



ActionLine

A PUBLICATION OF THE FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION

Special Edition: COVID-19 and RPPTL Practice



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IN THIS ISSUE:

Chair and Editor's Column	3
Summary of Paycheck Protection Program	8
Surviving The Storm: Business Continuity Planning For Law Firms	12
The Benefit Of A Force Majeure Clause During A Pandemic	16
Understanding The COVID-19 Business Interruption Insurance Quandary	22
Commercial Leases: Uncharted Implications of COVID-19	24
An Employer's Business Continuity Guideline For Today	28
7 Strategic Estate Planning Techniques For Right Now	30
COVID 19 Responses - Statutory Emergency Powers Available To Florida Condominium & Homeowner Associations	34
Using Grantor Retained Annuity Trusts In The Current Environment	38
Remote Online Notarization In The Time Of COVID-19	44
How Best to Handle Client Meetings, Document Signings, Hearings, Depositions, and Mediations in the Outbreak Environment	48
Retirement Account Relief Under The CARES Act	54
Learning From The Pandemic For Disaster Preparation	56
Political Roundup: Outlining Changes From The 2020 Regular Legislative Session and Predicting How COVID-19 Will Likely Result In An Upcoming Special Session	60
Practice Corner: Real Property Division - Lawyer's Practical Guide To Available Resources For Small Businesses In Response To The Covid-19 Pandemic	62
Practice Corner: Probate and Trust Division Trust Drafting Consideration: Fla. Stat. § 736.0412 Nonjudicial Modification	64
State And Local Case Summaries	65
Probate And Trust Case Summaries	67
Real Property Case Summaries	70
What's Happening Within the Section	74
Actionline Bulletin Board	76

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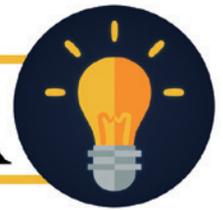
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Trust Drafting Consideration: Fla. Stat. § 736.0412 Nonjudicial Modification

By Joseph M. Percopo, Esq., LL.M., Mateer Harbert, Orlando, Florida

When reviewing an existing trust or drafting a new trust, one of many important considerations is whether the trust can be modified in the future. Methods for trust modification exist at common law and in Florida statutes. At common law, an irrevocable trust generally may be terminated or modified with the consent of the settlor and all beneficiaries.¹ The Florida Statutes offer a variety of different options² pertaining to trust modification, reformation, and termination and such provisions “are in addition to, and not in degradation of, rights under the common law to modify, amend, terminate, or revoke trusts.”³ The primary statute for nonjudicial reformation is Fla. Stat. § 736.0412 (2019).⁴

Fla. Stat. § 736.0412 (2019) applies to irrevocable trusts and revocable trusts after the settlor’s death. Such modification, which includes amending or changing the trust terms, terminating the trust in whole or in part, and directing or prohibiting trustee action,⁵ is permitted only upon the unanimous agreement of all “qualified beneficiaries”⁶ and the trustees.⁷ However, any “beneficiary”⁸ may initiate a judicial proceeding in an attempt to block a proposed modification or termination.⁹

There are two requirements to applying Fla. Stat. § 736.0412 (2019):

- (1) The trust must have been created after December 31, 2000,¹⁰ and either:
 - (2)(a) The trust terms expressly authorize nonjudicial modification AND it vests within the common law rule against perpetuities;¹¹ or
 - (2)(b) The trust provides that the 360 year perpetuities period is applicable.¹²

A trust opting for the 360 year perpetuities period may not prohibit this particular form of trust modification.¹³

For purposes of Fla. Stat. § 736.0412 (2019), the trust drafter must consider the applicable perpetuities period and whether this form of nonjudicial modification is desired. To permit this form of nonjudicial modification, the drafter must incorporate (1) the 360 years perpetuities period or (2) specific language expressly permitting nonjudicial modification. However, the drafter may preclude this particular form of nonjudicial

modification by incorporating the common law rule against perpetuities period (as opposed to the 360 year period) and avoiding inclusion of any language which expressly permits nonjudicial modification.

One final thought - while nonjudicial modification under Fla. Stat. § 736.0412 (2019) may be prohibited by proper trust drafting, such prohibition does not universally preclude potential application of other forms of nonjudicial reformation, such as trust decanting¹⁴ and nonjudicial settlement agreements.¹⁵ It can, however, be evidence of intent that the Settlor did not wish for the terms of the trust to be changed.

Endnotes

- 1 A detailed analysis of common law trust reformations is beyond the scope of this article. See *Peck v. Peck*, 133 So.3d 587 (Fla. 2d DCA 2014)(citing to *Preston v. City National Bank of Miami*, 294 So.2d 11 (Fla. 3d DCA 1974)(“Florida common law requires the trial court to allow modification or termination of a trust if the settlor and all beneficiaries consent, even if the trust is irrevocable and even if the trust’s purposes have not been accomplished”).
- 2 Options include forms of nonjudicial settlement agreements, judicial modification, nonjudicial modification, and trustee decanting. See Fla. Stat. §§ 736.0111 and 736.04113 - 736.0417 (2019).
- 3 Fla. Stat. §736.0412(6) (2019); See also Fla. Stat. §§ 736.04113(4), 736.04114(6), and 736.04115(5) (2019).
- 4 The predecessor to Fla. Stat. § 736.0412 (2019) is Fla. Stat. § 737.4032 (2005).
- 5 Fla. Stat. §§ 736.0412(2) and 736.04113(2) (2019).
- 6 See Fla. Stat. § 736.0103(16) (2019) (qualified beneficiary includes (1) permissible distributees of trust income or principal, (2) someone who would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in (1) above terminated without causing the trust to terminate, and (3) someone who would be a distributee or permissible distributee if the trust terminated in accordance with its terms on that date).
- 7 Note that consideration of the Settlor’s intent is not required for purposes of this type of modification/termination.
- 8 This differs from a “qualified beneficiary” and provides for larger class of individuals to potential object. The term beneficiary is defined in Fla. Stat. § 736.0103(4) (2019) and includes any “person who has a present or future beneficial interest in a trust, vested or contingent, or who holds a power of appointment over trust property in a capacity other than that of trustee.”
- 9 Fla. Stat. § 736.0410 (2019).
- 10 For revocable trusts, the date the trust is considered created is the date the right of revocation terminates (usually at the death of a Settlor). See Fla. Stat. § 736.0412(5) (2019).
- 11 Fla. Stat. § 689.225(2) (2019) (interest must vest or terminate (a) no later than 21 years after the death of an individual then alive or (b) within 90 years after its creation).
- 12 Fla. Stat. § 689.225(2)(f) (2019).
- 13 Fla. Stat. § 736.0105(2)(k) (2019).
- 14 Fla. Stat. § 736.07117 (2019).
- 15 Fla. Stat. § 736.0111 (2019).