proceeding from trust assets, including any fees required to be refunded, after the claim or defense is finally determined by the court. If a claim or defense based upon a breach of trust is withdrawn, dismissed or resolved without a determination by the court that the trustee committed a breach of trust after the entry of an order prohibiting payment of attorney's fees and costs pursuant to this paragraph, the trustee may pay costs or attorneys' fees incurred in the proceeding from the assets of the trust without further court authorization.

(c) If the court orders a refund under paragraph (b), the court may enter such sanctions as are appropriate if a refund is not made as directed by the court, including, but not limited to, striking defenses or pleadings filed by the trustee. Nothing in this subsection shall limit the other remedies and sanctions the court may employ for the failure to refund timely.

(d) Nothing in this subsection shall limit the power of the court to review fees and costs or the right of any interested persons to challenge fees and costs after payment, after an accounting or after conclusion of the litigation.

(e) Notice under paragraph (a) is not required if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a breach of trust.

This statutory language, effective July 1, 2008, authorizes a trustee to pay its attorneys' fees and costs in all litigation proceedings. *See F.S.* 736.0802(10). However, if a claim for breach of trust is made against the trustee, the trustee is required to notify all "qualified

beneficiaries", who are impacted by the payment of fees and costs, that the trustee intends to pay attorneys' fees and costs from trust assets. The written notice must inform the beneficiaries of the right to apply to the court for an order prohibiting the trustee from paying attorney's fees or costs from trust assets. See *F.S.* 736.0802(10)(a). The notice is not required if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a breach of trust. *F.S.* 736.0802(10)(e).

The amended statute sets forth the procedures for obtaining an order to prevent the payment of attorneys' fees and costs in breach of trust proceedings in subsection (b). The beneficiary is required to apply for an order from the court preventing the payment of fees and costs. At the hearing, the beneficiary must make a reasonable showing by "evidence in the record or by proffering evidence" that provides a reasonable basis for a court to conclude that there has been a breach of trust. The trustee may proffer evidence to rebut the evidence submitted by a party. The court may, in its discretion, defer ruling on the motion pending discovery to be taken by the parties. *F.S.* 736.0802(10)(b).

If the court finds that "there is a reasonable basis to conclude that there has been a breach of trust", the court is required to enter an order preventing payment of attorneys' fees and costs relating to the proceeding from trust assets and requiring the trustee and its attorneys to disgorge any fees and costs paid after the filing of the motion or application by the beneficiary unless "good cause" is shown by the trustee. Id. If the refund is not made, the court may enter appropriate sanctions, including, but not limited to, striking defenses or pleadings filed by the trustee. *F.S.* 736.0802(10)(c).

This procedure is intended to permit the court to make a ruling on the issues presented in a summary fashion without the necessity of protracted evidentiary hearings. To that end, an order entered pursuant to subsection (10)(b) is without prejudice to the rights of a trustee to seek payment of the fees which have been disgorged or incurred in the litigation. *F.S.* 736.0802(10)(b). Further, if the claim or defense based upon a breach of trust is withdrawn, dismissed or resolved without a determination by the court that the trustee committed a breach of trust after the entry of an order prohibiting payment of attorney's fees and costs, the trustee may pay costs or attorneys' fees incurred in the proceeding from the assets of the trust without further court authorization. Id.

The revised statute does not limit the power of the court to review fees and costs or the right of any interested persons to challenge fees and costs after payment, after an accounting or after conclusion of the litigation. *F.S.* 736.0802(10)(d).

D. Removal of a Trustee

1. Removal Under the Trust Instrument

Trust instruments commonly include express provisions which allow the settlor or certain classes of beneficiaries to remove a trustee. Such provisions are enforceable under Florida Law. Florida Statutes § 736.0105(2) provides that, with the exception of certain mandatory provisions,

the terms of a trust prevail over the Florida Trust Code. There is nothing in the Florida Trust Code which specifically prohibits removal of a trustee according to the terms of a trust. The Restatement (Third) of Trusts § 37(a) specifically recognizes that a trustee may be removed in accordance with the terms of the trust. Removal should be accomplished in compliance with the procedural requirements contained in the trust. Failure to follow the removal and succession provisions can result in questions concerning the legitimacy of the appointment of the successor trustee and may not relieve the trustee from liability for the ongoing administration of the trust.

A showing of "cause" or justification for removal is not required to remove a trustee pursuant to a trust instrument unless the trust instrument demands such a showing. *See e.g.*, Florida Nat'l Bldg. Corp. v. Miami Beach First Nat'l Bank, 9 So.2d 563, 564 (Fla. 1942).

Although court action is not required to remove a trustee according to its terms, proceedings may be required if: (a) the trust instrument does not specify a successor trustee and the qualified beneficiaries are unable to unanimously agree on the appointment of a successor (*F.S.* 736.0704(3)(c)); or (b) the trustee desires approval of its accounts before turning over trust assets to the successor trustee.

2. Removal Through Court Action

A proceeding for removal of a trustee is commenced by filing a complaint in the circuit court. *See F.S.* 736.0201(4)(b); Art. V, § 5(b), Fla. Const. The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on the court's own initiative. *F.S.* 736.0706. That said, a trustee is entitled to notice and an opportunity to be heard prior to his or her removal. Kountze v. Kountze, 93 So.3d 1164 (Fla. 2d DCA 2012).

Florida Statutes § 736.0706 provides the grounds for removal of a trustee. The court may remove a trustee if:

(a) the trustee has committed a serious breach of trust;

(b) the lack of cooperation among cotrustees substantially impairs the administration of the trust;

(c) due to unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or

(d) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

F.S. 736.0706(2).

Generally, Florida courts have been reluctant to remove a trustee unless actual harm has or will occur to the trust. As the Murphy court said in the context of a personal representative, removal is "a drastic action and should only be resorted to when the administration of the estate is endangered." In re Estate of Murphy, 336 So.2d 697, 699 (Fla. 4th DCA 1976). The court will only remove a trustee upon a showing of an actual breach. Gresham v. Strickland, 784 So.2d 578, 581 (Fla. 4th DCA 2001); Parr v. Cushing, 507 So. 2d 1227 (Fla. 5th DCA 1987)(requiring a clear showing of abuse or wrongdoing in the administration of the trust); State of Delaware ex rel. Gebelein v. Belin, 456 So. 2d 1237 (Fla. 1st DCA 1984). This concept is embodied in Florida Statutes § 736.0706(2)(a).

However, the Florida Trust Code has included additional grounds for removal which have altered this standard. In particular, Florida Statutes § 736.0706(c) now provides for removal on the grounds of "unfitness" to serve. *See* Spivey, *supra* at §3.13 ("[T]he rule that prospective maladministration cannot justify removal of a trustee is probably changed by the Florida Trust Code."). Indeed, unfitness as described in section (c) would seem to direct the court to look for a showing that the trustee is unlikely to properly administer the trust in the future as opposed to a current breach. The Restatement (Third) of Trust § 37, comment (e), gives the following as examples of "unfitness": insolvency, diminution of physical vigor or mental acuity, substance abuse, want or skill, or the inability to understand fiduciary standards and duties.

There has been a great deal of litigation in Florida over whether hostility between the trustee and the beneficiaries is sufficient to justify removal. Generally, courts have been reluctant to do so absent proof of an actual breach. *See e.g.*, Nickels v. Philips, 18 Fla. 732 (1992)(refusing to remove a trustee who forbade a beneficiary from having any social contact with the trustee or his family because there was no breach proof of breach relating to trust property); Parker v. Shullman, 843 So. 2d 960 (Fla. 4th DCA 2003)(an acrimonious relationship and questionable and vindictive behavior by the trustee did not rise to the level requiring removal). However, lack of cooperation between cotrustees that substantially impairs the administration of a trust *is* grounds for removal. *F.S.* 736.0706(2)(b). In such a circumstance, the court will remove the trustee found to be the cause of the lack of cooperation. Robinson v. Tootalian, 691 So. 2d 52 (Fla. 4th DCA 1997).

Florida Statutes § 736.0706(d) also presents its own issues in that it seemingly allows for removal of a trustee without an actual breach. In particular, a trustee can be removed if: (a) there has been a substantial change of circumstance; OR (b) removal is requested by all of the qualified beneficiaries; AND (c) the court finds that removal of the trustee best serves the interests of all beneficiaries; AND (d) is not inconsistent with a material purpose of the trust; AND (e) a suitable cotrustee or successor trustee is available. There is no Florida case law construing this section. Beneficiaries who seek to remove a trustee can frequently point to changed circumstances from the date when a trust was created to a later date during administration. Trustees defending against removal should muster as much evidence as possible to show that their selection as a fiduciary fulfilled a material purpose of the trust. The Restatement (Third) of Trusts § 37, comment (e) provides that changes in the place of administration of a trust, location of beneficiaries, or other developments causing serious geographic inconvenience to the beneficiaries or the administration of the trust may be grounds

for removal. This is consistent with Florida Statutes § 736.0108(4) which provides that a trustee is under a continuing duty to administer the trust at a place appropriate to its purposes and its administration.

Beneficiaries seeking to remove a trustee should be able to accomplish the same result by modifying the trust so as to change the trustee. At common law, an irrevocable trust may be terminated or modified with the consent of the settlor and all of the beneficiaries. *See* Preston v. City Nat'l Bank of Miami, 294 So. 2d 11, 14 (Fla. 3d DCA 1974). This presumably would allow the settlor and beneficiaries to agree among themselves on a new trustee and modify the trust to change the trustee. If all of the beneficiaries and the settlor consent, the trustee has no standing to object. In addition, the beneficiaries of an irrevocable trust can compel modification if: (1) all of the beneficiaries consent; and (2) the proposed modification or the termination of the trust will not defeat a material purpose of the settlor in creating the trust. Restatement (Second) of Trusts § 337. *See* Smith, 116 Fla. at 420; Featherston v. Tompkins, 339 So. 2d 306, 307 (Fla. 3d DCA 1976).

Beyond the common law, Florida's Trust Code contains a number of provisions that permit the court to modify trusts in certain situations. Section 736.04113 permits a court to modify or terminate an irrevocable trust when one of the following occurs: (1) the purposes of the trust have been fulfilled or have become illegal, impossible, wasteful, or impracticable to fulfill; (2) because of circumstances not known to or anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of a material purpose of the trust; or (3) if a material purpose of the trust no longer exists. In addition, Florida Statutes § 736.04115 allows a court to modify an irrevocable trust created after December 31, 2000 if "compliance with the terms of the trust is not in the best interest of the beneficiaries." *See F.S.* 736.04115. The provision will not apply if the interest must vest within 90 years after its creation and the terms of the trust prohibit judicial modification. *See F.S.* § 736.04115(3)(b). These statutes may allow beneficiaries to accomplish the removal of a trustee through modification proceedings.

D. Appointment of Successor Trustee

In many instances, the settlor of a trust will designate a successor trustee or, at a minimum, a mechanism for selecting a successor trustee such as by a majority of the beneficiaries then entitled to income. Such provisions are enforceable and will govern the appointment of a successor trustee. *See* Barnett First National Bank of Jacksonville v. Cobden, 393 So. 2d 78 (Fla. 5th DCA 1981). The power to appoint a successor trustee contained in a trust instrument will be enforced. *See* Stearns v. Fraleigh, 39 Fla. 603, 23 So. 18 (1897). An unauthorized appointment is void. Griley v. Marion Mortgage Co., 132 Fla. 299, 182 So. 297(1938).

A person designated as trustee accepts the trusteeship (without the necessity of court order): (a) by substantially complying with the method of acceptance of acceptance provided in the terms of the trust; or (b) if the terms of the trust do not provide an exclusive method of acceptance, by accepting delivery of trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship *F.S.* 736.0701(1). A person

designated as a trustee *who has not accepted the trusteeship* may decline to serve. *F.S.* 736.0701(2). A designated trustee who does not accept the trusteeship within a reasonable time after knowing of the designation is deemed to have declined the trusteeship. Id.

If the terms of the trust do not designate a successor trustee, a successor trustee may be appointed by unanimous agreement of the qualified beneficiaries. *F.S.* 736.0705(3)(b). If the qualified beneficiaries are unable to agree, the successor trustee will be selected by the court. *F.S.* 736.0705(3)(c). The trust code does not give guidance as to the selection of a trustee by the court under (3)(c), however the comments to the Uniform Trust Code direct the court to consider "the objectives and probable intention of the settlor, the promotion of the proper administration of the trust, and the interests and wishes of the beneficiaries." UNIFORM TRUST CODE § 704 (2000), 7C U.L.A. 571 (2006). Under this standard, any interested party should make a recommendation to the court expressing their interests and wishes. Furthermore, the court should rely on those that are qualified and have a background in the type and size of trust at issue.

If there are cotrustees serving, a vacancy in a trusteeship need not be filled. The vacancy must only be filled if there is no remaining trustee or if it is required by the trust instrument. *F.S.* 736.0705(2).

It has been held "that the power of courts to appoint new trustees is very broad." Van Roy v. Hoover, 96 Fla. 194, 117 So. 887 (1928). In Mills v. Ball, 380 So. 2d 1134 (Fla. 1st DCA 1980), the court used that power to appoint additional trustees even though there was no vacancy and the terms of the trust did not provide for the increase. The court in Bailey v. Leatherman, 615 So. 2d 810(Fla. 3d DCA 1993) used its equitable power to appoint a cotrustee to act in situations where the trustee had a conflict. This power is codified in § 736.0705(5) which provides that "the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust, whether or not a vacancy in a trusteeship exists or is required to be filled."