

## What Trustees Should Know About Florida's New Attorneys' Fee Statute

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### Introduction

More and more lawsuits are filed in Florida alleging that the trustee of a trust breached a fiduciary duty to the beneficiaries. In these cases, the plaintiff might expect the trustee to use personal funds to pay legal fees, as opposed to spending money from the trust. Plaintiffs argue they should not have to suffer financially by losing more trust assets simply to enforce their legal rights. Indeed, the Florida Trust Code requires a trustee to administer the trust solely in the interests of the beneficiaries. *See Fla. Stat.* § 736.0802(1). However, many people would never agree to serve as a trustee knowing they would have to spend their own money to pay legal fees in the case of a lawsuit, and some trustees simply cannot afford to pay for lawyers. Under section 736.1007, *Florida Statutes*, legal fees for trust administration are generally to be paid from the trust, and trustees would argue that any litigation emanating from trust administration should fall into the same category. This is a serious issue in trust litigation because some cases last for years and the legal fees can be hundreds of thousands of dollars for each side.

The Probate and Trust Litigation Committee of the Real Property, Probate and Trust Law ("RPPTL") Section of the Florida Bar worked for several years on proposed legislation to establish a framework for how to determine whether a trustee can continue to pay attorneys' fees from trust assets after an allegation of breach of trust has been made. The critical issues were who should have the burden of raising the issue (the trustee or the beneficiaries), what evidence should be considered, and what should be the burden of proof for the moving party. The legislation proposed by the RPPTL Section was enacted by the Florida legislature with minor revisions and replaced the original version of section 736.0802(10), *Florida Statutes*, effective July 1, 2008 (the "Statute"). In general, the Statute allows the trustee to pay attorneys' fees from trust assets until the opposing party makes a reasonable showing of evidence to convince a judge that there has been a breach of trust, at which time the court would enjoin the trustee from using trust assets to pay legal fees.

### Prior Law

The genesis of the current version of the Statute was the 1984 decision by the Fourth District Court of Appeals in *Shriner v. Dyer*, 462 So.2d 1122 (Fla. 4th DCA 1984). At the time the dispute in *Shriner* arose, Florida law provided that trustees could employ attorneys to assist them and pay the attorneys' fees from the assets of the trust, unless there was a conflict of interest between the duty of the trustee and the individual interests of the trustee. *See Fla. Stat.* §§ 737.402(2)(y) and 737.403(2) (1983).

In *Shriner* the beneficiaries of a trust first brought suit against the co-trustees individually to declare the trust void and to recover a surcharge (money damages) against the co-trustees individually. The court held for the co-trustees. The beneficiaries then filed a second suit against the co-trustees, this time both individually and in their capacity

as trustees, to remove the co-trustees and to surcharge them individually. Again, the court held for the trustees. In a third suit, the beneficiaries alleged that the co-trustees had improperly paid attorneys' fees to defend against the previous suits (in which the trustees had prevailed) without approval of the court. The court held that because the duties of the co-trustees and their individual interests conflicted, the payment of their attorneys' fees out of the trust without prior court approval was improper. The court ordered the co-trustees to repay \$58,000 to the trust.

Subsequently, in *Brigham v. Brigham*, 934 So.2d 544 (Fla. 3d DCA 2006), beneficiaries of a trust brought suit against the co-trustees, both individually and as trustees, for breach of fiduciary duty and mismanagement of trust assets, among other things. The court found that there was insufficient evidence to separate the fees paid by the trust to defend the co-trustees individually from the fees paid to defend them in their capacity as trustees. The court found that because the co-trustees expended trust funds to defend against their individual liability, a conflict of interest existed between their duties as trustees and their individual interests. Relying on *Shriner*, the court found that payment of attorneys' fees without prior court approval was improper and ordered the co-trustees to repay all of the fees to the trust.

Both *Shriner* and *Brigham* involved individuals acting as trustees. The decisions in the cases could significantly impact corporate fiduciaries who serve as trustees of thousands of trusts in Florida. Corporate fiduciaries, like individuals, serving as trustee are often involved in suits brought by beneficiaries, some of which are well grounded and some of which are spurious.

In response to the decision in *Shriner*, the Florida Bankers Association proposed an amendment to section 736.403, *Florida Statutes*, which was enacted by the legislature and became effective in 2005. The amendment created an exception to the requirement that a trustee have court authorization to pay attorneys' fees from the assets of the trust if there is a conflict of interest. The amendment provided that court authorization was not required for –

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.

*Fla. Stat. § 737.403(2)(e) (2005).*

In *J.P. Morgan Trust Company, N.A. v Siegel*, 965 So.2d 1193 (Fla. 4th DCA 2007), a case that arose before the statutory amendment, the court relied on *Shriner* and *Brigham* to hold that the trustee had a conflict of interest in paying attorneys' fees in an action to approve its accountings which the beneficiaries contested. The court ordered the trustee to seek the return of fees from the law firm that had defended it and if it were unable to secure the return of the funds then to reimburse the trust. The court noted that if the dispute had arisen after the effective date of the 2005 amendment to section

737.403, *Florida Statutes*, the trustee would have prevailed because the court did not determine that the trustee had committed a breach of trust.

When the new Florida Trust Code was enacted, replacing all of chapter 736, *Florida Statutes* effective July 1, 2007, the exception contained in section 737.403(2)(e) was incorporated into the new Trust Code as Section 736.0802(10). As stated above, the Florida legislature replaced the original version of section 736.0802(10) with the new Statute effective July 1, 2008.

#### Practical Application of the New Statute

After a lawsuit is filed, the trustee must provide written notice to the beneficiaries of an intent to pay costs or attorneys' fees in the proceeding from the trust prior to making payments. *See Fla. Stat.* § 736.0802(10)(a). After providing such notice, the trustee can begin paying legal fees from the trust, and it is up to the plaintiff to present evidence to the judge to obtain what is essentially an injunction. Specifically, the Statute provides in relevant part:

(10) Payment of costs or attorney's fees incurred in any 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).

....

(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 in its discretion may 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 attorney's fees or costs previously paid from assets of the trust to 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 attorney's fees incurred in the proceeding from the assets of the trust without further court authorization.

*See Fla. Stat. § 736.0802(10).*

It is important to understand that the general rule, set forth in the first section above, is a trustee needs no one's approval to pay legal fees from the trust. For strategic reasons, however, a trustee may opt to pay legal fees out of pocket and request a court order specifically allowing payments from the trust. This might be particularly true for institutional trustees, who can afford to pay their own legal fees and do not want to risk upsetting a judge who may not be familiar with the Statute. It also might serve to preempt a full hearing under the Statute. In any event, for a plaintiff to obtain a court order preventing the trustee from paying legal fees from the trust, a motion is required. Some plaintiffs may incorporate this motion into the end of the complaint, but that practice is not preferred.

After the motion is filed, the court will schedule an evidentiary hearing upon the request of either party, usually for either one or two days, to determine whether there is a "reasonable basis" for a court to conclude that there has been a breach of trust. Like a trial, the plaintiff will typically start with an opening statement and then proceed to call witnesses. The plaintiff would call witnesses who have personal knowledge of the trustee's breaches; they could be bank managers, members of the trustee's family, or expert witnesses as to the reasonableness of trustee commissions. The trustee's attorney would then cross-examine those witnesses in a variety of ways, depending on the witness and the circumstances, such as by demonstrating their lack of knowledge, failure to act, inconsistent prior statements, or bias.

After the plaintiff presents his case, the trustee's attorney might move for what would be a judgment as a matter of law at trial, asking the judge to adjudicate the motion in favor of the trustee because the plaintiff failed to present enough evidence for the court to conclude there was a breach of trust. As stated above, the duty of a trustee is to administer the trust in good faith, in accordance with its terms and purposes and the interest of the beneficiaries, and in accordance with the Florida Trust Code. *See Fla. Stat. § 736.0801.* However, it is important to note that certain complaints by a plaintiff -- such as an inadequate trust accounting or a failure to provide certain information to the beneficiaries in a timely manner -- may not qualify as breach of trust issues. Honest mistakes or sloppy accounting might not constitute a breach of trust. In practice, the court will generally equate a breach of trust with the concept of a breach of fiduciary duty.

The elements for a cause of action for breach of fiduciary duty are the existence of a fiduciary duty and the breach of that duty such that it is the proximate cause of the plaintiff's damages. *Gracey v. Eaker*, 837 So. 2d 348, 353 (Fla. 2002). To prove a case in court, the initial burden of proof is on the beneficiaries to prove that a breach occurred which proximately caused an injury. If that is established, the burden shifts to the trustee to demonstrate that there was no breach or that the loss or injury would have occurred absent the breach. *Fort Myers Memorial Gardens, Inc. v. Barnett Banks Trust Company, N.A.*, 474 So. 2d 1215 (Fla. 2d DCA 1985). The trustee also may argue that there was no loss or injury. For example, if a trustee inadvertently transfers money from the wrong bank account for a personal expense, identifies the error and then immediately returns it with interest, there may be no damages.

In some cases a plaintiff will question the judgment or discretion of a trustee, such as with regard to accepting offers to purchase real estate. When a trustee's judgment or discretion is involved, courts will not interfere with the trustee's actions except to prevent abuse. See Restatement (Third) of Trusts, §50. Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit. See *Fla. Stat.* § 736.1003. Additionally, the terms of a trust document generally provide wide latitude in describing the trustee's powers, and there are public policy reasons for allowing trustees to pay legal fees from the trust. If a trust beneficiary is named to be a successor trustee of his parent's trust, knowing he has a strained relationship with siblings who are also trust beneficiaries, he may not want to accept the trusteeship and risk losing hundreds of thousands of dollars of personal assets to pay legal fees to defend his actions as a trustee. In turn, if beneficiaries are less willing to serve as trustee, settlors become less confident in having their wishes carried out through trusts, and the process would break down.

However, sometimes a breach of trust is flagrant. For example, a trustee who is not a beneficiary may have used trust funds to buy a new sports car. Where there is a breach of trust, not only will the court issue an order under subsection (b) of the Statute enjoining the use of trust assets to pay legal fees, but also the trustee would be subject to all the remedies for breach of trust in section 736.1001, *Florida Statutes*. As a practical matter, the evidentiary hearing on attorneys' fees under the Statute is much like a preliminary injunction hearing in a commercial litigation case. The court is hearing the gist of the evidence through witnesses and documents -- even though formal discovery has not been taken -- and making a ruling that may be very close to what the parties should expect at trial. For that reason, an early win for the trustee might cause the plaintiff to slow down or dismiss parts of the litigation, and a win for the plaintiff might cause the trustee to start making settlement offers rather than endure the expense of what might be a losing battle.

There is another interesting part of the Statute that is important to know for purposes of litigation. Near the end of subsection (b), the Statute provides that where 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, the trustee may pay

costs or attorney's fees incurred in the proceeding from the assets of the trust without further court authorization. The vast majority of civil cases are settled prior to trial, although more fiduciary litigation seems to go to trial because family emotions are often involved. Before trial, if a breach of trust case goes to mediation, the trustee can rely on the above language to demand that his or her legal fees are paid from the trust; if the plaintiff refuses, the parties may settle on a certain portion of the fees to be paid by the trust. Ultimately, the parties are wise to settle breach of trust cases because the legal fees for each side through trial can be hundreds of thousands of dollars, and a potential loss of the case for either side will be compounded by the risk of having to pay the opposing side's legal fees. Attorneys' fees and costs may be recoverable under sections 736.1004-1007, *Florida Statutes*.

If you would like additional information about trust litigation, please contact David Hathaway at (407) 428-5124. For information about how to serve as a trustee, or how to properly administer a trust, please contact David Akins at (407) 428-5169.