

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Barry F. Spivey, Chair, Trust Law Committee of the Real Property
Probate & Trust Law Section

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Position Type Trust Law Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation

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Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

Appearances

Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with
Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable,

List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position

X Support Oppose Technical Assistance Other

Proposed Wording of Position for Official Publication:

Support amending §§736.0302 and 736.0103(4) of the Florida Statutes to provide that a "permissible appointee" under a power of appointment is not a "beneficiary" of a trust unless the power of appointment is irrevocably exercised in favor of the appointee, and that the potential interests of permissible appointees can be represented by those who take the trust property if the power of appointment is not exercised.

Reasons For Proposed Advocacy:

Subsection 736.0302 of the Florida Trust Code provides that the holder of a power of appointment may represent and bind the interests of permissible appointees in a trust, except when the holder of the power is the sole trustee of the trust. In that case, no one can represent the interests of permissible appointees without filing a legal action and securing the appointment of a guardian ad litem to represent those interests. The

statute should be amended to provide that those persons who would take the trust property if the power of appointment is not exercised can represent and bind permissible appointees in order to fill the gap that exists when a sole trustee holds the power of appointment. A permissible appointee does not fall within the statutory definition of a "beneficiary" of a trust, and the statute should be amended to clarify that a permissible appointee is not a beneficiary until the power of appointment is irrevocably exercised in favor of the appointee.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position RPPTL Section supported adoption of the Florida Trust Code in 2007
(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others

(May attach list if
more than one)

NONE
(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

None
(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER

PROPOSED REVISIONS TO §§736.0302 and 736.0103(4), FLA. STAT.

I. SUMMARY

The purpose of the proposed changes to these sections of the Florida Trust Code is to provide that a *permissible appointee* under a power of appointment is not a “beneficiary” of a trust until the power of appointment is irrevocably exercised in favor of the appointee. Until there is an irrevocable exercise, an appointee therefore cannot be a “qualified beneficiary” entitled to information concerning the trust, accountings, and notice of certain actions and proceedings involving the trust. The proposed changes further provide that persons who take trust property if a power of appointment is not exercised (“takers in default”) may represent and bind permissible appointees.

II. CURRENT SITUATION

“Qualified beneficiaries” of a trust, as defined in section 736.0103(14) of the Florida Trust Code, are entitled to receive a complete copy of the trust, annual trust accountings, and information concerning the trust, including its assets, liabilities, and the particulars of its administration among other rights. To be considered a qualified beneficiary, a person must first be a “beneficiary” as defined in section 736.0103(4). A person who is a “permissible appointee” under a power of appointment is not a “beneficiary” within the definition in section 736.0103(4) because the permissible appointee does not have a present or future beneficial interest in the trust, either vested or contingent. Currently, under section 736.0302 there is no one who can represent and bind the interests of permissible appointees if the holder of the power of appointment is also the sole trustee of the trust.

III. EFFECT OF PROPOSED CHANGE

This proposed amendment would provide that takers in default under a power of appointment (who *are* qualified beneficiaries) can represent and bind permissible appointees under a power of appointment. This covers the representation gap that occurs when the holder of the power of appointment is also the sole trustee of the trust. In addition, the change in the definition of “beneficiary” in section 736.0103(4) will make it clear that a permissible appointee is not a beneficiary *unless* the power of appointment is irrevocably exercised in favor of the appointee. In that event, whether the appointee is or is not a *qualified* beneficiary requires the application of the definition of that term in section 736.0103(14). The substitution of a new subsection (4) in section 736.0302 in lieu of the former subsection (2)(b) of that section is intended to clarify the point that the term “power of appointment” as used in that section does not include a trustee’s *discretionary power* to distribute trust property that is contained in the terms of the trust.

736.0302. Representation by holder of power of appointment and by takers in default

(1) The holder of a power of appointment may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

(2) The takers in default of the exercise of a power of appointment may represent and bind persons whose interests, as permissible appointees, are subject to the power.

(23) Subsection (1) does not apply to:

(a) Any matter determined by the court to involve fraud or bad faith by the trustee;

~~(b) A power of a trustee to distribute trust property; or~~

(be) A power of appointment held by a person while the person is the sole trustee.

(4) As used in this section, the term "power of appointment" does not include a power of a trustee to make discretionary distributions of trust property.

Section 736.0103(4), Florida Statutes, is amended as follows:

(4) "Beneficiary" means a person who:

(a) Has a present or future beneficial interest in a trust, vested or contingent; or

(b) Holds a power of appointment over trust property in a capacity other than that of trustee.

An interest as a permissible appointee of a power of appointment (held by a person in a capacity other than that of trustee) is not a beneficial interest for purposes of this definition. Upon an irrevocable exercise of a power of appointment, the interest of a person in whose favor the appointment is made shall be considered a present or future beneficial interest in a trust in the same manner as if the interest had been included in the trust instrument.

IV. ANALYSIS

The proposed amendments fill a gap in the provisions for representation of the potential interests of permissible appointees under a power of appointment in the common circumstance where a sole trustee holds the power of appointment. Absent this amendment, it will frequently be necessary to file a court action to appoint a guardian ad litem to represent the interests of permissible appointees, contrary to the general theme of the Florida Trust Code to allow resolution of issues concerning trusts by the persons having an interest in the trust without court

proceedings. See, e.g., sections 736.0111, 736.0412, 736.0414, 736.0417. The change in the definition of the term “power of appointment” as used in section 736.0302 is suggested because only a trustee’s *discretionary power* to distribute trust property could otherwise be considered to be a power of appointment. A non-discretionary power to distribute trust property is not considered a power of appointment.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

VI. DIRECT IMPACT ON PRIVATE SECTOR

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

VII. CONSTITUTIONAL ISSUES

There appear to be no constitutional issues raised by this proposal.

VIII. OTHER INTERESTED PARTIES

None are known at this time.