

PROBATE & PUMPERNICKEL LUNCHEON

February 18, 2015

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NON-JUDICIAL AND JUDICIAL MODIFICATION OF

IRREVOCABLE TRUSTS IN FLORIDA

INTRODUCTION

Florida Statute §736.04115 permits judicial modification of an irrevocable trust; and, *Florida Statute* §736.0412 permits non-judicial modification of Irrevocable trusts as to any trust created after December 31, 2000. Upon first reading of both of these statutes there would seem to be a hallelujah moment for those difficult situations where the modification of an irrevocable trust is a necessary cure but there are no other common law or statutory remedies. However, what the legislature giveth, the legislature immediately taketh away because both statutes specifically state that the statute shall not apply if:

...Under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rules against perpetuities...

So it would appear that if an irrevocable trust has been drafted utilizing the proper “rules against perpetuities” language, neither statute may be utilized to judicially or non-judicially modify such trust. WHY? What is the importance of this language: is this a mistake; does it serve a purpose; or, should these statutes be changed by eliminating such limitation.

Before attempting to answer what I consider to be today’s question, I thought we might spend a little time reviewing irrevocable trusts, their creation, and the existing permissible methods of modification.

I. IRREVOCABLE TRUSTS - A BRIEF DISCUSSION

A. Creation: By declaration of trust, by inter-vivos transfer in trust, by transfer in trust by will, and by exercise of power of appointment.

B. Irrevocability: Unless the power to modify, amend or terminate is reserved at the time of creation, a trust becomes irrevocable upon its creation. Further, unless there is specific language to the contrary, an inter-vivos trust, in which the power to amend, modify or revoke is reserved, will generally become irrevocable upon the death of the Grantor/Settlor and a transfer in trust by will (testamentary trust) is generally irrevocable immediately upon its creation after the death of the testator.

II. MODIFICATION OF IRREVOCABLE TRUSTS - COMMON LAW

A. Under the common law, an irrevocable trust cannot be altered or amended *without the consent of all parties in interest*, except under a reserved power of amendment or alteration as referenced above. See 55 Fla. Jur 2d Trusts § 49 and *Scott's Abridgment of the Law of Trusts* § 338. Thus, under Florida common law, a trust can be modified by unanimous consent of all affected parties.

Preston v. City Nat. Bank of Miami, 294 So. 2d 11 (Fla. 3d DCA 1974). The terms of a trust can be modified if the settlor and all beneficiaries consent, because those who have the power to terminate have the power to modify, amend, or create a new trust. *Id.*

Peck v. Peck, 133 So.3d 587 (Fla. 2d DCA 2014). The Settlor filed a petition to terminate her trust. Her beneficiaries agreed to the termination, however, the settlor's brother, as co-trustee, objected because the Settlor might unwisely dissipate the assets. The Brother / Co-Trustee argued that the trust purposes

remained unfulfilled, (a requirement for modification under Florida Statute 736.04113) so the Court had no power to judicially modify the trust under 736.04113. The Court noted that the court's power to modify under 736.04113 is in addition to, not in derogation of, the Common Law. Under the common law the Settlor was entitled to terminate the trust because she had the unanimous consent of all parties in interest.

III. MODIFICATION OF IRREVOCABLE TRUSTS – FLORIDA STATUTES

A. Under Florida Statute 736.0105, Default and Mandatory Rules: The terms of the trust prevail over any provision of the trust code except:

(j) The power of the court to modify or terminate a trust under §§ 736.0410-736.04115, except as provided in § 736.04115(3)(b) mentioned above, and under §§ 736.0413, 736.0415, and 736.0416.

(k) The ability to modify a trust under § 736.0412, except as provided in § 736.0412(4)(b), also mentioned above.

The following is a closer examination of several of the mandatory trust modification statutes..

B. Florida Statute § 736.0415 - Reformation to correct mistakes, to conform the terms of the trust, to accomplish the settlor's intent. If the terms of trust are affected by mistake of law or fact in expression or inducement, the settlor or any interested person may ask the court to reform the trust, but must prove by clear and convincing evidence that the terms of the trust were affected by the mistake.

Reid v. Temple Judea, 994 So.2d 1146 (Fla. 3d DCA 2008). In *Reid*, the Trustee petitioned the court to reform trust, claiming that a drafting mistake had occurred, and that the trust as written did not reflect the settlor's intent. The court found that "Florida law has long recognized a trustee's standing to seek modification of a trust instrument where the purposes of that trust, as written, have been, or cannot be, fulfilled; where complying with the terms of the trust will defeat or substantially impair carrying out a material purpose of the trust; or where the purpose for the trust no longer exists. *Id.* at 1149.

C. Florida Statute § 736.0416 - Court may also reform an irrevocable trust to achieve settlor's tax objectives.

D. Florida Statute § 736.04117 --Trust Decanting statute, i.e., a Trustee can modify or terminate a trust if the trust instrument gives him the power to do so, for example:

1. A Trust may indirectly permit trustee to terminate the trust by empowering trustee to invade the principal;
2. The absolute power to invade arises when there is no ascertainable standard associated with Trustee's power to invade principal. Unless the trust expressly provides otherwise, a trustee with absolute power to invade principal may appoint all or part of principal to a new trust as long as the beneficiaries of new trust are the same beneficiaries as old trust and the new trust must not reduce any provisions for the payment fixed income from the old trust.

E. Eleemosynary Trust Modification: Under *Florida Statute § 736.0405* a trust may be created for charitable purposes, including, but not limited to, relief of poverty, advancement of the arts, sciences, education, or religion if the terms of the

charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one or more purposes or beneficiaries consistent with the settlor's intent to the extent that such intent can be ascertained.

F. Florida Statute § 736.0413 - An Irrevocable Eleemosynary or Charitable trust may be modified or terminated under the *CY PRES* doctrine. Cy Pres or "cy près comme possible" is old Norman French for "as near as possible" *Black's Law Dictionary* defines "Cy pres" as "[t]he equitable doctrine under which a court reforms a written instrument with a gift to charity as closely to the donor's intention as possible, so that the gift does not fail."

See *Jewish Guild for the Blind v. First Nat'l Bank in St. Petersburg*, 226 So. 2d 414, 416 (Fla. 2d DCA 1969). A court applying cy pres may modify or terminate trust, directing trustee to apply or distribute trust property in a manner consistent with settlor's charitable purposes.

SPCA Wildlife Care Center v. Abraham, 75 So.3d 1271 (Fla 4th DCA 2011). The will contained a Testamentary Trust, providing for a lifetime income beneficiary. Thereafter, the will provided that the lifetime beneficiary's share of the trust estate shall be distributed outright and free of trust to the International Wildlife Society. No such International Wildlife Society existed, so the trial court, without an evidentiary hearing, entered an order that the devise failed and that the estate passed under the intestacy statutes. The Fla 4th DCA remanded the matter for an evidentiary hearing to determine distribution to a charitable claimant or claimants which could fulfill the original intent of the bequest as closely as possible.

The Trustees of the Corcoran Gallery of Art v. The District of Columbia, 2014 CA 003745 B. Last year, the Trustees of the Corcoran Gallery of Art petitioned the court to use the doctrine of Cy Pres to modify the Art Gallery's Trust Deed and

corresponding Federal Charter. The Trust was losing money at an alarming rate, because it was operating the gallery under terms created in 1869. Continued operation was found to be financially impracticable or impossible. The Court used the doctrine of cy pres, permitting the Trustees to enter into agreements with the National Gallery of Art and George Washington University so that the purposes of trust were not defeated by the terms of the trust.

G. Florida Statute § 736.04113 - Judicial Modification When Modification Is Not Inconsistent with Settlor's Purpose: Upon the application of a trustee of the trust or any qualified beneficiary, a court at any time may modify the terms of a trust that is not then revocable, if:

1. The purposes of the trust have been fulfilled or have become illegal, impossible, wasteful, or impracticable to fulfill;
2. Because of circumstances not anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of a material purpose of the trust; or
3. A material purpose of the trust no longer exists.

In modifying a trust under this section, a court may: amend or change the terms of the trust, including terms governing distribution of the trust income or principal or terms governing administration of the trust; terminate the trust in whole or in part; direct or permit the trustee to do acts that are not authorized or that are prohibited by the terms of the trust; or prohibit the trustee from performing acts that are permitted or required by the terms of the trust.

In exercising discretion to modify a trust under this section: the court shall consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and extrinsic evidence relevant to the

proposed modification; the court shall consider spendthrift provisions as a factor in making a decision, but the court is not precluded from modifying a trust because the trust contains spendthrift provisions.

The provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts. Under *Florida Statute* §736.04113, a Court may modify a trust by: (1) amending the terms of the trust, including terms related to distributions; (2) terminating the trust; (3) permitting acts that are not authorized by the trust; and (4) prohibiting acts that are authorized by the trust. When doing so, the Court shall consider the terms and purposes of the trusts as well as the abuse of discretion standard.

Judicial modification is permissible under *Florida Statute* § 736.04113 which provides for judicial modification that is not inconsistent with the settlor's purpose. *Florida Statute* § 763.04113(1)(b). Judicial modification is granted to correct for the settlor's intent, even if contrary to express provisions in the trust. See *Reid v. Temple Judea*, 994 So. 2d 1146 (Fla. 3d DCA 2008) and *Peck v. Peck*, 133 So.3d 587 (Fla 2d DCA 2014) discussed above. But, also see, *Bellamay v. Langfit*, 86 So.3d 1170 (Fla 3d DCA 2012) which involved a Family Trust, which required a corporate trustee, that was modified by the trial court to permit withdrawal of the corporate trustee, and to allow for a corporate custodian instead. The trial court found this modification to be in the best interest of the beneficiaries. However, in light of the trust provision which forbade judicial modification, the District Court of Appeals, reinstated the corporate trustee.

H. *Florida Statute* § 736.0808 - Powers to Direct: The terms of a trust may confer on a trustee or other person a power to direct the modification or termination of a trust. See *Minassian v. Rachins*, 2014 WL 6775269 (4th DCA

2014). Last December the Fourth DCA held that Florida Statute § 736.0808(3) permits the creation of a Trust Protector. In *Minassian*, the trust at issue granted the Trust Protector the power to modify or amend the trust provisions to: (1) correct ambiguities that might otherwise require court construction; or (2) correct a drafting error that defeats the settlor's intent, as determined by the Trust Protector in its sole and absolute discretion. After litigation arose between the settlor's spouse and the settlor's children, the Trust Protector modified the trust to correct ambiguities which defeated the children's' claim. The Court held that the Trust Protector's amendments were made to effectuate the settlor's intent, and the amendments that he made to the trust were within his powers. While the amendments disadvantaged the settlor's children, the Trust Protector was authorized the correct ambiguities with the limitation that he act *either* to benefit a group of beneficiaries *or* to further the husband's probable wishes.

IV. BACK TO THE BEGINNING –CONFUSION and CONTRADICTION

Florida Statute § 736.04115 - Judicial Modification Of Irrevocable Trust When Modification Is In Best Interests Of Beneficiaries. Without regard to the reasons for judicial modification when not inconsistent with settlor's purpose under *Florida Statute* § 736.04113, previously mentioned, upon application of a trustee or any qualified beneficiary, a court may modify a trust created after December 31, 2000, when modification is in the best interests of the beneficiaries unless, as we mentioned at the beginning:

...Under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rules against perpetuities...

Similarly, *Florida Statute* §736.0412 permits non-judicial modification of irrevocable trusts as to any trust created after December 31, 2000, upon the unanimous consent of the trustee and all qualified beneficiaries, unless:

...Under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rules against perpetuities...

None of the other sections of Chapter 736 of The Florida Trust Code that were previously discussed impose limitations upon the modification of irrevocable trusts related to the rule against perpetuities. What is the purpose of such limitation in these two sections? What is so different about the authority granted in these two sections that this limiting language was found to be necessary?

Senate Staff Analysis The attached Appendix includes copies of *Florida Statute* § 736.04115 and *Florida Statute* §736.0412 upon which the Rule against perpetuities language has been highlighted and also includes a copies of pages 18 and 19 of the *Senate Staff Analysis and Economic Impact Statement* dated March 21, 2006. The analysis, I presume, is intended to provide the rationale for including language regarding the rule against perpetuities in these two sections. It would seem that the intent was to include language which mandated modifications to irrevocable trusts to cure breaches of the rule against perpetuities even where modification of the trusts was prohibited by the terms of the instruments. However, as the language was incorporated into the two sections in question, it seems to have much broader impact, i.e., such language limits the ability to use *Florida Statute* § 736.04115 and *Florida Statute* §736.0412 in those difficult situations where the modification of an irrevocable trust is a necessary cure.

Comments? Questions?

APPENDIX

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The 2010 Florida Statutes(including Special Session A)

[Title XLII](#)[Chapter 736](#)[View Entire Chapter](#)

ESTATES AND TRUSTS

FLORIDA TRUST CODE

736.04115 Judicial modification of irrevocable trust when modification is in best interests of beneficiaries.—

(1) Without regard to the reasons for modification provided in s. [736.04113](#), if compliance with the terms of a trust is not in the best interests of the beneficiaries, upon the application of a trustee or any qualified beneficiary, a court may at any time modify a trust that is not then revocable as provided in s. [736.04113\(2\)](#).

(2) In exercising discretion to modify a trust under this section:

(a) The court shall exercise discretion in a manner that conforms to the extent possible with the intent of the settlor, taking into account the current circumstances and best interests of the beneficiaries.

(b) The court shall consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and extrinsic evidence relevant to the proposed modification.

(c) The court shall consider spendthrift provisions as a factor in making a decision, but the court is not precluded from modifying a trust because the trust contains spendthrift provisions.

(3) This section shall not apply to:

(a) Any trust created prior to January 1, 2001.

(b) Any trust created after December 31, 2000, if:

1. Under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rule against perpetuities in s. [689.225\(2\)](#), notwithstanding s. [689.225\(2\)\(f\)](#).

2. The terms of the trust expressly prohibit judicial modification.

(4) For purposes of subsection (3), a revocable trust shall be treated as created when the right of revocation terminates.

(5) The provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.

History.—s. 4, ch. 2006-217.

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The 2010 Florida Statutes(including Special Session A)

[Title XLII](#)[Chapter 736](#)[View Entire Chapter](#)

ESTATES AND TRUSTS

FLORIDA TRUST CODE

736.0412 Nonjudicial modification of irrevocable trust.—

- (1) After the settlor's death, a trust may be modified at any time as provided in s. [736.04113](#) (2) upon the unanimous agreement of the trustee and all qualified beneficiaries.
- (2) Modification of a trust as authorized in this section is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.
- (3) An agreement to modify a trust under this section is binding on a beneficiary whose interest is represented by another person under part III of this code.
- (4) This section shall not apply to:
 - (a) Any trust created prior to January 1, 2001.
 - (b) Any trust created after December 31, 2000, if, under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rule against perpetuities in s. [689.225\(2\)](#), notwithstanding s. [689.225\(2\)\(f\)](#), unless the terms of the trust expressly authorize nonjudicial modification.
 - (c) Any trust for which a charitable deduction is allowed or allowable under the Internal Revenue Code until the termination of all charitable interests in the trust.
- (5) For purposes of subsection (4), a revocable trust shall be treated as created when the right of revocation terminates.
- (6) The provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.

History.—s. 4, ch. 2006-217.

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The court's authority to modify a trust under s. 736.04113 is included on the list of mandatory provisions.¹⁶¹ Thus, a provision in a trust instrument which would seek to prevent the court from exercising its discretion on the matter is ineffective.

Judicial Modification in the Best Interest of the Beneficiaries

Under the Code, s. 736.04115, a court may modify an irrevocable trust in any of the ways described previously when compliance with the terms of the trust is not in the best interest of the beneficiaries. As with s. 736.04113 discussed above, modification under this section is not precluded by the presence of a spendthrift provision.¹⁶² In exercising its discretion, a court is directed to consider the terms and purposes of the trust, the facts and circumstances surrounding its creation, and extrinsic evidence relevant to the proposed modification.¹⁶³

Except for a clarification of who may apply for a modification under the section – a trustee or any qualified beneficiary – this section is identical in effect to existing s. 737.4031(2), F.S.¹⁶⁴ Under both sections, it is the best interest of the beneficiaries that is the controlling criteria for modification. Consequently, it is possible that the new section could be used to modify a trust in a manner that is inconsistent with the settlor's intent.

Under Florida's statutory Rule Against Perpetuities, all trust interests must vest or terminate within 360 years of their creation. For trusts subject to this version of the Rule, s. 736.04115 is mandatory.¹⁶⁵ However, a provision in a trust instrument that expressly prohibits judicial modification under this section can be effective if the trust is drafted to comply with either the common law Rule Against Perpetuities (lives in being plus 21 years) or with Florida's shorter 90-year statutory substitute. Drafting to comply with the common law or shorter statutory rules is not in and of itself sufficient to preclude modifications under this section. The trust instrument must also expressly prohibit judicial modifications under the section.¹⁶⁶

Nonjudicial Modification of Irrevocable Trusts

Section 736.0412 provides for the nonjudicial modification of a trust. Under this section, a qualifying trust may be modified in any of the ways described previously upon the unanimous agreement of the trustee and all qualified beneficiaries, although neither a spendthrift clause nor a provision in a trust instrument prohibiting amendment or revocation of a trust prevents modifications under the section. The objection of a nonconsenting beneficiary, however, might. Because consent to a nonjudicial modification is required only of the trustee and *qualified* beneficiaries, there is a possibility that a s. 736.0412 modification could be detrimental to the interests of other beneficiaries. To protect against that, Code s. 736.0410(2) allows any beneficiary (i.e., qualified beneficiaries and beneficiaries) to commence a judicial proceeding to have a court review a proposed nonjudicial modification.

¹⁶¹ See s. 736.0105(2)(j).

¹⁶² Section 736.04115(2)(c).

¹⁶³ Section 736.04115(2)(b).

¹⁶⁴ Like s. 737.4031(1), F.S., s. 736.04155 does not apply to a trust created prior to January 1, 2001. Section 736.04115(3)(a). For this purpose, a revocable trust is deemed to be created on the date the trust becomes irrevocable. Section 736.04115(4).

¹⁶⁵ See s. 736.0105(2)(j).

¹⁶⁶ See s. 736.04115(3)(b)2. *Accord*, s. 737.4031(2)(c)2., F.S.

New s. 736.0412 is substantively identical to existing s. 737.4032, F.S. Under both, a number of factors must be considered in determining whether a trust qualifies for nonjudicial modification.

- There can be no nonjudicial modification for trusts created before 2001.¹⁶⁷
- There can be no nonjudicial modification for any trust for which a charitable deduction is allowed or allowable under the Internal Revenue Code until such time, if ever, that all charitable interests in the trust have terminated.¹⁶⁸
- There can be no nonjudicial modification of any trust while the trust settlor is still alive.¹⁶⁹

Assuming the above criteria are met, a final consideration involves the applicable Rule Against Perpetuities associated with the trust. Section 736.0412 involves a tradeoff with the Rule Against Perpetuities similar to that detailed above for s. 736.04113. Nonjudicial modification is not only permissible, its availability is mandatory for trusts having a perpetuities period in excess of the common law and 90-year statutory periods.¹⁷⁰ For other trusts, the availability of nonjudicial modification is within the control of the governing instrument. By default, trusts drafted to comply with the common law or 90-year statutory period are exempt from modification under s. 736.0412. The governing instrument may, however, provide to the contrary.¹⁷¹

The three sections discussed above are rooted in the existing modification provisions of chapter 737, F.S. In addition, the Code includes two other modification/termination provisions that are derived from the UTC. Modification and termination are addressed for situations involving uneconomic trusts and settlor tax objectives.

Section 736.0414 provides a mechanism for a trustee or court to modify or terminate an uneconomic trust. Modifications and terminations under this section may be precluded by an express provision in the trust instrument.¹⁷² Assuming no such provision:

- A trustee of a trust with property worth less than \$50,000 may terminate the trust on its own initiative if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration. Before proceeding, notice must be given to the qualified beneficiaries. If one or more of them object, they may commence a judicial proceeding to disapprove the trustee's termination.¹⁷³

¹⁶⁷ Section 736.0412(4)(a).

¹⁶⁸ Section 736.0412(4)(c). This restriction is intended to preserve deductibility of charitable trusts for federal tax purposes.

¹⁶⁹ See s. 736.0412(1). This limitation insures that a settlor's participation in a modification, either directly as a qualified beneficiary or indirectly as a representative of another qualified beneficiary, cannot cause adverse estate tax exposure at a settlor's death under the reading some recent court decisions have given to Internal Revenue Code sections 2036 and 2038.

¹⁷⁰ See s. 736.0105(2)(k).

¹⁷¹ See s. 736.0412(4)(b), F.S.

¹⁷² The existence of a spendthrift clause is not itself sufficient to preclude applicability of the section. Section 736.0414(4), F.S.

¹⁷³ See s. 736.0414, F.S.