

Co-Existing With A Co-Trustee: Cooperation or Controversy?

Stacy Rubel, Esq.
The Virgil Law Firm
201 Alhambra Circle, Suite 705
Coral Gables, FL 33134
Telephone: (305) 448-6333
Email: stacy@virgillaw.com
www.virgillaw.com

Understanding the Role and Responsibilities of Co-Trustees

It is common for settlors to name more than one trustee in a trust document, which may include multiple children of the settlor, individual and corporate trustees, or a mix of family and non-family members. Reasons for naming multiple trustees can range from not hurting any feelings (ex. naming all children together) to ensuring compliance with the settlor's intent (ex. corporate neutral trustee) to checks and balances (ex. prevent misuse by single trustee). However, naming multiple trustees can create a number of issues as well, especially when decisions are deadlocked, the trustees do not get along, or they refuse to communicate with each other. This presentation explores considerations for trustees when they are considering accepting a role as a co-trustee, the Florida Statutes and trust terms that may govern the administration, and the proposed new Florida Uniform Directed Trust Act, which will likely be signed by the Governor as part of Senate Bill 1070 by the time of this presentation.

I. The Specific Terms of a Trust are Key

A. Guiding force in trust administration is primarily the trust's own language.

1. The polestar of trust interpretation is the settlor's intent.¹
2. The intent of the settlor as expressed in the terms of the trust controls the legal effect of the dispositions made in the trust.²

B. The "terms of a trust" means:

1. Except as otherwise provided in this definition, the manifestation of the settlor's intent regarding a trust's provisions as:
 - a. expressed in the trust instrument; or
 - b. as may be established by other evidence that would be admissible in a judicial proceeding;³ or
2. The trust's provisions as established, determined, or amended by:
 - a. A trustee or trust director in accordance with applicable law;

¹ *L'Argent v. Barnett Bank, N.A.*, 730 So. 2d 395, 397 (Fla. 2d DCA 1999).

² Fla. Stat. § 736.1101(1).

³ Fla. Stat. § 736.0103(24).

b. Court order; or

c. A nonjudicial settlement agreement under s. 736.0111

C. *Lines v. Darden*, 5 Fla. 51, 68 (Fla. 1853)

The intention of the testator, as expressed in his will, shall prevail over all other considerations, if consistent with the principles of law. The intention is everything; and to this first and great rule, in the exposition of wills, all others must bend. With an anxious desire to secure this leading object, the courts allow no rule of construction of mere words, to control the intention, but the whole instrument is to be considered, and if possible, effect given to every part of it. The relative situation of the parties, the ties and affections subsisting between them, besides the motive which would naturally influence the mind of the testator, are proper to be considered in expounding the import of doubtful words.⁴

D. Terms to look for in the trust provisions:

1. Role of each trustee
2. Delegation of authority
3. Decision-making requirements: does the trust require unanimity/majority/independent decisions?

II. **Florida Statutes Relating to Co-Trustees**

A. Unanimity/Majority requirements

1. Co-trustees who are unable to reach a unanimous decision may act by majority⁵
2. If a vacancy occurs, the remaining co-trustees or a majority of the remaining co-trustees may act for the trust⁶
3. A co-trustee must participate in the performance of a trustee's function unless unavailable because of:⁷
 - a. Absence;

⁴ *Id.* at 68.

⁵ Fla. Stat. § 736.0703(1).

⁶ Fla. Stat. § 736.0703(2).

⁷ Fla. Stat. § 736.0703(3).

- b. Illness;
- c. Disqualification;
- d. Other incapacity; or
- e. Proper delegation to another co-trustee.

B. Exceptions

1. If a co-trustee is unavailable for one of the reasons indicated above and prompt action is necessary to achieve the purposes of the trust or avoid injury to the trust property, the remaining co-trustees may act for the trust.⁸

C. Delegation

1. 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 investment functions pursuant to Fla. Stat. § 518.112

D. Liability

1. A co-trustee who does not join in an action of another co-trustee is not liable for the action,⁹ except that each co-trustee shall exercise reasonable care to:
 - a. Prevent a co-trustee from committing a breach of trust; and
 - b. Compel a co-trustee to redress a breach of trust.¹⁰
2. If a dissenting co-trustee joins in the action at the direction of the majority AND notifies any co-trustee of the dissent at or before the time of the action, they are not liable for the action.¹¹
3. If more than one person, including co-trustees, is liable to the beneficiaries for a breach of trust, each liable person is entitled to pro rata contribution from the other person(s).

III. Pre-Acceptance Considerations

⁸ Fla. Stat. § 736.0703(4).

⁹ Fla. Stat. § 736.0703(6).

¹⁰ Fla. Stat. § 736.0703(7).

¹¹ Fla. Stat. § 736.0703(8).

- A. Review the terms of the trust
- B. Review the general nature and composition of trust assets
- C. Who is/are the other co-trustee(s)? Are they beneficiaries?
- D. Litigation history of the trust or trust administration
 - 1. Any court cases pending?
 - 2. Review any settlement agreements
 - 3. Is litigation over?
 - 4. Likelihood of future issues
- E. Governing law
- F. Discussion with co-trustee or nominated co-trustee regarding trust terms and expectations
- G. Discussion with beneficiaries regarding trust terms and expectations
- H. Distribution requirements
- I. Review of prior trust activity
- J. “Headache Test”

IV. Trust Administration

- A. What role does each trustee have?
- B. Trust director (f/k/a trust protector)
- C. Who needs to consent to various decisions?
- D. Investment decisions
- E. Fees/Compensation
- F. Protocol for decisions
- G. Meetings

V. Directed Trustee- Senate Bill 1070 (pending governor’s signature)

Senate Bill 1070, among other changes, creates the Florida Uniform Directed Trustee Act. This Act highlights the requirements and regulations for trust directors (formerly known as trust protectors), including clarifying the fiduciary nature of the role, the application to co-trustees (including when one co-trustee has the authority to direct other co-trustees), and the duties and liabilities of those making decisions and complying with decisions.

A. Definitional Changes¹²

1. “Directed trust” means a trust for which the terms of the trust grant a power of direction.
2. “Directed trustee” means a trustee that is subject to a trust director’s power of direction.
3. “Power of direction” means a power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not serving as a trustee. The term includes a power over the investment, management, or distribution of trust property, a power to amend a trust instrument or terminate a trust, or a power over other matters of trust administration. The term excludes the powers excluded from part XIV of this chapter under s. 736.1405(2).
4. “Terms of a Trust”: unless established, determined or amended by a trustee or trust director in accordance with the law, a court order or a nonjudicial settlement, the manifestation of the settlor’s intent as expressed in the trust or established by other evidence that would be admissible in a judicial proceeding.
5. “Trust director” means a person who is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary or settlor of the trust.

B. Default and Mandatory Rules¹³

1. The requirement that the terms of a trust prevail over the provisions of the Florida Trust Code was modified with respect to the duty to act in good faith and in accordance with the terms

¹² Fla. Stat. § 736.0103

¹³ Fla. Stat. § 736.0105

and purposes of the trust and interests of the beneficiaries, to carve out exceptions relating to the duties and liabilities of a directed trustee and the allocation of powers among co-trustees

C. Settlor Direction¹⁴

1. Subject to ss. 736.0403(2) and 736.0602(3)(a), the trustee may follow a direction of the settlor that is contrary to the terms of the trust while a trust is revocable

D. Co-Trustees¹⁵

1. Modifies s. 736.0703(3) to specify that the requirement for a co-trustee to participate in the performance of a trustee's function is subject to s. 736.1412 relating to the allocation of powers of co-trustees, requirements for excluded co-trustees to act as a directed trustee, and liability and related obligations of directing co-trustees
2. Similarly, the requirement for each co-trustee to exercise reasonable care to prevent a co-trustee from committing a breach of trust or to compel a co-trustee to redress a breach of trust is subject to the same s. 736.1412 limitations

E. Limitation Notice¹⁶ and Actions

1. A trust director can disclose information in a trust disclosure document with a limitations period
2. Any claim barred against a trustee or trust director under s. 736.1008 is also barred against the directors, officers, and employees acting for the trustee or trust director
3. An action against a trust director is subject to the same limitation period as an action against a trustee for breach of trust when similar circumstances¹⁷

¹⁴ Fla. Stat. § 736.0603

¹⁵ Fla. Stat. § 736.0703

¹⁶ Fla. Stat. § 736.1008

¹⁷ Fla. Stat. § 736.1413

4. A trust director may assert the same defenses as a trustee in similar circumstances¹⁸

Practice Tip: Make sure to modify your limitation notice language to include trust director in cases where there is an acting trust director serving documents with the notice

F. Certification of Trust¹⁹

1. Instead of furnishing a copy of the trust to a third party, the trustee may furnish a certification of trust containing information included whether the trust contains any powers of direction, the powers subject to the direction, and whether the trust directors have directed or authorized the trustee to engage in the proposed transaction for which the certification was issued

G. Florida Uniform Directed Trust Act: Fla. Stat. 736.1401-1416

1. Application- when Florida is principal place of administration:²⁰

Trust Created before 7/1/21	Applies only to a decision or acting occurring on or after 7/1/21
If principal place of administration is changed to Florida on or after 7/1/21	Applies only to a decision or action occurring on or after date of change
In addition to s. 736.0108, in a directed trust, terms of the trust that designate Florida as principal place valid and controlling if:	Trust director's principal place of business is located in or trust director is a resident of Florida

2. Exclusions²¹

¹⁸ Fla. Stat. § 736.1414

¹⁹ Fla. Stat. § 736.1017

²⁰ Fla. Stat. § 736.1403

²¹ Fla. Stat. § 736.1405

- a. Contains a list of powers that are NOT considered powers of direction unless the terms of the trust expressly provide otherwise by specific reference to Act, section or paragraph
 - b. Examples
 - a. Power of appointment
 - b. Power to appoint or remove a trustee
3. Power of Trust Director²²
- a. Subject to s. 736.1407, the terms of a trust may grant a power of direction to a trust director
 - b. Power includes only those powers granted by the terms of the trust
 - c. Unless terms provide otherwise:
 - a. A director may exercise any further power appropriate to the exercise or nonexercised of a granted power
 - b. Multiple directors with joint powers must act by majority
4. Limitations of a Trust Director²³
- a. Same rules as a trustee in a like position and under similar circumstances
5. Duty and Liability of a Trust Director²⁴
- a. Generally same fiduciary duty and liability as a trustee
 - b. Terms of trust can vary duty or liability to same extent applicable for a trustee
 - a. Terms may impose additional duties and liabilities
 - c. Exception for providing health care, unless trust says otherwise

²² Fla. Stat. § 736.1406

²³ Fla. Stat. § 736.1407

²⁴ Fla. Stat. § 736.1408

6. Duty and Liability of Directed Trustee²⁵

- a. Must take reasonable action to comply with a trust director's exercise or nonexercise of a power and the trustee is NOT liable for such reasonable action
- b. May NOT comply with a power to the extent that complying the trustee would engage in willful misconduct
- c. Before complying with a direction, the directed trustee shall determine whether or not the exercise is within the scope of the trust director's power.
 - a. The exercise is not outside the scope merely because it constitutes or may constitute a breach of trust
- d. An exercise of a power under which a trust director may release a trustee or another trustee director from liability for breach of trust is NOT effective if:
 - a. Breach involves willful misconduct of trustee/other director;
 - b. Release induced and procured by improper conduct of the trustee/other director; or
 - c. At time of release, trust director did not know material facts relating to the breach
- e. A directed trustee that has reasonable doubt about its duty may apply to the court for instructions, with attorney fees and costs to be paid from assets of the trust as provided in this code
- f. The trust terms may impose a duty or liability on a directed. Trustee in addition to the duties and liabilities under this part

7. Duty to Provide Information²⁶

²⁵ Fla. Stat. § 736.1409

²⁶ Fla. Stat. § 736.141

- a. Subject to s. 736.1411, a trustee shall provide information to a trust director to the extent the information is reasonably related to the powers or duties of the trust director
 - b. Subject to s. 736.1411, a trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related to the powers or duties of the trustee/other director
 - c. A trustee/trust director that acts in reliance on information provided by the other is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trustee/director engages in willful misconduct
 - d. A trust director shall provide information within the trust director's knowledge or control to a qualified beneficiary upon a written request of a qualified beneficiary to the extent the information is reasonably relate to the powers or duties of the trust director
8. No Duty to Monitor, Inform, or Advise²⁷
- a. Unless the terms of a trust provide otherwise, a trustee does NOT have a duty to:²⁸
 - a. Monitor a trust director; or
 - b. Inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the trust director
 - b. Unless the terms of a trust provide otherwise, a trust director does NOT have a duty to:²⁹

²⁷ Fla. Stat. § 736.1411

²⁸ If a trustee takes an action, they do not assume a duty

²⁹ If a trust director takes an action, they do not assume a duty

- a. Monitor a trust director; or
- b. Inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an instance in which the trust director might have acted differently than the trustee

9. Application to Co-Trustee³⁰

- a. A trust may appoint multiple trustees but confer upon one or more, to the exclusion of the others, the power to direct or prevent specified actions of the trustees
- b. Excluded trustees shall act in the same manner, and with same duties and liabilities, as a directed trustee
- c. The trustee(s) having the power to direct 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

10. Jurisdiction Over Trust Director³¹

- a. A trust director submits to Florida jurisdiction regarding any matter related to a power or duty of the trust director by accepting appointment

11. Office of the Trust Director³²

- a. Unless terms of trust provide otherwise, trust director shall be considered a trustee for a laundry list of statutes applicable to trustees under the Florida Trust Code
- b. If a person has not accepted a trust directorship or a trustee, settlor or qualified beneficiary is uncertain regarding acceptance, they may make a written demand,

³⁰ Fla. Stat. § 736.1412

³¹ Fla. Stat. § 736.1415

³² Fla. Stat. § 736.1416

copying the trustee(s), to accept or confirm prior acceptance of the trust directorship in writing. A written acceptance, acknowledgement of prior acceptance or declination shall be delivered by the trust director within 60 days after receipt of such demand to all trustees, qualified beneficiaries, and the settlor if living

VI. Additional Case Law

- A. *Horgan v. Cosden*, 249 So. 3d 683 (Fla. 2d DCA 2018)
- B. *Berlinger v. Wells Fargo, N.A.*, 2015 WL 6125529, as clarified by 2016 WL 11430083
- C. *Miller v. Miller*, 89 So. 2d 962 (Fla. 5th DCA 2012)
- D. *Fleck-Rubin v. Fleck*, 933 So. 2d 38 (Fla. 2d DCA 2006)
- E. *Anton v. Anton*, 815 So. 2d 768 (Fla. 4th DCA 2002)
- F. *Brent v. Smathers*, 547 So. 2d 683 (Fla. 3d DCA 1989)
- G. *Ball v. Mills*, 376 So.2d 1174 (Fla. 1st DCA 1979)