

Real Property Probate & Trust Law Section
White Paper Regarding a Trustee's Use of Trust Assets to Pay
Attorney's Fees and Costs in Connection with Claim or Defense of Breach of Trust

This White Paper relates to proposed amendments to section 736.0802(10) concerning a trustee's payment of its attorney's fees and costs from assets of the trust in connection with a claim or defense of breach of trust.

This White Paper also relates to proposed amendments to section 736.0816(20) and section 736.1007(1), the purpose of which amendments is to clarify that the authority granted in both of those statutes to pay a trustee's attorney's fees and costs from assets of the trust is subject to the limitations of section 736.0802(10).

I. SUMMARY

The bill proposes amendments to section 736.0802(10), section 736.0816(20) and section 736.1007(1) to clarify when a trustee may use trust assets to pay its legal fees and to provide further guidance to practitioners and courts with regard to the procedure to be employed when a trustee seeks to use trust assets to pay its legal fees when defending a breach of trust claim. The amendments are intended to make application of the statutes simpler for lawyers and the courts. The policy and purpose of the statutes remain unchanged.

The bill does not have an impact on state funds.

II. CURRENT SITUATION

A trustee's statutory power to pay its attorney's fees and costs from assets of the trust has been limited under certain circumstances by statute since 1974, when Chapter 737 was enacted. The initial statutory limitation, which was codified as section 737.403(2) and then construed by the court in Shriner v. Dyer, 462 So. 2d 1122 (Fla. 4th DCA 1984) and several subsequent cases, has been amended on multiple occasions. The most recent modification, which occurred in 2008, involved significant and complex changes. The current statute is codified as section 736.0802(10), entitled Duty of Loyalty.

Section 736.0802(10) generally confirms that a trustee may pay its attorney's fees and costs from trust assets even when the trustee is defending itself against an allegation of breach of trust. However, it also provides that in the latter instance (i) the trustee must provide prior notice of its intent to pay its attorney's fees and costs from the trust, and (ii) upon the motion of qualified beneficiaries of a trust whose share of the trust may be affected by such payment, the court may preclude a trustee from paying its attorney's fees and costs from the trust if it finds that there is a reasonable basis to conclude that there has been a breach of trust. The proposed amendments to the statute do nothing to change that policy and purpose.

However, the current statute lacks clarity, and thus fails to provide direction to lawyers and the court, with respect to a number of issues.

- It lacks clarity regarding the circumstances under which the limitations imposed by the statute are triggered.
- It lacks clarity regarding which categories of attorney's fees and costs are subject to the limitations.
- It lacks clarity regarding the circumstances under which the trustee must serve notice of an intention to pay attorney's fees and costs from trust assets and the consequences, if any, of paying such attorney's fees and costs from trust assets prior to serving notice.
- It literally and unconditionally mandates that qualified beneficiaries seek a court order to prohibit a trustee from using trust assets to pay attorney's fees and costs even when a trustee has no intention of doing so.
- It lacks clarity regarding whether a trustee may use trust assets to pay its attorney's fees and costs upon a final determination in its favor by the trial court or whether the trustee must wait until a final determination by the appellate court.
- And it lacks clarity regarding what type of showing is required to preclude a trustee from using trust assets to pay its attorney's fees and costs, and regarding the type of evidence that may be used to make or to rebut such a showing.

III. EFFECT OF PROPOSED CHANGES

A. Section 736.0802(10)

The bill substantially amends section 736.0802(10) to provide needed additional guidance to lawyers and the courts to understand and apply it. The policy and purpose of the statute remain unchanged.

The proposed amendments to the introductory paragraph clarify that the authority granted to a trustee under section 736.0816(20) and section 736.1007(1) to pay attorney's fees and costs from assets of the trust remains the general rule, whereas the provisions of section 736.0802(10) are merely an exception to the rule. That is consistent with the provisions of the current statute.

The proposed amendments to paragraph (a) clarify the type of event that triggers the limitations imposed by the statute, the type of fees and costs affected, and the requirements concerning the timing of the service of notice of intent to pay such fees and costs from trust assets. Specifically, the amendments to paragraph (a) provide that in the event that a trustee incurs attorney's fees or costs in connection with a claim or defense of breach of trust that is actually set forth in a filed pleading, the trustee continues to have the power to pay those fees and costs from assets of the trust. However, prior to payment of those fees and costs from assets of the trust, the trustee must serve a written notice of intent, which is described in paragraph (b), upon each qualified beneficiary whose share of the trust may be affected by the payment.

The proposed amendments to the other paragraphs of section 736.0802(10) include several references to the “attorney’s fees and costs described in paragraph (a),” which is intended to be a specific reference to attorney’s fees and costs incurred in connection with a claim or defense of breach of trust that is actually set forth in a filed pleading, as opposed to, for example, fees or costs incurred in connection with ordinary trust administration, a judicial proceeding not involving allegations of breach of trust or in connection with allegations of breach of trust that have not yet been set forth in a filed pleading.

The proposed amendments to paragraph (b) set forth the required content of the written notice of intent and the manner of service thereof. These requirements are consistent with the provisions of the current statute, but the proposed amendments add a requirement that the notice identify the judicial proceeding in which the claim or defense of breach of trust has been made. The proposed amendments also limit the availability of one of the authorized methods of service – service in the manner provided for service of pleadings and other documents by the Florida Rules of Civil Procedure – to those parties over whom the court has already acquired jurisdiction in that judicial proceeding.

The proposed amendments to paragraph (c) provide that in the event a trustee pays attorney’s fees and costs described in paragraph (a) from trust assets prior to serving a notice of intent, any qualified beneficiary whose share of the trust may have been affected by such payment, and who is not otherwise barred pursuant to the limitations provisions of section 736.1008, upon the filing of a motion is entitled to an order compelling the return of such payment, together with statutory interest, to the trust. Further, the court may award attorney’s fees and costs in connection with the beneficiary’s motion as provided in section 736.1004. The current statute does not specifically provide that a qualified beneficiary would be entitled to the relief set forth in these proposed amendments in that the current statute lacks clarity regarding whether a trustee is precluded from making payments of these types of attorney’s fees and costs prior to service of a notice of intent.

The proposed amendments to paragraph (d) clarify that a qualified beneficiary whose share of the trust may be affected by the payments at issue has the option of filing a motion to prohibit these payments and to seek the return to the trust of any such payment already made. The amendments to paragraph (d) also clarify that such a motion shall be denied unless the court makes a finding that “there is a reasonable basis to conclude there has been a breach of trust” and that if the court does make such a finding, the court shall grant the motion unless the court “also finds good cause to deny the motion.” These proposed amendments are consistent with the existing statute but serve to clarify that the qualified beneficiary need file this motion only if he or she wants to prohibit or compel the return of these payments and also clarifies that the court may not prohibit or compel the return of these payments in the absence of making the requisite finding.

The proposed amendments to paragraph (d) also identify the categories of evidence through which a movant may make a showing, or through which a trustee may rebut a showing, that a reasonable basis exists to conclude there has been a breach of trust. The categories of evidence permitted are affidavits, answers to interrogatories, admissions, depositions and any evidence otherwise admissible under the Florida Evidence Code. In other words, the categories

of evidence permitted are “summary judgment evidence” (as defined in Florida Rule of Civil Procedure 1.510(c)) and any other category of evidence admissible under the Florida Evidence Code, such as live witness testimony. The existing statute does not provide this level of specificity regarding the categories of evidence the parties may present.

The proposed amendments to paragraph (e) clarify that if a trustee fails to comply with an order of the court prohibiting or compelling the return of payments of these types of attorney’s fees and costs, the court may impose such remedies or sanctions as the court deems appropriate, which include but are not limited to striking the defenses or pleadings filed by the trustee. This is consistent with the provisions of the current statute.

The proposed amendments include a new paragraph (f) providing that if the claim or defense of breach of trust is withdrawn, dismissed or resolved by the trial court without a determination that the trustee committed a breach of trust, the trustee may pay these types of attorney’s fees and costs from trust assets without serving a notice of intent and without court order even if the court had previously granted a motion to prohibit or compel the return of such payments. Further, the attorney’s fees and costs that the trustee may pay from trust assets under such circumstances include those payments that the trustee may have returned to the trust pursuant to court order. This is consistent with the provisions of the current statute, but the current statute does not specify whether such payment from trust assets may be made after a final determination by the trial court or whether the trustee must wait for a final determination by the appellate court.

The proposed amendments also include a new paragraph (g) providing that the statute does not operate to limit the right of any interested person to challenge or object to the payment of compensation or costs from the trust at any time, to seek review of compensation under section 736.0206, or to seek remedies for breach of trust under section 736.1001. These proposed amendments are consistent with provisions in the current statute.

B. Section 736.0816(20)

The bill amends section 736.0816(20) to alert lawyers and the courts that the authority of a trustee to use trust assets to pay the trustee’s attorney’s fees and costs is subject to the limitations of section 736.0802(10). It accomplishes this by inserting the language “subject to section 736.0802(10).”

C. Section 736.1007(1)

The bill amends section 736.1007(1) to alert lawyers and the courts that the authority of a trustee to use trust assets to pay the trustee’s attorney’s fees and costs is subject to the limitations of section 736.0802(10). It accomplishes this inserting the language “subject to section 736.0802(10).”

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal will not have a fiscal impact on state or local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal will not have a direct economic impact on the private sector.

VI. CONSTITUTIONAL ISSUES

There do not appear to be any constitutional issues raised by this proposal.

VII. OTHER INTERESTED PARTIES

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