Bifurcation of Trustee Functions in Florida
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I. Introduction: Wealthy families are demanding great flexibility in their estate plans. They are no longer satisfied with one or two trustees making all of the investment, administrative, and distribution decisions. Clients, especially those with diverse balance sheets, are utilizing directed trusts with increasing regularity. The Florida Trust Code does not permit fully directed trusts (wherein a trustee is directed by an outside adviser with respect to specific functions). Accordingly, many families are looking to other states, such as Alaska and Delaware. Although Florida does not have a directed trust statute in its purest sense, it does provide other means of delegating and bifurcating trustee functions. Trustee duties and powers and the ability to bifurcate them are governed by the Florida Trust Code (the “Code”) and Florida common law.

II. Trustee Duties: A trustee is obligated to carry out certain fiduciary duties. Generally, the terms of the trust instrument prevail over the provisions of the Code except where the duty is identified as non-waivable below.

a. Duty to Administer Trust: Fla. Stat. §736.0801 provides that “[u]pon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with is terms and purposes and the interests of the beneficiaries, and in accordance with this code.” non-waivable

b. Duty of Loyalty: Fla. Stat. §736.0802 provides that “[a]s between a trustee and the beneficiaries, a trustee shall administer the trust solely in the interests of the beneficiaries.” non-waivable. The statute goes on to provide various rules and notice provisions aimed at preventing a trustee from breaching the duty of loyalty, many of which are waivable.

c. Duty of Impartiality: The trustee should award each beneficiary the same level of benefits and protections. Fla. Stat. §736.0803 provides that “[i]f a trust has two or more beneficiaries, the trustee shall act impartially in administering the trust property, giving due regard to the beneficiaries’ respective interests.”

d. Duty of Prudent Administration: Fla. Stat. §736.0804 requires that “[a] trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.”
e. **Duty to Incur Only Reasonable Expenses:** Fla. Stat. § 736.0805 provides that a trustee, while administering a trust, “shall only incur expenses that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.”

f. **Duty to Use the Trustee’s Skills:** Fla. Stat. §736.0805 provides that “[a] trustee who has special skills or expertise, or is named trustee in reliance on the trustee’s representation that the trustee has special skills or expertise, shall use those special skills or expertise.”

g. **Duty to Control and Protect the Trust Property:** Fla. Stat. §736.0809 provides that the “trustee shall take reasonable steps to take control of and protect the trust property.”

h. **Duty to Keep Records:** Fla. Stat. §736.0810 provides that the trustee is obligated to (1) “keep clear, distinct, and accurate records of the administration of the trust,” (2) keep the trust property separate from his own, and (3) to the extent feasible, ensure that third party records accurately reflect the trust’s interest in property.

i. **Duty to Ascertain the Marketable Title of Real Property:** Fla. Stat. §736.08105 states that “[a] trustee holding title to real property received from a settlor or estate shall not be required to obtain title insurance or proof of marketable title until a marketable title is required for a sale or conveyance of the real property.”

j. **Duty to Enforce and Defend Claims:** Fla. Stat. §736.0811 provides that “[a] trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.”

k. **Duty to Collect Trust Property:** Fla. Stat. §736.0812 provides that “[a] trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee and, except as provided in s. 736.08125, to redress a breach of trust known to the trustee to have been committed by a former trustee.”

l. **Duty to Inform and Account:** Fla. Stat. §736.0813 provides that a trustee has a duty to keep all “qualified beneficiaries of the trust reasonably informed of the trust and its administration.” The statute goes on to provide very specific requirements regarding notifying beneficiaries of the existence of a trust, the identity of the trustee, and information regarding the administration of the trust and the assets and liabilities of the trust, including accounting requirements. *non-waivable in the document but waivable by the qualified beneficiaries as set forth in Fla. Stat. §736.0813(2).*
m. **Duty to Distribute Income:** Fla. Stat. §736.08147 provides that if a trust provides for income distributions to the settlor’s or testator’s spouse for life but is silent as to timing of distributions, the trustee shall distribute all net income no less frequently than annually.

n. **Duty to Distribute upon Termination of the Trust:** Fla. Stat. §736.0817 provides that “[u]pon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to the property, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes. The provisions of this section are in addition to and are not in derogation of the rights of a trustee under the common law with respect to final distribution of a trust.”

### III. Trustee Powers:

Trustees have broad powers in order to carry out their fiduciary duties.

a. **Fla. Stat. §736.0815:** A trustee does not need court authorization to exercise
   i. powers conferred upon the trustee in the trust instrument, and
   ii. unless limited by the terms of the trust
      • powers over trust property that an unmarried competent owner has over individually owned property;
      • powers appropriate to achieve the proper investment, management, and distribution of the trust property; and
      • any other powers conferred upon the Trustee by the Code.

b. **Fla. Stat. §736.0816** sets forth a laundry list of specific trustee powers. It is not necessary for such list to be reproduced in this outline.

### IV. Delegation of Trustee Duties and Powers:

a. **Delegation among co-trustees (Fla. Stat. §736.0703):**
   i. **Fla. Stat. §736.0703(3):** A co-trustee must participate in the performance of a trustee’s function unless the co-trustee is unavailable because of absence, illness, disqualification under other provisions of law, or other temporary incapacity or the co-trustee has properly delegated the **performance of the function to another co-trustee.**
   ii. **Fla. Stat. §736.0703(5):** A co-trustee may not delegate to another co-trustee the performance of a function the settlor reasonably expected the co-trustees to perform jointly, except that a co-trustee may delegate investment functions to a co-trustee pursuant to and in compliance with Fla. Stat. §518.112.
iii. **Fla. Stat. §736.0703(7):** A co-trustee must take reasonable care to (1) prevent a co-trustee from committing a breach of trust and (2) compel a co-trustee to correct a breach. An exception to this rule is provided in §736.0703(9), as discussed in more detail below.

b. **Delegation to Agent:** Fla. Stat. §736.0807 provides that “[a] trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances, including investment functions pursuant to s. 518.112.” The trustee shall exercise reasonable care, skill, and caution in:
   i. Selecting an agent;
   ii. Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
   iii. Reviewing the agent’s actions periodically, in order to monitor the agent’s performance and compliance with the terms of the delegation.

   “In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.” A trustee who complies with these provisions (or the provisions of 518.112 when the investment function is delegated) is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.
   i. Does the trustee have a duty to redress a breach?
   ii. What kind of standard is the agent held to? The agent must exercise reasonable care to comply with the terms of the delegation.

c. **Delegation of Investment Functions:** Fla. Stat. §518.112 permits a fiduciary to delegate any part or all of the investment functions of a trust administration that a prudent investor of comparable skills might delegate under the circumstances, to an investment agent if certain conditions are met.
   i. The fiduciary must exercise reasonable care, judgment, and caution in selecting the investment agent, in establishing the scope and specific terms of any delegation, and in reviewing periodically the agent’s actions in order to monitor overall performance and compliance with the scope and specific terms of the delegation.

   - Careful consideration should be given by the fiduciary in establishing the scope and specific terms of the delegation. If the agent is not provided with the appropriate information, could the trustee have committed a breach by not properly establishing the scope and specific terms of the delegation? Does the investment
adviser understand the purpose of the trust? Distribution standards? Should the investment adviser be made aware of outside or illiquid assets?

- Should the trustee rely upon the investment policy statement as the written delegation?

ii. The trustee of a trust must give written notice of its intention to begin delegating investment functions under this section, to all beneficiaries eligible to receive distributions from the trust within thirty (30) days of the delegation unless such notice is waived. Fla. Stat. §518.112(3)(b).

iii. Fla. Stat. §518.112(6) provides that “[i]n performing a delegated function, the investment agent shall be subject to the same standards as the fiduciary.”

- Is the investment adviser now a de facto trustee?
- What duties does the delegatee investment adviser owe to the beneficiaries?
- Does the investment adviser have a complete understanding of its role? Was it sufficiently set forth in the delegation document?
- Has the fiduciary reviewed the general terms and conditions of the account agreement to determine the applicable standard of care?
- Does the investment adviser have the appropriate resources in which to invest assets as a trustee? Is it prudent to assign a trust officer to such accounts?

iv. There is no need to notice additional beneficiaries who join the class after notice has been given to beneficiaries eligible to receive distributions from the trust. Fla. Stat. §518.112(3)(b)1.

v. Trustee should consider that it may be considered a breach NOT to delegate to a professional investment adviser if the trustee does not have the requisite experience and time to manage the investments him or herself.

V. **Powers to Direct:**

a. **Direction by non-fiduciaries.** Fla. Stat. §736.0808 provides that “[i]f the terms of a trust confer on a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would
constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.” § 736.0808(2), Fla. Stat. (emphasis added).

i. The same statute also provides that a trust may give a trustee or other person the power to direct the modification or termination of the trust. § 736.0808(3), Fla. Stat.

ii. A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary and must act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of the power to direct is liable for any loss that results from a breach of fiduciary duty. § 736.0808(4), Fla. Stat.

- Why was the word presumptively used? Is this rebuttable?

iii. What constitutes a serious breach of fiduciary duty?

iv. Interesting that the directed trustee could be liable for the breach of a directing trustee.

v. What is the power holder’s (or directing trustee’s) duty?

- If the direction is a clear breach of the power holder’s fiduciary duty, the directed trustee shall not act pursuant to the direction.
- Does the directed trustee have a duty to investigate, inquire, or monitor the activities of the power holder (or directing trustee) to be sure that any given direction is not a breach by the power holder?

vi. What is the directed trustee’s duty?

vii. In 2007, the Florida Bankers Association presented proposed amendments to the then-newly enacted Code in House Bill 743. One of the changes proposed was the revision of Fla. Stat. § 736.0808 to eliminate the liability of a trustee when following the direction of a trust adviser. The trustee would have been relieved of any responsibility from reviewing or investigating a trust adviser’s actions. The Real Property, Probate and Trust Law Section of the Florida Bar opposed such changes. Among other things, the Section felt that the proposed statutory changes were in conflict with Fla. Stat. § 736.0703, which places an affirmative duty on every trustee to exercise reasonable care to prevent a co-trustee (or any type of adviser with fiduciary duties) from committing a breach of trust.

viii. Delaware Trust Adviser Statute (Del. Code tit. 12, § 3313)
Delaware law permits trustees to be directed by “trust advisers” and limits the trustees’ liability for following the direction of a “trust adviser.”

Advisers are fiduciaries unless the governing document provides otherwise.

In the absence of willful misconduct or gross negligence on the part of the trustee, the trustee is exonerated from liability as long as the trustee follows the direction of the adviser.

Willful misconduct is defined as “intentional wrong doing, not mere negligence, gross negligence or recklessness.” Del. Code tit. 12, § 3301(h)(4).

The trustee shall have no duty to monitor the conduct of the adviser, provide advice to or consult with the adviser, or communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary would or might have exercised the fiduciary’s own discretion in a manner different from the manner directed by the adviser. Del. Code tit. 12, § 3313(e).

b. Co-trustee with Power to Direct: Fla. Stat. §736.0703(9) applies when the settlor of a trust gives one trustee the power to direct another trustee on a specified action. It provides as follows:

i. If the terms of a trust instrument provide for the appointment of more than one trustee but confer upon one or more of the trustees, to the exclusion of the others, the power to direct or prevent specified actions of the trustees, the excluded trustees shall act in accordance with the exercise of the power.

ii. Except in the cases of willful misconduct on the part of the trustee with the authority to direct or prevent actions of the trustees of which the excluded trustee has actual knowledge, an excluded trustee is not liable, individually or as a fiduciary, for any consequence that results from compliance with the exercise of the power, regardless of the information available to the excluded trustees.

iii. The excluded trustees are relieved of any obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of the power.
iv. The trustee or trustees having the power to direct or prevent actions of the trustees shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power.

- Willful misconduct is not a defined term in Florida.
- What constitutes actual knowledge?
- Interesting that the excluded trustee could be liable for the breach of a trustee with the power to direct.

c. Case Law. Unfortunately there is no case law in Florida on directed trusts. Furthermore, there is not a significant body of case law from other states.

i. Duemler v. Wilmington Trust Company, CVA No. 20033 (Del. Ch., Nov. 10, 2004). The Delaware Chancery Court upheld the Delaware statute and said that the directed trustee was not liable for investment losses where there was an investment adviser appointed in the trust document. The adviser failed to direct the corporate trustee on an investment matter. The court found that there was no willful misconduct on the part of the corporate trustee and that the Delaware statute requires the investment adviser to make investment decisions in isolation, without oversight from the trustee.

ii. Rollins v. Branch Banking & Trust Company of Virginia, 2001 Va. Cir. Lexis 146 (Va. Cir. Ct. 2001). The court upheld the Virginia directed trust statute but also found that the trustee was liable and could not “rid himself of this duty to warn.” In this case, the power to direct the trustee with respect to investments was given to the beneficiaries and set forth in the trust document. The trust owned a concentrated stock position which ultimately declined in value. The court found that based upon the language of the trust and the Virginia directed trust statute, the trustee could not be held liable for failure to diversify. However, the court also found that the trustee could not ignore basic fiduciary duties and that it had a duty to fully inform the beneficiaries of all of the facts known by the trustee that are material for the beneficiaries to protect their interests.

VI. Ancillary Issues:
a. **Exculpation clauses:** Fla. Stat. §736.1011 provides that an exculpatory clause limiting the liability of a trustee for breach of trust is unenforceable to the extent that it “[r]elieves the trustee of liability for a breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries,” or was placed into the trust as a result of “abuse by the trustee of a fiduciary or confidential relationship with the settlor.” Further, §736.1011(2) provides that such a clause is deemed to be an abuse of a fiduciary or confidential relationship unless: “(a) The trustee proves that the exculpatory term is fair under the circumstances” and “(b) The term’s existence and contents were adequately communicated directly to the settlor or the independent attorney of the settlor.” **non-waivable.** There are no Florida cases on this statute.

b. **Compensation:** Fla. Stat. §736.0708 provides that a trustee is entitled to compensation that is reasonable under the circumstances unless the terms of the trust specify the trustee’s compensation. Even if the compensation is specified, the court may allow more or less compensation if the duties of the trustee are substantially different than what was contemplated by the trust or if the compensation set forth in the trust would be unreasonable. In determining what is reasonable as compensation, regard may be had to such matters as the amount of principal and income received and distributed by the trustee, the compensation customarily granted to persons performing like work, the success or failure of the trustee’s administration, any unusual skills of the trustee, the trustee’s loyalty to the trust and the beneficiaries of it, the amount of responsibility assumed, the time taken in the execution of the trustee’s duty, the customary compensation for trust companies and banks in the area, and the character of the work done. See *West Coast Hospital Ass’n v. Florida Nat. Bank of Jacksonville*, 100 So. 2d 807 (Fla. 1958). Note that when there are multiple trustees, the allocation of trustee compensation is a matter to be decided by them on the basis of services rendered by each. Where no agreement can be reached, this may be determined by a court.