

# FLORIDA IRREVOCABLE TRUST AMENDMENT MECHANISMS

By Charles (Chuck) Rubin & Jenna Rubin

Gutter Chaves Josepher Rubin Forman Fleisher Miller P.A.  
[www.floridatax.com](http://www.floridatax.com)

Last Updated: May 2018

## I. JUDICIAL MECHANISMS

### A. Fla.Stats. §732.615 - Reformation Of Will To Correct Mistakes

1. Requirements
  - a) Clear and convincing evidence that (a) accomplishment of testator's intent, and (b) terms of the will, were affected by a mistake of fact or law (whether in expression or inducement)
2. Related Requirements
  - a) Service of process and statutory representation compliance
3. Changes Permitted
  - a) Conform terms to conform to testator's intent
4. Who can seek
  - a) Any interested person
5. Misc.
  - a) In determining testator's intent, court may consider evidence that contradicts an apparent plain meaning of the will
6. Statute

732.615 Reformation to correct mistakes.—Upon application of any interested person, the court may reform the terms of a will, even if unambiguous, to conform the terms to the testator's intent if it is proved by clear and convincing evidence that both the accomplishment of the testator's intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement. In determining the testator's original intent, the court may consider evidence relevant to the testator's intent even though the evidence contradicts an apparent plain meaning of the will.

History.—s. 3, ch. 2011-183.

### B. Fla.Stats. §736.04113 - Judicial Modification Of Trust When Not Inconsistent With Settlor's Purpose

1. Requirements
  - a) Trust not revocable [.04113(1)]
  - b) One of these three circumstances apply:
    - (1) The purposes of the trust: [.04113(1)(a)]
      - (a) Have been fulfilled, or
      - (b) Have become illegal, impossible, wasteful, or impracticable to fulfill
    - (2) Because of circumstances not anticipated by the settlor, compliance with the trust terms would defeat or substantially impair the accomplishment of a material purpose of the trust [.04113(1)(b)]

(3) A material purpose of the trust no longer exists [.04113(1)(c)]

(4) Interpretations:

(a) Barring other circumstances, mere savings on future administrative expenses, and the risk of market fluctuations was not enough to meet these requirements and authorize a trust termination. *Horgan v. Cosden*, 2018 WL 2374443 (Fla. 2nd DCA 2018)

## 2. Related Requirements

a) Service of process and statutory representation compliance

## 3. Who can Seek

a) Trustee or any qualified beneficiary [.04113(1)]

## 4. Changes Permitted

a) Expressly permitted modifications: [.04113(2)]

(1) Amend or change the trust terms, including terms governing distribution of the income or principal, or governing administration [.04113(2)(a)], or

(2) Terminate the trust in whole or in part [.04113(2)(b)], or

(3) Direct or permit the trustee to do acts that are not authorized or that are prohibited by the terms of the trust [.04113(2)(c)], or

(4) Prohibit the trustee from performing acts that are permitted or required by the trust terms [.04113(2)(d)]

b) Limits on court

(1) Court must consider: [.04113(3)]

(a) Terms and purposes of the trust, and

(b) Facts and circumstances surrounding the creation of the trust, and

(c) Extrinsic evidence relevant to the proposed modification, and

(d) Spendthrift provisions:

(i) *Court must consider as a factor*

(ii) *Court not precluded from modifying because of them*

## 5. Misc.

a) Statute does not impact common law rights to modify, amend, terminate or revoke [.04113(5)]

b) This statute replaces Fla.Stats. §737.4031(1)

c) Trust provisions cannot override this statute [736.0105(j)]

## 6. Statute

736.04113 Judicial modification of irrevocable trust when modification is not inconsistent with settlor's purpose.—

(1) 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 in the manner provided in subsection (2), if:

(a) The purposes of the trust have been fulfilled or have become illegal, impossible, wasteful, or impracticable to fulfill;

- (b) 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
  - (c) A material purpose of the trust no longer exists.
- (2) In modifying a trust under this section, a court may:
- (a) 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;
  - (b) Terminate the trust in whole or in part;
  - (c) Direct or permit the trustee to do acts that are not authorized or that are prohibited by the terms of the trust; or
  - (d) Prohibit the trustee from performing acts that are permitted or required by the terms of the trust.
- (3) In exercising discretion to modify a trust under this section:
- (a) 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.
  - (b) 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.
- (4) 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.

### C. Fla.Stats. §736.04114 - Judicial Construction Of Trust With Federal Tax Provisions If 2010 Disposition

1. Requirements
  - a) Trust is not revocable [.04114(1)]
  - b) Disposition occurs during the applicable period (1/1/10 through limited period in 2010)
  - c) Relating to certain stated formula, shares, deductions and amounts relating to estate and GST taxes
2. Constructions permitted [.04114(1)]
  - a) Define respective shares of beneficiaries
  - b) Determine beneficiaries
  - c) Limits on court:

- (1) In accordance with settlor's intent
- 3. Who Can Seek
  - a) Trustee or any qualified beneficiary [.04114(1)]
- 4. Misc.
  - a) Note that this is a "construction" not a "modification" statute
  - b) Trust provisions cannot override this statute [736.0105(j)]
- 5. Comment: of limited utility per requirements of a 2010 disposition
- 6. Statute

736.04114 Limited judicial construction of irrevocable trust with federal tax provisions.—

(1) Upon the application of a trustee or any qualified beneficiary of a trust, a court at any time may construe the terms of a trust that is not then revocable to define the respective shares or determine beneficiaries, in accordance with the intention of the settlor, if a disposition occurs during the applicable period and the trust contains a provision that:

(a) Includes a formula disposition referring to the “unified credit,” “estate tax exemption,” “applicable exemption amount,” “applicable credit amount,” “applicable exclusion amount,” “generation-skipping transfer tax exemption,” “GST exemption,” “marital deduction,” “maximum marital deduction,” “unlimited marital deduction,” or “maximum charitable deduction”;

(b) Measures a share of a trust based on the amount that can pass free of federal estate tax or the amount that can pass free of federal generation-skipping transfer tax;

(c) Otherwise makes a disposition referring to a charitable deduction, marital deduction, or another provision of federal estate tax or generation-skipping transfer tax law; or

(d) Appears to be intended to reduce or minimize federal estate tax or generation-skipping transfer tax.

(2) For the purpose of this section:

(a) “Applicable period” means a period beginning January 1, 2010, and ending on the end of the day on the earlier of:

1. December 31, 2010; or

2. The day before the date that an act becomes law which repeals or otherwise modifies or has the effect of repealing or modifying s. 901 of the Economic Growth and Tax Relief Reconciliation Act of 2001.

(b) A “disposition occurs” when an interest takes effect in possession or enjoyment.

(3) In construing the trust, the court shall consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and the settlor's probable intent. In determining the settlor's probable intent, the court may consider evidence relevant to the settlor's intent even though the evidence contradicts an apparent plain meaning of the trust instrument.

(4) This section does not apply to a disposition that is specifically conditioned upon no federal estate or generation-skipping transfer tax being imposed.

(5) Unless otherwise ordered by the court, during the applicable period and without court order, the trustee administering a trust containing one or more provisions described in subsection (1) may:

(a) Delay or refrain from making any distribution;

(b) Incur and pay fees and costs reasonably necessary to determine its duties and obligations, including compliance with provisions of existing and reasonably anticipated future federal tax laws; and

(c) Establish and maintain reserves for the payment of these fees and costs and federal taxes. The trustee is not liable for its actions as provided in this subsection which are made or taken in good faith.

(6) The provisions of this section are in addition to, and not in derogation of, rights under this code or the common law to construe a trust.

(7) This section is remedial in order to provide a new or modified legal remedy. This section applies retroactively and is effective as of January 1, 2010.

History.—s. 4, ch. 2010-122.

#### **D. Fla.Stats. §736.04115 - Judicial Modification Of Trust When In Best Interests Of Beneficiaries**

##### 1. Requirements

a) Trust is not revocable [.04115(1)]

b) Compliance with trust terms is not in best interests of the beneficiaries [.04115(1)]

(1) Barring other circumstances, mere savings on future administrative expenses, and the risk of market fluctuations is not enough to meet the requirements. *Horgan v. Cosden*, 2018 WL 2374443 (Fla. 2nd DCA 2018)

c) Trust created on or after 1/1/01 [.04115(3)(a)]

(1) Revocable trust deemed created when right of revocation terminates [.04115(4)]

d) Terms of the trust do not expressly prohibit judicial modification, or if it does, then also: [.04115(3)(b)(2)]

(1) Trust does not have a 90 year perpetuities vesting period; and [.04115(3)(b)(1)]

(2) Trust does not have a common law "lives in being plus 21 years" perpetuities period

[.04115(3)(b)(1)]

## 2. Related Requirements

- a) Service of process and statutory representation compliance

## 3. Who Can Seek

- a) Trustee or any qualified beneficiary [.04115(1)]

## 4. Changes Permitted

- a) Same as under 04113(2) rules [.04115(1)]

### b) Limits on court

(1) Use discretion in a manner that conforms to the extent possible with intent of settlor, taking into account current circumstances and best interests of the beneficiaries [.04115(2)(a)]

(2) Court must consider: ([.04115(2)(b)])

(a) Terms and purposes of the trust

(b) Facts and circumstances surrounding the creation of the trust

(c) Extrinsic evidence relevant to the proposed modification

(d) Spendthrift provisions [.04115(2)(c)]

*(i) Court must consider as a factor*

*(ii) Court not precluded from modifying because of them*

## 5. Misc.

- a) .04113 reasons are not applicable [.04115(1)]

- b) Statute does not impact common law rights to modify, amend, terminate or revoke [.04115(5)]

- c) This statute replaces Fla.Stats. §737.4031(2)

- d) Trust provisions cannot override this statute, except as provided under .04115(3)(b) [736.0105(j)]

## 6. Statute

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.

## E. Fla.Stats. §736.0413 - Cy Pres Judicial Modification Of Trust

### 1. Requirements

a) A particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful [.0413(1)]

### 2. Changes Permitted

a) Court may modify or terminate by directing the trust property be applied or distributed, in whole or in part [.0413(1)]

b) Limits on court

(1) Court must act consistent with settlor's charitable purpose [.0413(1)]

### 3. Who can seek

a) Settlor, trustee, or any qualified beneficiary [.0413(2)]

### 4. Misc.

a) Trust provisions cannot override this statute [736.0105(j)]

### 5. Statute

736.0413 Cy pres.—

(1) If a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful, the court may apply the doctrine of cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

(2) A proceeding to modify or terminate a trust under this section may be commenced by a settlor, a trustee, or any qualified beneficiary.



History.—s. 4, ch. 2006-217

## F. Fla.Stats. §736.0414 - Judicial Or Nonjudicial Modification Or Termination Of An Uneconomic Trust

1. Nonjudicial
  - a) See discussion under Nonjudicial Modification
2. Judicial
  - a) Requirements
    - (1) Court determination that value of trust property is insufficient to justify the cost of administration [.0414(2)]
    - (2) No spendthrift provision and trust clause that prohibits termination under s. 736.0414 [.0414(4)]
  - b) Related Requirements
    - (1) Service of process and statutory representation compliance
  - c) Changes Permitted
    - (1) Modify or terminate a trust [.0414(2)]
    - (2) Remove the trustee and appoint a different trustee [.0414(2)]
  - d) Who can seek
    - (1) Trustee or a qualified beneficiary [.0414(2)]
  - e) Misc.
    - (1) If trust terminated, property distributed in a manner consistent with trust purposes [.0414(3)]
    - (2) Trustee may enter into agreements or make other provisions deemed necessary or appropriate to protect beneficiary and trustee interests and to carry out the intent and purposes of the trust [.0414(3)]
    - (3) Spendthrift provision does not prevent statute from operating unless trust provision expressly providing inapplicability of this section [.0414(4)]
    - (4) Not applicable to easements for conservation or preservation [.0414(5)]
  - f) Statute

### 736.0414 Modification or termination of uneconomic trust. —

(1) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than \$50,000 may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

(2) Upon application of a trustee or any qualified beneficiary, the court may modify or terminate a trust or remove the trustee and appoint a different trustee if the court determines that the value of the trust property is insufficient to justify the cost of administration.

(3) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust. The trustee may enter into agreements or make such other

provisions that the trustee deems necessary or appropriate to protect the interests of the beneficiaries and the trustee and to carry out the intent and purposes of the trust.

(4) The existence of a spendthrift provision in the trust does not make this section inapplicable unless the trust instrument expressly provides that the trustee may not terminate the trust pursuant to this section.

(5) This section does not apply to an easement for conservation or preservation.

History.—s. 4, ch. 2006-217.

## **G. Fla.Stats. §736.0415 - Judicial Reformation Of Trust To Correct Mistakes**

### 1. Requirements

a) Clear and convincing evidence that both (a) the accomplishment of the settlor's intent, and (b) the terms of the trust, were affected by a mistake of fact or law (whether in expression or inducement)

### 2. Related Requirements

a) Service of process and statutory representation compliance

### 3. Changes Permitted

a) Reform trust terms to conform to settlor's intent

### 4. Who can seek

a) Settlor or any interested person

b) Trustee, per Reid v. Temple Judea, 994 So2d 1146 (3rd DCA 2008), which cites Fla. S. Comm. On Banking & Ins., CS for SB 1170 (2006) Staff Analysis 20 (March 21, 2006)

### 5. Misc.

a) Irrelevant that trust terms are unambiguous

b) In determining settlor's original intent, court may consider evidence that contradicts an apparent plain meaning of the instrument

c) Trust provisions cannot override this statute [736.0105(j)]

### 6. Statute

736.0415 Reformation to correct mistakes.—Upon application of a settlor or any interested person, the court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intent if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intent even though the evidence contradicts an apparent plain meaning of the trust instrument.

History.—s. 4, ch. 2006-217.

## **H. Fla.Stats. §736.0416 - Judicial Modification Of Trust To Achieve Settlor's Tax Objectives**

### 1. Requirements

- a) Modification is to achieve settlor's tax objectives
- 2. Related Requirements
  - a) Service of process and statutory representation compliance
- 3. Changes Permitted
  - a) Modifications of terms to achieve settlor's tax objectives, if not contrary to settlor's probable intent
  - b) Retroactive changes permitted
- 4. Who can seek
  - a) Any interested person
- 5. Misc.
  - a) IRS respect for such modifications has to be separately determined
  - b) Trust provisions cannot override this statute [736.0105(j)]
- 6. Statute

736.0416 Modification to achieve settlor's tax objectives.—Upon application of any interested person, to achieve the settlor's tax objectives the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intent. The court may provide that the modification has retroactive effect.

History.—s. 4, ch. 2006-217.

## I. Common Law

- 1. Rescission
- 2. Modification or Reformation
- 3. Construction
- 4. Termination

## II. NONJUDICIAL MECHANISMS

### A. Fla.Stats. §736.0111 - Nonjudicial Settlement Agreements

- 1. Requirements
  - a) Interested persons enter into an agreement [.0111(1)]
  - b) If agreement is among trustee and trust beneficiaries, terms and conditions of agreement could be properly approved by the court [.0111(3)]
- 2. Changes Permitted
  - a) Any matter involving a trust [.0111(2)]
    - (1) But subject to limitations that the agreement is valid only to the extent (a) the terms and conditions could be properly approved by the court, and (b) cannot be used to produce a result not authorized by other provisions of the code such as terminating or modifying a trust in an impermissible manner [.0111(3)]
  - b) Specifically authorized matters:

- (1) Interpretation or construction of the terms of the trust [.0111(4)(a)]
- (2) Approval of a trustee's report or accounting [.0111(4)(b)]
- (3) Direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power [.0111(4)(c)]
- (4) Resignation or appointment of a trustee and the determination of a trustee's compensation [.0111(4)(d)]
- (5) Transfer of a trust's principal place of administration [.0111(4)(e)]
- (6) Liability of a trustee for an action relating to the trust [.0111(4)(f)]

### 3. Who can seek

- a) "Interested persons" - persons whose interest would be affected by a settlement agreement [.0111(1)]

### 4. Misc.

- a) Any interested person may request the court to approve or disapprove a nonjudicial settlement agreement [.0111(5)]

### 5. Statute

#### 736.0111 Nonjudicial settlement agreements.—

(1) For purposes of this section, the term “interested persons” means persons whose interest would be affected by a settlement agreement.

(2) Except as otherwise provided in subsection (3), interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

(3) A nonjudicial settlement agreement among the trustee and trust beneficiaries is valid only to the extent the terms and conditions could be properly approved by the court. A nonjudicial settlement may not be used to produce a result not authorized by other provisions of this code, including, but not limited to, terminating or modifying a trust in an impermissible manner.

(4) Matters that may be resolved by a nonjudicial settlement agreement include:

- (a) The interpretation or construction of the terms of the trust.
- (b) The approval of a trustee’s report or accounting.
- (c) The direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power.
- (d) The resignation or appointment of a trustee and the determination of a trustee’s compensation.
- (e) The transfer of a trust’s principal place of administration.
- (f) The liability of a trustee for an action relating to the trust.

(5) Any interested person may request the court to approve or disapprove a nonjudicial settlement agreement.

## B. Fla.Stats. §736.04117 - Trustee's Power To Invade Principal (Decanting)

### 1. Requirements

a) Trustee has absolute power under the terms of the trust to invade principal [.04117(1)(a)]

(1) This includes a power to invade principal not limited to specific or ascertainable purposes (such as HEMS) [.04117(1)(b)]

(2) Term "absolute" does not have to be included [.04117(1)(b)]

(3) Terms like "best interests," "comfort," "happiness," and "welfare" constitute an absolute power [.04117(1)(b)]

b) No express prohibition in the trust instrument against decanting [.04117(a)(1)]

c) Must be by an instrument in writing, signed and acknowledged by the trustee, and filed with the records of the first trust [.04117(2)]

d) Trustee must notify all qualified beneficiaries of first trust, in writing, 60 days before exercising the power to invade principal of the manner in which the trustee intends to exercise the power [.04117(4)]

(1) Copy of proposed instrument exercising the power satisfies this notice obligation [.04117(4)]

(2) If all qualified beneficiaries waive the notice period by signed written instrument delivered to the trustee, the trustee can exercise this power immediately [.04117(4)]

(3) Trustee's notice does not limit the right of a beneficiary to object to the trustee's exercise of this power [.04117(4)]

### 2. Misc. Requirements

a) Exercise of the power to invade principal is considered an exercise of a power of appointment and is subject to s. 689.225 relating to the rule against perpetuities period [.04117(3)]

### 3. Changes Permitted

a) Appointment of all or part of the principal subject to the power to a trustee of another trust (the "second trust") [.04117(1)(a)1]

(1) Can be a trust under the same trust instrument or a new trust instrument [.04117(1)(a)1]

b) Second trust may only include beneficiaries of first trust [.04117(1)(a)1]

(1) But need not include all of them [.04117(1)(a)]

c) Second trust may not reduce any fixed income, annuity, or unitrust interest in the assets of the first trust [.04117(1)(a)2]

d) If the first trust qualified for the marital/charitable deduction, the second trust can not contain any provisions which, if included in the first trust, would prevent the first trust from qualifying for that deduction [.04117(1)(a)3]

### 4. Who can seek

a) Trustee [.04117(1)(a)]

### 5. Misc.

- a) The exercise of the power to invade principal is not prohibited by a spendthrift clause or by a provision that prohibits amendment/revocation [.04117(5)]
  - b) There is no duty to exercise this power, nor will there be an inference of impropriety if a trustee does not exercise this power [.04117(6)]
  - c) This section does not abridge the right of a trustee who has a power of invasion to appoint property in further trust under the terms of the first trust, the code or common law [.04117(7)]
  - d) Comment- Consider moving trust to another state that has more liberal decanting mechanisms
6. Statute

736.04117 Trustee’s power to invade principal in trust.—

(1) Definitions.--As used in this section, the term:

(a) “Absolute power” means a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support, regardless of whether the term “absolute” is used. A power to invade principal for purposes such as best interests, welfare, comfort, or happiness constitutes an absolute power not limited to specific or ascertainable purposes.

(b) “Authorized trustee” means a trustee, other than the settlor or a beneficiary, who has the power to invade the principal of a trust.

(c) “Beneficiary with a disability” means a beneficiary of the first trust who the authorized trustee believes may qualify for government benefits based on disability, regardless of whether the beneficiary currently receives those benefits or has been adjudicated incapacitated.

(d) “Current beneficiary” means a beneficiary who, on the date his or her qualification is determined, is a distributee or permissible distributee of trust income or principal. The term includes the holder of a presently exercisable general power of appointment but does not include a person who is a beneficiary only because he or she holds another power of appointment.

(e) “Government benefits” means financial aid or services from any state, federal, or other public agency.

(f) “Internal Revenue Code” means the Internal Revenue Code of 1986, as amended.

(g) “Power of appointment” has the same meaning as provided in s. 731.201.

(h) “Presently exercisable general power of appointment” means a power of appointment exercisable by the power holder at the relevant time. The term:

1. Includes a power of appointment that is exercisable only after the occurrence of a specified event or that is subject to a specified restriction, but only after the event has occurred or the restriction has been satisfied.
2. Does not include a power of appointment that is exercisable only upon the death of the power holder.

(i) “Substantially similar” means that there is no material change in a beneficiary’s beneficial interests or in the

power to make distributions and that the power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to the power under the first trust to make a distribution directly to the beneficiary. A distribution is deemed to be for the benefit of a beneficiary if:

1. The distribution is applied for the benefit of a beneficiary;
2. The beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated, and the distribution is made as permitted under this code; or
3. The distribution is made as permitted under the terms of the first trust instrument and the second trust instrument for the benefit of the beneficiary.

(j) "Supplemental needs trust" means a trust that the authorized trustee believes would not be considered a resource for purposes of determining whether the beneficiary who has a disability is eligible for government benefits.

(k) "Vested interest" means a current unconditional right to receive a mandatory distribution of income, a specified dollar amount, or a percentage of value of a trust, or a current unconditional right to withdraw income, a specified dollar amount, or a percentage of value of a trust, which right is not subject to the occurrence of a specified event, the passage of a specified time, or the exercise of discretion.

1. The term includes a presently exercisable general power of appointment.
2. The term does not include a beneficiary's interest in a trust if the trustee has discretion to make a distribution of trust property to a person other than such beneficiary.

(2) Distribution from first trust to second trust when authorized trustee has absolute power to invade.--

(a) Unless a trust instrument expressly provides otherwise, an authorized trustee who has absolute power under the terms of the trust to invade its principal, referred to in this section as the "first trust," to make current distributions to or for the benefit of one or more beneficiaries may instead exercise such power by appointing all or part of the principal of the trust subject to such power in favor of a trustee of one or more other trusts, whether created under the same trust instrument as the first trust or a different trust instrument, including a trust instrument created for the purposes of exercising the power granted by this section, each referred to in this section as the "second trust," for the current benefit of one or more of such beneficiaries only if:

1. The beneficiaries of the second trust include only beneficiaries of the first trust; and
2. The second trust does not reduce any vested interest.

(b) In an exercise of absolute power, the second trust may:

1. Retain a power of appointment granted in the first trust;
2. Omit a power of appointment granted in the first trust, other than a presently exercisable general power of

appointment;

3. Create or modify a power of appointment if the power holder is a current beneficiary of the first trust;
4. Create or modify a power of appointment if the power holder is a beneficiary of the first trust who is not a current beneficiary, but the exercise of the power of appointment may take effect only after the power holder becomes, or would have become if then living, a current beneficiary of the first trust; and
5. Extend the term of the second trust beyond the term of the first trust.

(c) The class of permissible appointees in favor of which a created or modified power of appointment may be exercised may differ from the class identified in the first trust.

(3) Distribution from first trust to second trust when authorized trustee does not have absolute power to invade.--Unless the trust instrument expressly provides otherwise, an authorized trustee who has a power, other than an absolute power, under the terms of a first trust to invade principal to make current distributions to or for the benefit of one or more beneficiaries may instead exercise such power by appointing all or part of the principal of the first trust subject to such power in favor of a trustee of one or more second trusts. If the authorized trustee exercises such power:

(a) The second trusts, in the aggregate, shall grant each beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to the beneficial interests of the beneficiary in the first trust.

(b) If the first trust grants a power of appointment to a beneficiary of the first trust, the second trust shall grant such power of appointment in the second trust to such beneficiary, and the class of permissible appointees shall be the same as in the first trust.

(c) If the first trust does not grant a power of appointment to a beneficiary of the first trust, the second trust may not grant a power of appointment in the second trust to such beneficiary.

(d) Notwithstanding paragraphs (a), (b), and (c), the term of the second trust may extend beyond the term of the first trust, and, for any period after the first trust would have otherwise terminated, in whole or in part, under the provisions of the first trust, the trust instrument of the second trust may, with respect to property subject to such extended term:

1. Include language providing the trustee with the absolute power to invade the principal of the second trust during such extended term; and

2. Create a power of appointment, if the power holder is a current beneficiary of the first trust, or expand the class of permissible appointees in favor of which a power of appointment may be exercised.

(4) Distribution from first trust to supplemental needs trust.--

(a) Notwithstanding subsections (2) and (3), unless the trust instrument expressly provides otherwise, an authorized trustee who has the power under the terms of a first trust to invade the principal of the first trust to make current distributions to or for the benefit of a beneficiary with a disability may instead exercise such



power by appointing all or part of the principal of the first trust in favor of a trustee of a second trust that is a supplemental needs trust if:

1. The supplemental needs trust benefits the beneficiary with a disability;
2. The beneficiaries of the second trust include only beneficiaries of the first trust; and
3. The authorized trustee determines that the exercise of such power will further the purposes of the first trust.

(b) Except as affected by any change to the interests of the beneficiary with a disability, the second trusts, in the aggregate, shall grant each other beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to such other beneficiary's beneficial interests in the first trust.

(5) Prohibited distributions.--

(a) An authorized trustee may not distribute the principal of a trust under this section in a manner that would prevent a contribution to that trust from qualifying for, or that would reduce a federal tax benefit, including a federal tax exclusion or deduction, which was originally claimed or could have been claimed for that contribution, including:

1. An exclusion under s. 2503(b) or s. 2503(c) of the Internal Revenue Code;
2. A marital deduction under s. 2056, s. 2056A, or s. 2523 of the Internal Revenue Code;
3. A charitable deduction under s. 170(a), s. 642(c), s. 2055(a), or s. 2522(a) of the Internal Revenue Code;
4. Direct skip treatment under s. 2642(c) of the Internal Revenue Code; or
5. Any other tax benefit for income, gift, estate, or generation-skipping transfer tax purposes under the Internal Revenue Code.

(b) If S corporation stock is held in the first trust, an authorized trustee may not distribute all or part of that stock to a second trust that is not a permitted shareholder under s. 1361(c)(2) of the Internal Revenue Code. If the first trust holds stock in an S corporation and is, or but for provisions of paragraphs (a), (c), and (d) would be, a qualified subchapter S trust within the meaning of s. 1361(d) of the Internal Revenue Code, the second trust instrument may not include or omit a term that prevents it from qualifying as a qualified subchapter S trust.

(c) Except as provided in paragraphs (a), (b), and (d), an authorized trustee may distribute the principal of a first trust to a second trust regardless of whether the settlor is treated as the owner of either trust under ss. 671-679 of the Internal Revenue Code; however, if the settlor is not treated as the owner of the first trust, he or she may not be treated as the owner of the second trust unless he or she at all times has the power to cause the second trust to cease being treated as if it were owned by the settlor.

(d) If an interest in property which is subject to the minimum distribution rules of s. 401(a)(9) of the Internal

Revenue Code is held in trust, an authorized trustee may not distribute such an interest to a second trust under subsection (2), subsection (3), or subsection (4) if the distribution would shorten the otherwise applicable maximum distribution period.

(6) Exercise by writing.--The exercise of a power to invade principal under subsection (2), subsection (3), or subsection (4) must be by a written instrument signed and acknowledged by the authorized trustee and filed with the records of the first trust.

(7) Restrictions on exercise of power.--The exercise of a power to invade principal under subsection (2), subsection (3), or subsection (4):

(a) Is considered the exercise of a power of appointment, excluding a power to appoint to the authorized trustee, the authorized trustee's creditors, the authorized trustee's estate, or the creditors of the authorized trustee's estate.

(b) Is subject to the provisions of s. 689.225 covering the time at which the permissible period of the rule against perpetuities begins and the law that determines the permissible period of the rule against perpetuities of the first trust.

(c) May apply to a second trust created or administered under the law of any jurisdiction.

(d) May not:

1. Increase the authorized trustee's compensation beyond the compensation specified in the first trust instrument; or

2. Relieve the authorized trustee from liability for breach of trust or provide for indemnification of the authorized trustee for any liability or claim to a greater extent than the first trust instrument; however, the exercise of the power may divide and reallocate fiduciary powers among fiduciaries and relieve a fiduciary from liability for an act or failure to act of another fiduciary as otherwise allowed under law or common law.

(8) Notice.--

(a) The authorized trustee shall provide written notification of the manner in which he or she intends to exercise his or her power to invade principal to all of the following parties at least 60 days before the effective date of the authorized trustee's exercise of such power pursuant to subsection (2), subsection (3), or subsection (4):

1. All qualified beneficiaries of the first trust.

2. If paragraph (5)(c) applies, the settlor of the first trust.

3. All trustees of the first trust.

4. Any person who has the power to remove or replace the authorized trustee of the first trust.

(b) The authorized trustee's obligation to provide notice under this subsection is satisfied when he or she provides copies of the proposed instrument exercising the power, the trust instrument of the first trust, and the proposed trust instrument of the second trust.

(c) If all of those required to be notified waive the notice period by signed written instrument delivered to the authorized trustee, the authorized trustee's power to invade principal shall be exercisable immediately.

(d) The authorized trustee's notice under this subsection does not limit the right of any beneficiary to object to the exercise of the authorized trustee's power to invade principal except as otherwise provided in other applicable provisions of this code.

(9) Inapplicability of spendthrift clause or other prohibition.--The exercise of the power to invade principal under subsection (2), subsection (3), or subsection (4) is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(10) No duty to exercise.--Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety may be made as a result of an authorized trustee's failure to exercise the power to invade principal conferred under subsections (2), (3), and (4).

(11) No abridgement of common law rights.-- This section may not be construed to abridge the right of any trustee who has a power of invasion to appoint property in further trust that arises under the terms of the first trust or under any other section of this code or under another provision of law or under common law.

## C. Fla.Stats. §736.0412 - Nonjudicial Modification After Settlor's Death

### 1. Requirements

a) Settlor deceased [.0412(1)]

b) Unanimous agreement of the trustee and all qualified beneficiaries [.0412(1)]

c) Trust created on or after January 1, 2001 [.0412(4)(a)]

(1) Revocable trust treated as created when right of revocation terminates [.0412(5)]

d) Trust does not have a 90 year perpetuities vesting period [.04113(b)]

(1) Can still meet this requirement with a 90 year period if trust terms expressly authorize nonjudicial modification

e) Trust does not have a common law "lives in being plus 21 years" perpetuities period [.04113(b)]

(1) Can still meet this requirement with a "lives in being" period if trust terms expressly authorize nonjudicial modification

f) Cannot modify a trust for which a charitable deduction is allowed until all charitable interests terminate [.0412(4)(c)]

### 2. Misc. Requirements

a) Provisions of this section are in addition to rights under common law to modify, amend, terminate or revoke trusts [.0412(6)]

### 3. Changes Permitted

a) Any modification authorized under s. 736.04113(2)

- (1) Amend or change the terms of the trust, including terms governing the distribution of the trust income or principal or terms governing administration of the trust [736.04113(2)(a)]
- (2) Terminate the trust in whole or in part [736.04113(2)(b)]
- (3) Direct or permit the trustee to do acts that are not authorized or that are prohibited by the terms of the trust [736.04113(2)(c)]
- (4) Prohibit the trustee from performing acts that are permitted or required by the terms of the trust [736.04113(2)(d)]

#### 4. Who can seek

- a) Trustee and all qualified beneficiaries [.0412(1)]

#### 5. Misc.

- a) Modification is not prohibited by a spendthrift clause or by trust provision prohibiting amendment/revocation [.0412(2)]
  - (1) Except as provided in .0412(2), terms of trust cannot override this section [736.0105(2)(k)]
- b) Agreement to modify trust under this section is binding on beneficiary represented by another person under Part III [.0412(3)]
- c) Any beneficiary (not just a qualified beneficiary) can commence a proceeding to disapprove a proposed modification [736.0410(2)]

#### 6. Statute

##### 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.

## D. Fla.Stats. §736.0414 - Judicial Or Nonjudicial Modification Or Termination Of An Uneconomic Trust

### 1. Nonjudicial

#### a) Modification

(1) See discussion under Judicial Modification

#### b) Termination

##### (1) Requirements

(a) Notice to qualified beneficiaries [.0414(1)]

(b) Trust property valued at less than \$50,000 [.0414(1)]

(c) Trustee determines that the value of the trust property is insufficient to justify the cost of administration [.0414(1)]

##### (2) Changes Permitted

(a) Trust can be terminated [.0414(1)]

*(i) Upon termination, trustee must distribute the property in a manner consistent with the purposes of the trust. [.0414(3)]*

*(ii) Trustee can enter into agreements or make other provisions necessary to protect the interests of beneficiaries and trustee and to carry out the intent of the trust [.0414(3)]*

##### (3) Who can seek

(a) Trustee [.0414(1)]

##### (4) Misc.

(a) Existence of a spendthrift provision does not make this section inapplicable unless the trust expressly says that the trustee may not terminate under this section [.0414(4)]

(b) Does not apply to an easement for conservation or preservation [.0414(5)]

(c) Any qualified beneficiary may commence a proceeding to disapprove a proposed termination [736.0410(3)]

### 2. Judicial

a) See discussion under Judicial Modification discussion of this statute

### 3. Statute

#### 736.0414 Modification or termination of uneconomic trust.—

(1) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than \$50,000 may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

(2) Upon application of a trustee or any qualified beneficiary, the court may modify or terminate a trust or remove the trustee and appoint a different trustee if the court determines that the value of the trust property is insufficient to justify the cost of administration.

(3) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust. The trustee may enter into agreements or make such other provisions that the trustee deems necessary or appropriate to protect the interests of the beneficiaries and the trustee and to carry out the intent and purposes of the trust.

(4) The existence of a spendthrift provision in the trust does not make this section inapplicable unless the trust instrument expressly provides that the trustee may not terminate the trust pursuant to this section.

(5) This section does not apply to an easement for conservation or preservation.

## E. Fla.Stats. §736.0417 - Combination And Division Of Trusts

### 1. Requirements

- a) Notice to the qualified beneficiaries [.0417(1)]
- b) Combination or division may not impair rights of any beneficiary or adversely affect achieve of the purposes of the trust [.0417(1)]

### 2. Misc. Requirements

- a) Trusts don't have to be identical for this section to apply
- b) The types of actions permitted under Fla.Stats. §736.0417 may exceed what are permissible from a tax standpoint. Trustees should exercise caution as tax law requirements for trust combinations and severances vary with the context.

### 3. Changes Permitted

- a) Combine two or more trusts into a single trust [.0417(1)]
- b) Divide a trust into two or more separate trusts [.0417(1)]

### 4. Who can seek

- a) Trustee [.0417(1)]

### 5. Misc.

- a) Subject to the terms of the trust, the trustee may take into considerations differences in federal tax attributes and other factors in administering the trust, in making tax elections and making distributions [.0417(2)]
- b) Separate trusts must be treated as separate trusts for all purposes from date severance is effective [.0417(2)]
- c) Severance date can be retroactive to before the date the trustee exercised the power [.0417(2)]
- d) Any beneficiary (not just a qualified beneficiary) can commence a proceed to disapprove a proposed modification or termination [736.0410(2)]

### 6. Statute

736.0417 Combination and division of trusts.—

(1) After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trusts or trust, respectively.

(2) Subject to the terms of the trust, the trustee may take into consideration differences in federal tax attributes and other pertinent factors in administering the trust property of any separate account or trust, in making applicable tax elections, and in making distributions. A separate trust created by severance must be treated as a separate trust for all purposes from the date on which the severance is effective. The effective date of the severance may be retroactive to a date before the date on which the trustee exercises such power.

**F. Fla.Stats. §736.0602(1) Settlor Power To Amend Or Revoke Non-Irrevocable Trust**

1. Florida trusts executed on or after July 1, 2007 are considered revocable by the settlor if the trust does not expressly provide it is irrevocable. Fla.Stats. §736.0602(1).

a) The opposite rule applies for trusts executed before July 1, 2007. *Macfarlane v. First Nat. Bank of Miami*, 203 So.2d 57 (3rd DCA 1967).

**G. Fla.Stats. §736.1206 - Charitable Trusts**

1. Requirements

a) Trust used solely for named charitable organization(s) [.1206(1)]

b) Trustee does not have any discretion concerning distributions of income/principal among organizations [.1206(1)]

c) Consent of all named charitable organizations [.1206(1)]

2. Misc. Requirements

a) In the case of a trust that does not meet the above requirements, trustee may amend the trust to comply with Fla.Stats. §736.1204(2) with the consent of and notice to the state attorney

3. Changes Permitted

a) May amend the governing instrument to comply with the provisions of s. 736.1204(2)

(1) So that the trust is not subject to tax under s.4942 of the Internal Revenue Code

4. Who can seek

a) Trustee

5. Statute

736.1206. Power to amend trust instrument

(1) In the case of a trust that is solely for a named charitable organization or organizations and for which the trustee does not possess any discretion concerning the distribution of income or principal among two or more such organizations, the trustee may amend the governing instrument to comply with the provisions of s.

736.1204(2) with the consent of the named charitable organization or organizations.

(2) In the case of a charitable trust that is not subject to subsection (1), the trustee may amend the governing instrument to comply with s. 736.1204(2) after delivery of notice to, and with the consent of, the Attorney General.

## H. Specific Trust Instrument Amendment Provisions

1. To extent not prohibited by law

## I. Common Law

1. Termination

2. Modification

3. E.g., trust could be modified by settlor and beneficiaries, even over objection of trustee, and without regard to whether purposes of the trust have been fulfilled, applying common law principles and notwithstanding the statutory methods of termination. *Peck v. Peck*, 133 So.3d 587 (Fla. 2d DCA February 26, 2014)

## III. OTHER/UNUSUAL METHODS

### A. Fla.Stats. §736.0201(2) & (4) - Court Intervention In The Administration Of A Trust

1. Who can seek

a) Interested person or as provided by law

2. Misc.

a) Uncertain scope of what may be obtained from a court under this statute. See Fla.Stats. §736.0201(4).

3. Statute

(2) The court may intervene in the administration of a trust to the extent the court's jurisdiction is invoked by an interested person or as provided by law.

### B. Fla.Stats. §736.1012 - Beneficiary Consent

1. Usage

a) May allow an effective modification if beneficiaries release trustee from liability of breach of trust, thus freeing the trustee to act outside of the terms of the trust. Thus, if all potentially impacted beneficiaries consent, it may sanction a breach of trust as a practical matter.

(1) Does not directly authorize an amendment - it is only a waiver of liability for the trustee for a breach of trust

(2) May also require waiver of right to enforce a provision of the trust

2. Requirements

a) Applicable beneficiaries either consent to, released the trustee from liability for, or ratify, the subject breach of trust [.1012]



b) Unless:

- (1) The consent, release, or ratification was induced by improper trustee conduct, or [.1012(1)]
- (2) At the time of the consent, release, or ratification, the beneficiary did not know of his or her rights or of the material facts [.1012(2)]

### 3. Statute

736.1012 Beneficiary's consent, release, or ratification.—A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

- (1) The consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or
- (2) At the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

History.—s. 10, ch. 2006-217.

## C. Fla.Stats. §736.0406 - Effect Of Fraud, Duress, Mistake Or Undue Influence (Voiding)

### 1. Requirements

- a) The creation, amendment or restatement of a trust procured by fraud, duress, mistake or undue influence

### 2. Effects

- a) The trust or the part so procured is void, and the remainder of the trust is not void
- b) May be applied to void a revocation of a trust

### 3. Misc.

- a) Effective without a judicial determination?
  - (1) If yes, trustee or parties act at their own peril without a judicial determination

### 4. Statute

736.0406 Effect of fraud, duress, mistake, or undue influence.— If the creation, amendment, or restatement of a trust is procured by fraud, duress, mistake, or undue influence, the trust or any part so procured is void. The remainder of the trust not procured by such means is valid if the remainder is not invalid for other reasons. If the revocation of a trust, or any part thereof, is procured by fraud, duress, mistake, or undue influence, such revocation is void.

History.—s. 4, ch. 2006-217; s. 10, ch. 2011-183.

## D. Fla.Stats. §744.441(19) - Power Of Guardian To Create Irrevocable Trusts For Ward's Property

#### IV. MISC

- A. Subject To Limitations Periods, Under Applicable Statutes, Rules, And Common Law Doctrines, Including Trust Limitations Notices
- B. Tax Authorities May Not Be Bound By Any Of The Described Changes Or Actions For Tax Purposes
- C. The Information Contained Herein Is Condensed From, And A General Summary Of, Legislation, Rules, And Other Information, May Not Be Up-to-date, And Should Not Be Construed As Legal Advice Or Opinion, And Is Not A Substitute For The Advice Of Counsel

#### V. OTHER LINKS FROM THE AUTHORS

- A. [www.floridatax.com](http://www.floridatax.com)
- B. [www.rubinontax.floridatax.com](http://www.rubinontax.floridatax.com)
- C. [home.rubinonprobatelit.com](http://home.rubinonprobatelit.com)
- D. [www.rubinonfloridahomestead.com](http://www.rubinonfloridahomestead.com)