



## **CAN I AMEND MY REVOCABLE TRUST WITH A NON-TESTAMENTARY DIRECTIVE**

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### **EXECUTIVE SUMMARY:**

The recent 3<sup>rd</sup> District Court of Appeals case of *Kritchman v. Wolk*, Nos. 3D12-2977, 3D12-2457, has reinforced, under Florida law, a cause of action against the trustee(s) of a Revocable Trust for breach of Trust and the potential for the settlor to amend their trust without compliance with Section 736.0405(2)(b) of the Florida Statutes. The case evolved from a correspondence (the "Note") the Settlor of a Revocable Trust's had written to the co-trustee during her lifetime. The Note did not comply with the requirements of Section 736.0405(2)(b) of the Florida Statutes (which requires that all testamentary directives in wills and trusts be in writing and witnessed) but advised the co-trustee that the Settlor had been paying for her first cousin's grandson's (the "grandson") private school and college education expenses for seven years and that she wanted her Trust to continue to pay for his remaining college education expenses. Shortly thereafter, the Settlor passed away. Upon her death, the Settlor's son became a successor individual co-trustee of the Trust. Consistent with the terms of the Note, the successor corporate co-trustee paid the grandson's educational expenses for the fall semester, but thereafter refused to make any educational payments on his behalf. The grandson then sued the successor co-trustees for breach of written and oral contracts, promissory estoppel, and breach of trust. On appeal, the 3<sup>rd</sup> DCA affirmed the trial court order which found that the failure of the successor co-trustees to carry out the terms of the Note violated

multiple sections of the Florida Statutes and these breaches of duty establish the liability of the successor co-trustees for a breach of trust.

## FACTS:

The Settlor created a revocable trust (the “Trust”) and amended it on several occasions during her lifetime. The terms of the Trust specified that the Trustee was to “pay such sums from principal as [the Settlor] may direct at any time.” For the seven years, prior to the Settlor’s death, the Settlor had instructed her trust officer to pay for her grandson’s private school and college education expenses. Shortly before her death, she corresponded with her co-trustee and advised them as follows:

“[a]s you know, I have agreed to pay for Hunter’s college education at Yale, as I have for the last 2 years. Thank you for your assistance with the logistics. He will be beginning his junior year in September 2010 and his senior year in 2011. Please make arrangements so that his costs will be paid for those 2 years as well. The cost for his junior year is forty nine thousand eight hundred dollars, which you will see when the school sends its documentation in the next month or so. Thank you for taking care of this on my behalf.”(the “Note”)

The successor corporate co-trustee then paid for the grandson’s next semester of college. Subsequently, the successor corporate co-trustee refused to pay the grandson’s tuition, room, and board for his last three semesters at college.

As a result of the successor co-trustees refusal to pay the college education expenses, the grandson sued for breach of written and oral contracts, promissory estoppel, and breach of trust. In defense, the successor co-trustees asserted affirmative defenses based on the statute of frauds and an interpretation of the Trust Agreement that nullified the Settlor’s Note upon her death. The trial court subsequently granted final judgment in favor of the grandson on (a) the breach of oral contract count for the unpaid college expenses; and (b) the breach of trust claim, for the unpaid college expenses, as well as other expenses, such as books and health insurance; and (a) reserved jurisdiction to consider future damages for graduate school tuition; and (b) concluded that the co-trustees were required to disgorge any amounts removed from the Trust to pay their respective legal expenses.

The trial court held that the successor co-trustees actions, in failing to carry out the terms of the Trust, violated sections 736.0801, Florida Statutes (2010) (duty to administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries), 736.0803 (duty to act impartially as among

beneficiaries), and 736.0804 (duty to prudently administer the trust by considering the purposes, terms, distribution requirements, and other circumstances of the trust). The trial court held that these breaches of duty establish the liability of the successor co-trustees for a breach of trust. § 736.1001(1), Fla. Stat. (2010).

The successor co-trustees then appealed the final judgment against them in favor of the grandson to the 3<sup>rd</sup> DCA. The 3<sup>rd</sup> DCA affirmed the trial court's rulings as to the successor co-trustees' breach of the Trust and the directive for disgorgement of attorney's fees and costs paid from the Trust to, or for the benefit of, the successor co-trustees. In doing so, the 3<sup>rd</sup> DCA rejected the successor co-trustees argument that it reasonably relied on the language of the Trust Agreement and focused on the fact the Trust specifically states that the co-trustee "shall" pay such sums as the Settlor might direct at any time.

## COMMENT:

The case is unique in that it effectively allowed a written correspondence from the Settlor of the Trust to a co-trustee, which did not comply with the requirements of Section 736.0405(2)(b) of Florida's Statute, that all testamentary directives in wills and trusts be in writing and witnessed, to amend the terms of the Trust. As a result, it is important to review our clients trust instruments to determine whether language of similar nature may be contained therein and what specific requirements (must be witnessed by two impartial persons and clearly setting forth the effective date of the action for which notice is being given) are required for a written instrument to impact the testamentary disposition.

**HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!**

*Marc Soss*

## CITES AS:

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## **CITES:**

*Kritchman v. Wolk*, Nos. 3D12-2977, 3D12-2457 (Florida Court of Appeals, Third District) October 1, 2014

§736.0801, Florida Statutes

§736.0803, Florida Statutes

§736.0804, Florida Statutes

§736.1001(1), Florida Statutes

§736.0405(2)(b), Florida Statutes