

## **WHEN THE FIDUCIARY'S AGENT ERRS: WHO PAYS?**

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## I. INTRODUCTION:

In Florida, a personal representative/trustee (“fiduciary”) may employ individuals to advise or assist him in the performance of his administrative duties and to perform acts of administration, including discretionary acts.

“So what?” you ask. Well, consider this scenario: You represent the beneficiary of an estate. The estate’s primary asset is the decedent’s residence. The personal representative retained an attorney to assist him with the sale of the decedent’s residence. After the closing, the title company makes the check payable to the attorney and the funds are deposited into the attorney’s trust account. The attorney embezzles the sale proceeds and dies shortly thereafter. How does your client recover her inheritance? Your initial reaction is to look to the personal representative (“PR”) for recovery – after all, he retained the attorney. Wouldn’t the doctrine of *Respondeat superior* apply? Not necessarily. If the PR used ordinary care in the selection of the attorney, and properly supervised the attorney, the PR would not be liable for the act of the attorney in stealing the funds. In *re Estate of Rosenthal*, 189 So.2d 507 (Fla. 3rd DCA 1966).

Your next step is to make a demand on the PR to pursue a claim against the attorney’s estate for the embezzled funds. However, since the estate is now insolvent, the PR, realizing that he will probably not be paid, refuses to retain an attorney to pursue the claim. Is the PR liable for the actions of his attorney, i.e., did he use ordinary care in the selection of the attorney and did he properly supervise the attorney? Has the PR breached his fiduciary duty by not pursuing recovery on behalf of the estate? Does the beneficiary have standing to make her own claim against the attorney’s estate? Can the PR assign the claim to the beneficiary and close out the estate?

Consider a second scenario: You represent the bank trustee of a large trust. The trustee, on the negligent advice of in-house counsel, creates a substantial tax liability for the trust. The beneficiary’s attorney makes a demand on your client to repay the trust. How do you advise your client? You blow the dust off of your copy of the probate code and turn to §737.402, Fla. Stat. The statute reads in relevant part: A trustee has the power to “employ persons, including attorneys, auditors, investment advisers, or agents, even if they are the trustee or associated with the trustee, to advise or assist the trustee in the performance of his or her administrative duties; to act without independent investigation upon their recommendations....” You smile to yourself with the confidence that you have earned your pay. With the statute in hand, you draft a letter to the beneficiary’s attorney pointing out the frivolous nature of his claim. The letter is earmarked for mailing the following morning.

That night, you wake up in a cold sweat! You ask yourself: “Does my client have a fiduciary duty to pursue a claim against its in-house counsel? If it does, isn’t the bank ultimately liable for the loss?” The next morning, you tear up the letter and ask your first year associate to prepare a research memo on this issue.

The focus of this presentation is what happens when the fiduciary’s agent errs. Is the fiduciary responsible for his agent’s negligent advice? If the fiduciary delegates administrative acts to the agent, is he responsible for his agent’s negligent performance? Is the fiduciary responsible for

his agent's criminal conduct? These are real concerns for both the fiduciary as well as the beneficiaries who stand to lose their entire inheritance.

## II. §§733.612 & 737.402, FLORIDA STATUTES

In 1974, the Florida legislature attempted to create a safe harbor for fiduciaries by enacting §733.612(19), Fla. Stat. for estates and §737.402(2)(y), Fla. Stat. for trusts. The relevant sections of the statutes read as follows:

### i. ESTATES:

Sec. 733.612 Transactions authorized for the personal representative; exceptions.—Except as otherwise provided by the will or court order, and subject to the priorities stated in s.733.805, without court order, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

\* \* \* \*

(19) Employ persons, including, but not limited to, attorneys, accountants, auditors, appraisers, investment advisers, and others, even if they are one and the same as the personal representative or are associated with the personal representative, to advise or assist the personal representative in the performance of administrative duties; act upon the recommendations of those employed persons without independent investigation; and, instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary. ...

### ii. TRUSTS:

Sec. 737.402 Powers of trustees conferred by this part.—

(1) From the creation of the trust until final distribution of the assets from the trust, a trustee has the power to perform every act that a prudent trustee would perform for the purposes of the trust, without court authorization, including, but not limited to, the powers specified in subsections (2) and (3) but subject to the limitations of subsection (4).

(2) Unless otherwise provided in the trust instrument, a trustee has the power:

\* \* \* \*

(y) To employ persons, including attorneys, auditors, investment advisers, or agents, even if they are the trustee or associated with the trustee, to advise or assist the trustee in the performance of his or her administrative duties; to act without independent investigation upon their recommendations; and, instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary.

## III. POST-STATUTORY CASE LAW

### i. Florida

Sec.733.612, Fla. Stat. became effective on 7/1/75. The only case in Florida discussing §733.612(19) is Wohl v. Lewy, 505 So.2d 525 (Fla. 3rd DCA 1987). There, the personal representatives retained the services of the decedent's long time accountant to prepare the federal tax returns for the estate. The accountant advised the personal representatives to take a marital

deduction which was ultimately disallowed by the Service. As a result, the personal representatives were surcharged for the attorney's fees, taxes, and penalties resulting from the accountant's negligence. The appellate court, in reversing the trial court, reasoned:

A personal representative is not an insurer of an estate's assets. In re Estate of Rosenthal, 189 So.2d 507, 508 (Fla. 3rd DCA 1966). A personal representative is held to the same standard of care as a trustee, that is, he must act as a prudent trustee would act in dealing with the property of another. §§733.602, 737.302, Fla. Stat. (1985). Section 733.612(21), Florida Statutes (1985), provides that a personal representative, acting reasonably, may employ an accountant to advise him and may act upon that advice without independent investigation. This is exactly what the personal representatives did. We see no indication that the personal representatives did not act reasonably and prudently in employing and taking the advice of the accountant. See *Armstrong's, Inc. v. Iowa Dept. of Revenue*, 320 N.W.2d 623 (Iowa 1982) (taxpayer's reliance on CPA to file return constituted reasonable cause for taxpayer's failure to file timely return). The filing of complex tax returns, estate or otherwise, almost always requires the services of a professional. The accountant's erroneous judgment call to take the marital deduction may or may not have been malpractice insofar as the accountant is concerned. That professional decision, however, cannot operate to create a surcharge against the personal representatives.

## ii. Out Of State

Sec.733.612 is modeled after the Uniform Probate Code §3-715. Additionally, Sec.737.402 is modeled after the Uniform Trustees' Powers Act§3 (the UTPA is modeled after the UPC). In construing a statute modeled after a uniform law, it is pertinent to resort to the holdings in other jurisdictions where the act is in force. *Teague v. Estate of Hoskins*, 709 So. 2d 1373 (Fla. 1998). In each of the following cases, the referenced State has a statute modeled after the UPC §3-715. Therefore, it is pertinent to resort to the holdings in the following cases to construe §733.612(19), Fla. Stat.

In *In re Estate of Gangloff*, 743 S.W. 2d 498 (Mo. App. 1987), the personal representative hired an attorney to provide advice in administering the estate and to handle various aspects of estate administration, including preparation of the federal estate tax return. At the close of the estate's first tax year, the attorney advised the personal representative that prepayment of the personal representative's and the attorney's fees would provide a deduction to the estate and a significant tax savings. Based in this advice, the personal representative made the payments. In addition, the attorney recommended that the personal representative secure an extension for filing the estate tax return. However, the attorney failed to advise the personal representative to pay the estimated tax with the extension. The Service assessed penalties and interest against the estate for the unpaid tax. Additionally, the attorney absconded with the unearned, prepaid fees.

At trial, the personal representative asserted that he relied on the advice of the attorney on both matters and that the relevant Missouri statute granted him the power to act without independent

investigation and constituted an absolute bar to a claim of breach of fiduciary duty. The trial court disagreed and found the personal representative liable for both matters.

The Missouri Supreme Court affirmed on the issue of the personal representative's premature payment of the attorney's fees and reversed on the issue of the personal representative's liability for the estate tax penalties and interest. The Court reasoned that prepayment of counsel fees on the advice of counsel that it was for "tax purposes" was unreasonable. A prudent trustee ought to have anticipated the possibility that in prepaying significant fees to an agent, there was a risk that for some reason the agent would be unable to perform completely and a loss might result to the estate. With regard to the tax liability, the personal representative is allowed to rely on the advice of an expert. A "personal representative is not strictly liable for the errors, omissions or malfeasance of the estate's agents unless he unreasonably relies on their advice. There is no evidence in the record that would indicate that Borgers had any knowledge of estate tax preparation. The preparation and filing of complex estate tax returns almost always requires the services of a professional. See *Wohl v. Lewy*, 505 So.2d 525, 526 (Fla. Dist. Ct. App. 1987). The court in *Wohl*, interpreting the same statutory language as Section 473.810, RSMo 1986, reached the same conclusion as we reach today. It found the personal representative was not liable when he accepted the erroneous advice of an accountant in the filing of an estate tax return because he acted reasonably in employing and taking the advice of the accountant."

In *Estate of Smith*, 767 S.W. 2d 29 (Mo. 1989), the personal representative, having no experience or familiarity with estate tax preparation, retained a certified public accountant, Ms. Taylor, to prepare and file the estate's federal tax return. As a direct result of Ms. Taylor's negligence, additional taxes, penalties and interest were assessed against the estate. The trial court surcharged the personal representative for these additional expenses. On appeal, the personal representative alleged that the trial court erred in surcharging him because the damages to the estate resulted from the negligent and unethical conduct of the accountant, Ms. Taylor. The Missouri Supreme Court agreed with the personal representative and reversed. The Court reasoned:

In this case, the evidence shows that the additional taxes, penalties and interest assessed against the estate resulted from the erroneous advice and ineffective assistance given to Melvin by Ms. Taylor, the estate's accountant. Melvin was aware that the federal estate tax had to be filed and paid within a specific time and asked Ms. Taylor if an extension could be obtained. She advised him that obtaining an extension would be no problem. Although she filed a request for an extension of time in which to file the return, she neglected to file a request for an extension of time in which to pay the tax. Another example of the order of error committed by Ms. Taylor concerned the filing of the Missouri estate tax return. Melvin asked Ms. Taylor if such a return needed to be filed and was advised that it was unnecessary. In these circumstances, the failure to file timely returns was not due to a lack of diligence or dereliction of duty on the part of Melvin with regard to ascertaining and meeting filing deadlines, but rather due to his reliance on Ms. Taylor's erroneous advice and assistance regarding substantive issues.

\* \* \* \* The record demonstrates that Melvin's delegation and reliance on Ms. Taylor were reasonable. Having no experience or familiarity with estate tax preparation, he retained the services of Ms. Taylor, a certified public accountant. Melvin relied upon Ms. Taylor to prepare and file the required tax returns for the estate. Melvin had no reason to question Ms. Taylor's competency until Mr. Sumner, the accountant who replaced her, discovered various problems with the estate taxes. Accordingly, the trial court's order directing the \$3,461 in taxes, interest and penalties which had been levied against the estate to be surcharged against any amount which might be distributed to Melvin under his mother's will is for reversal. The estate is not without a remedy for the damages it has sustained as a result of Ms. Taylor's malpractice; Melvin, as personal representative, can bring a malpractice action on behalf of the estate against her.

In *In re Estate of Markus*, 442 N.W. 2d 883 (Neb. 1989), the personal representative retained an attorney to assist him with the administration of the estate. Although the personal representative felt that it was in the best interest of the estate to sell some of the estate assets, his attorney erroneously advised him that the beneficiaries appeal of his appointment as personal representative terminated his authority to sell the estate assets. Accordingly, the personal representative delayed selling assets until the appeal was dismissed. In the interim, the assets declined in value. The beneficiaries sued the personal representative for damages resulting from his failure to sell the estate assets in a timely manner. The probate court ruled in favor of the personal representative and the beneficiaries appealed. In affirming the trial court, the Nebraska Supreme Court reasoned:

From November 9, 1983, through November 12, 1984, Stengel, acting as personal representative, listed and sold the real property of the estate. The heirs objected to the timing of these sales, claiming undue delay and damage by the failure of the personal representative to dispose of the real property either through his powers as personal representative or as special administrator. Stengel contends that he was without power to sell the real property during the pendency of the numerous appeals and that even if he did have the power, he relied on the advice of his attorney, who informed him he was without power to sell the real estate. At trial, Stengel's attorney, Jeff Jacobsen, testified that he did tell Stengel that Stengel was without power to sell the real property, and in fact sent a letter to the attorney for the heirs informing him of this belief.

\* \* \* \*

Neb. Rev. Stat. §§ 30-2476(21) (Reissue 1985) provides that a personal representative may properly "employ persons, including attorneys . . . to advise or assist the personal representative in the performance of his administrative duties; [and] act without independent investigation upon their recommendations . . ." (Emphasis supplied.) The evidence clearly supports the county court's finding that Stengel consulted with his attorney regarding the sale of the real property and that his attorney advised that he could not sell real estate pending the appeal proceedings. There is sufficient evidence in the record to support the finding of the trial court that Stengel's reliance on the advice of his attorney was reasonable in this case, as nothing occurred that would cause a reasonable and

prudent person to believe that the advice given by Stengel's attorney was incorrect.

In *Gurdschinsky v. Hartill*, 815 P.2d 851 (Alaska 1991), the personal representative was surcharged for penalties and interest incurred by the estate for filing the estate tax return late pursuant to AS 13.16.485(b). On appeal, the personal representative defended on the basis that she reasonably relied on the advice of her accountant who, she claims, informed her that the returns had been timely filed. The Alaska Supreme Court, in affirming the judgment of surcharge, reasoned:

Gurdschinsky makes several arguments to escape all or part of this surcharge. First, she argues that she reasonably relied on the advice of her accountant who, she claims, informed her that the returns had been timely filed. We have found no cases which absolve from liability a personal representative who took no steps to assure that the estate's tax return had been filed on time. See, e.g., *In re Estate of Bartlett*, 680 P.2d 369, 377 (Okla. 1984) (executor not excused by failure of legal counsel to notify him that taxes were due); *In re Estate of Lohm*, 440 Pa. 268, 269 A.2d 451 (Pa. 1970) (executor should be aware that deadline exists); see also 47 A.L.R.3d 512 (1973) (fiduciary cannot escape liability if he "blindly leaves all tax matters and considerations affecting an estate to his attorney"). We agree with those courts which hold that if the personal representative displays some effort to ascertain the deadline or comply with it, then a delay might be justified. See, e.g., *Estate of Smith*, 767 S.W.2d 29, 36 (Mo. 1989) (personal representative not personally liable after asking accountant to secure filing extension); *Giesen v. United States*, 369 F. Supp. 33, 35, 73-2 U.S. Tax Cas. (CCH) p12,950, 33 A.F.T.R.2d (P-H) 1372 (W.D. Wis. 1973) (financially inexperienced executor asked and was assured by tax attorney that taxes would be filed on time); see also *Wohl v. Lewy*, 505 So. 2d 525, 526 (Fla. App. 1987) (personal representative cannot be held liable for costs incurred in erroneously claiming tax deduction where he relied on advice of accountant).

In Gurdschinsky's case, she apparently left all tax matters to the accountant. Gurdschinsky does not point to any evidence in the record which shows that she tried to find out when the taxes were due. She merely claims that she interpreted a conversation with her accountant to mean that the estate's tax returns had been filed on time. We find that Gurdschinsky's mere passive acceptance of an interpretation of a conversation with her accountant does not relieve her of liability for penalties and interest.

In *In the Matter of the Estate of Thomas*, 532 N.W. 2d 676 (N. D. 1995), the decedent's will named his brother Phil as personal representative and his brother Richard as alternate personal representative. Phil subsequently resigned and Richard was appointed personal representative. The estate assets consisted in part of shares of stock in a real estate holding company. Richard sold the shares to Phil for par value without determining the value of the corporation. The beneficiary of the estate sued Richard for breach of fiduciary duty. Richard defended on the basis that he relied upon the advice of counsel in determining to sell the stock for par value. The trial court did not make a finding as to whether Richard's conduct constituted a breach of

fiduciary duty, but resolved the issue by finding that there was no evidence that the stock could have been sold for more than their par value. The Supreme Court reversed. The Court ruled that Richard breached his fiduciary duty by selling the shares of stock to Phil for par value without inquiring into the assets or financial status of the corporation and remanded for a determination of the true and correct value of the stock on the date of the sale to Phil. The Court reasoned:

A personal representative is a fiduciary who must observe the standards of care applicable to trustees. [Citations omitted]. The personal representative's fiduciary obligation requires that he act reasonably for the benefit of the heirs, creditors, and other parties interested in the estate...

The personal representative must settle and distribute the estate as expeditiously and efficiently as is consistent with the best interests of the estate. [Citations omitted]. The personal representative must inventory and determine fair market value of the decedent's property...

Richard's actions in selling the stock to Phil for par value fell far short of his obligation to determine fair market value and obtain the best possible price. Richard testified he did not know what assets the corporation owned, did not know the value of those assets, never looked at any financial records of the company, and did not employ an outside appraiser to value the corporation or its assets.[Citations omitted]. Richard clearly breached his fiduciary duties by selling estate assets without making any inquiry into their actual value.

Richard asserts, however, that his misconduct is excused because he relied upon the advice of counsel in determining to sell the stock to Phil at par value. In fact, Richard's response to every allegation in these cases is that he just did what the estate attorney, Schirado, told him.

A personal representative may not avoid liability for breach of his fiduciary duty to the heirs of the estate by asserting a blanket defense of reliance upon counsel. A personal representative may reasonably rely upon legal advice from counsel. [Citations omitted]. However, that rule does not translate to an all-encompassing defense for reliance upon counsel on non-legal duties specifically delegated to the personal representative. [Citations omitted]. The personal representative is responsible for the inventory and appraisal of the estate, and for sale of estate property. [Statutes omitted]. His fiduciary obligations related thereto are personal, and cannot be delegated to his attorney.

Finally, in *In re Estate of Obering*, 1998 Neb. App. LEXIS 141(Neb. App. 1998), Lowe was appointed as the estate's special administrator. The order invested Lowe "with the power and duty of a Personal Representative" without specific limitation or direction regarding the duration of his appointment, or as to his duties. Lowe immediately hired Evans, a local mechanic and collector of antique automobiles, to inventory the automobiles and parts which the decedent, Obering had stored on his property and to find the titles to those vehicles.

In the process of accomplishing his duties, Evans had to sort through massive quantities of rubbish outdoors and inside three structures located on the Obering property, including a house. All were in filthy condition. The evidence was uncontroverted that 20 or more cats regularly roamed the Obering property. When one of these cats would die, the decedent would pitch the carcass into a backroom of the house, into one of the cars stored on the property, or simply throw it in another place out of the way. Empty cat food cans and cat excrement were ubiquitous. Not surprisingly, Lowe found it difficult to locate a person who would clean the premises. Evans cleaned, to the extent that the cleaning did not interfere with the other duties for which he was hired.

The decedent's sister, Wilson, sought Lowe's removal as special administrator and nominated herself as personal representative of the estate. The probate court issued an order removing Lowe as the estate's special administrator and appointing Wilson as personal representative. As a result of his removal, Lowe filed an inventory, an accounting and a final report. The listed assets were composed principally of real property and more than 70 antique autos and parts. Wilson objected. She alleged that the inventory was incomplete, lacking listing for valuable personal property such as a coin collection and other collectibles, several antique automobiles, and a host of automobile parts. Wilson claimed that numerous unpaid bills listed by Lowe were inappropriate or unnecessary expenses not properly attributable to the estate. Wilson disputed the objectivity of Evans to gather, list, and appraise the numerous antique automobiles and associated parts owned by the estate. Wilson also asserted, in substance, that Lowe allowed estate assets to be converted, including several antique cars. The trial court overruled Wilson's objections and Wilson appealed. The appellate court, in affirming the lower court, reasoned in part:

We have thoroughly reviewed the record on appeal. The record is clear that Lowe not only testified as to all of the entries contained in his inventory, accounting, and final report, but he also adduced the testimony of Evans and Anderson, who testified regarding their numerous, frequent firsthand observations of the quantity and condition of Obering's real and personal property. Lowe was entitled as a matter of law to hire Evans to assist him in inventorying and appraising the contents of the Obering estate, and Lowe was further entitled to rely upon Evans' work and conclusions. Neb. Rev. Stat. §§§§ 30-2468 and 30-2476(21) (Reissue 1995). Accord, *In re Estate of Markus*, 232 Neb. 947, 442 N.W.2d 883 (1989). By his own testimony, and that of Anderson and Evans, Lowe amply established what was in the estate and how he arrived at that conclusion....[Emphasis added].

#### IV. ANALYSIS OF STATUTES

##### i. Sec.733.612(19), Fla. Stat.:

- a) The personal representative must act reasonably in employing agents.
- b) A personal representative can employ attorneys, accountants, auditors, appraisers, investment advisers, and others, even if they are one and the same as the personal representative or are associated with the personal representative to advise or assist him in the performance of

administrative duties, and can act upon their recommendations without independent investigation.

- A personal representative is a fiduciary who shall observe the standards of care applicable to trustee. If the trustee has special skills, or is named trustee on the basis of representations of special skills or expertise, the trustee is under a duty to use those skills. See §§733.602(1) and 737.302.

- It would not be reasonable for the personal representative to retain an agent with the same special skills or expertise as the personal representative.

- If the personal representative was named as PR on the basis of his representation of special skills or expertise, it would not be reasonable for the personal representative to retain an agent with the same special skills or expertise that the personal representative was represented to have.

- It would not be reasonable for the personal representative to retain an agent if he knows or should know (fails to inquire) that the agent is not qualified to act. See *Wohl v. Lewy*, 505 So.2d 525 (Fla. 3rd DCA 1987)(In finding for the PR, the court stated that it saw “no indication that the personal representatives did not act reasonably and prudently in employing and taking the advice of the accountant.”).

- Prepayment of counsel fees on the advice of counsel that it was for “tax purposes” is unreasonable. A prudent trustee ought to anticipate that the possibility that in prepaying significant fees to an agent, there is a risk that for some reason the agent would be unable to perform completely and a loss might result to the estate. In *re Estate of Gangloff*, 743 S.W. 2d 498 (Mo. App. 1987).

- It is not reasonable to rely on the advice of counsel for non-legal advice. In the *Matter of the Estate of Thomas*, 532 N.W. 2d 676 (N. D. 1995).

- The personal representative can employ his own employees to advise or assist him and can act on their recommendation without an independent investigation.

c) A personal representative can employ agents to perform any act of administration, whether or not discretionary.

- It would not be reasonable for the personal representative to delegate the entire administration of the estate to the agent. *Laramore v. Laramore*, 64 So.2d 662 (Fla. 1953); In *re Estate of Rosenthal*, 189 So.2d 507 (Fla. 3rd DCA 1966). Refer to Appendix 1.

- It would not be reasonable for the personal representative to retain an agent with the same special skills or expertise as the personal representative. Additionally, if the personal representative was named as PR on the basis of his representation of special skills or expertise, it would not be reasonable for the personal representative to retain an agent with the same special

skills or expertise that the personal representative was represented to have. See §§733.602(1) and 737.302.

■ Sec.518.112, Fla. Stat. is a safe harbor for a fiduciary delegating investment functions. If certain statutory conditions are satisfied, the fiduciary cannot be held responsible for the investment decisions nor actions or omissions of the investment agent to which the investment functions are delegated. Refer to Appendix 2.

■ The PR is not liable for the actions of his agent if he uses ordinary care in the selection of the agent and properly supervises the business entrusted to him. *Thomas v. Carlton*, 143 So. 780 (Fla. 1932); *In re Estate of Rosenthal*, 189 So.2d 507 (Fla. 3rd DCA 1966). Refer to Appendix 1. Compare Restatement (Second) Of Trusts §225. Refer to Appendix 3.

■ It would not be reasonable for the personal representative to retain an agent if he knows or should know (fails to inquire) that the agent is not qualified to perform an act of administration of the estate, i.e., such performance is beyond the area of expertise or skill of the agent.

ii. Sec. 737.402(1) & (2)(y), Fla. Stat.:

There are minor differences between §737.402(2)(y) and §733.612(19), Fla. Stat. Therefore, the analysis used above for §733.612(19), Fla. Stat. applies equally as well to §737.402(2)(y), Fla. Stat.

a) A trustee has the power perform every act that a prudent trustee would perform for the purposes of the trust.

b) A trustee can employ attorneys, auditors, investment advisers, or agents, even if they are one and the same as the trustee or associated with the trustee, to advise or assist him in the performance of administrative duties, and can act upon their recommendations without independent investigation.

c) A trustee can employ agents to perform any act of administration, whether or not discretionary.

## V. APPLICATION (POSSIBLE SCENARIOS):

What happens when the fiduciary's agent errs? There a number of possible scenarios: (a) the fiduciary could admit liability for the acts of his agent and reimburses the estate/trust; (b) the fiduciary could pursue an action against the agent on behalf of the estate/trust; (c) the beneficiary could pursue an action against the fiduciary; (d) the beneficiary could pursue an action against the agent; and (e) if the fiduciary refuses to pursue an action against the agent, the beneficiary could file a motion to appoint an administrator ad litem to pursue an action against the agent. Each alternative has its own concerns for the practitioner. Those concerns are expressed below.

**(a) FIDUCIARY REIMBURSES THE ESTATE/TRUST FOR THE LOSS CAUSED BY HIS AGENT**

This is the preferred alternative for the beneficiary. The beneficiary is made whole without litigation and the fiduciary maintains his relationship with the beneficiary (good PR!). Additionally, the fiduciary can sue the agent for indemnification.

**(b) FIDUCIARY PURSUES AN ACTION AGAINST THE AGENT ON BEHALF OF THE ESTATE/TRUST (Fiduciary vs. Agent)**

Assuming the fiduciary fails to reimburse the estate/trust for the loss caused by his agent, he can sue the agent on behalf of the estate/trust. However, there are a number of issues the fiduciary should consider prior to filing suit:

- Is the agent insolvent?
- Has the estate/trust been rendered insolvent by the agent's actions? If so, how is the fiduciary going to finance the litigation?
- Can the agent be located?
- Is the agent insured? If he is insured, does his policy cover the conduct in issue? (most policies do not cover intentional torts).

**(c) BENEFICIARY PURSUES AN ACTION AGAINST THE FIDUCIARY (Beneficiary vs. Fiduciary)**

This alternative assumes that the fiduciary has either breached his fiduciary duty to the beneficiary or is liable for the actions of his agent. However, as shown in section IV above, the fiduciary has numerous defenses to such an action.

Pursuant to the Restatement (Second) of Trusts §225, the beneficiary may have an cause of action against the fiduciary for failing to compel the agent to redress his wrong. However, §225 has not been adopted in Florida. Refer to Appendix 2.

**(d) BENEFICIARY PURSUES AN ACTION AGAINST THE AGENT (Beneficiary vs. Agent)**

From the fiduciary's perspective, this is the preferred course of action. Assuming there is no privity between the beneficiary and the agent, the PR/trustee can assign his claim against the agent to the beneficiary and hopefully close out the estate/trust. However, without an assignment of the fiduciary's claim, the beneficiary has potentially insurmountable defenses to overcome. Typically, the beneficiary does not discover the problem until the final accounting, in which case the statute of limitations may have expired. The "delayed discovery doctrine" is no longer a defense. *Davis vs. Monahan*, 2002 Fla. Lexis 2382 (Fla. 11/7/02). Equitable relief may be your only course of action. Additionally, there is no statutory basis for the recovery of attorney's fees against the agent.

With regard to the standing issue, ask: Is the beneficiary an intended beneficiary of the services performed by the agent? See *Kinney v. Shinholser*, 663 So.2d 643 (Fla. 5th DCA1995) (A beneficiary had standing to bring a negligence action against the PR's attorney and accountant for failing to advise the PR/surviving spouse regarding the tax consequences of not disclaiming the general power of appointment within nine months after her husband's death. The failure to disclaim resulted in increasing the tax liability of the surviving spouses' estate and a decrease in the size of the beneficiary's inheritance.)

**CORPORATE DIRECTOR, OFFICER, ADMINISTRATOR, AND MANAGER'S PERSONAL LIABILITY TO TRUST BENEFICIARIES FOR TORTS COMMITTED DURING THE COURSE OF EMPLOYMENT. THEY OWE A DUTY NOT ONLY TO THE CORPORATION, BUT ALSO TO THE BENEFICIARIES OF A TRUST ADMINISTERED BY THE CORPORATION.**

In *Beaubien v. Cambridge Consol.*, 652 So. 2d 936 (5th DCA 1995), the beneficiaries of a trust sued Carr, as successor director for the corporate trustee, for breach of fiduciary duty. It was alleged that Carr oversaw the management of the trust. The lower court granted Carr's motion to dismiss for failure to state of cause of action. The appellate court, in reversing the lower court, reasoned in part:

It is well settled that an individual acting for a corporate trustee may be personally liable to third persons injured by his actions even if the individual was acting as agent for the corporation. <sup>n1</sup> Such corporate agents owe duties not only to the corporation, but also to the beneficiaries of a trust administered by the corporation. *Scott on Trusts*, §§ 326.3 (1989). In this case, the plaintiffs clearly alleged that Carr was acting as the corporate trustee's agent -- manager -- administrator -- and that his actions or inactions caused them a loss. Under Florida law, such an individual may be held personally liable where a tort has been committed. See *Shee-Con, Inc. v. Al Seim Appraisal Service, Inc.*, 427 So. 2d 311 (Fla. 5th DCA 1983); *Lee B. Stern & Co., Ltd. v. Green*, 398 So. 2d 918 (Fla. 3d DCA 1981); *Adams v. Brickell Townhouse, Inc.*, 388 So. 2d 1279 (Fla. 3d DCA 1980); *Dade Roofing and Insulation Corp. v. Torres*, 369 So. 2d 98 (Fla. 3d DCA 1979).

In re *USACafes, L.P. Litigation*, 600 A.2d 43 (Del. 1991) is a case close in point. There, individuals who were directors of a general partnership, the alleged trustee, who knowingly participated in a breach of trust, were held personally liable to persons wronged by the partnership. The court declared the individuals also owed them a fiduciary duty: "The law of trust is the earliest expression of this duty, but it applies to corporate directors in control of property. The problem comes up in trust law because modern corporations may serve as trustees of express trusts."

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<sup>n1</sup> 2 Fla. Jur.2d Agency §§§§ 82, 83 (1977); 8 Fla. Jur.2d Business Relationships §§§§ 334, 339 (1978); *Kerry's Bromeliad Nursery, Inc. v. Reiling*, 561 So. 2d 1305 (Fla. 3d DCA 1990); *McElveen By and Through McElveen v. Peeler*, 544 So. 2d 270 (Fla. 1st DCA 1989); P.V.

Construction Corp v. Kovner, 538 So. 2d 502 (Fla. 4th DCA 1989); Orlovsky v. Solid Surf, Inc., 405 So. 2d 1363 (Fla. 4th DCA 1981).

(e) FIDUCIARY REFUSES TO PURSUE AN ACTION AGAINST THE AGENT  
(Administrator ad litem vs. Agent)

If the fiduciary refuses to pursue an action against his agent, the estate/trust can still pursue a claim against the agent through the appointment of an administrator ad litem. However, if the estate/trust has been rendered insolvent by the agent's actions, then there is no money to pay the administrator ad litem.

## APPENDIX 1

### CASE LAW PRIOR TO ENACTMENT OF §§733.612 &737.402

Although the following cases pre-date §§733.612 &737.402, they are still good law on the issue of a fiduciary's liability for delegating acts of administration to an agent.

Thomas v. Carlton, 143 So. 780 (Fla. 1932) is one of the first cases in Florida to discuss this issue. There, the governor brought suit against the board of bond trustees ("trustees") and the bond sureties. The governor alleged that public funds for roads and bridges were lost due to misappropriation or negligence by the trustees. The trustees contended that the governor lacked standing to bring suit. They claimed that funds were embezzled by an individual acting as engineer and paymaster for the project, who was sentenced by the court. In discussing the general law regarding the liability of an officer for the loss of public money in his care and custody, due to the default, misfeasance or nonfeasance of an assistant or employee, the Florida Supreme Court stated:

In general, all trustees who have the custody of money are held to be exempt from liability for the loss of funds occurring without their fault or negligence, and this is so, regardless of the form or character of the bond which they may have given, or the statutes or orders of court prescribing their duties. Such trustees are held merely to that diligence and care which a prudent man ordinarily uses in his own concerns. A trustee is not an insurer. He is not absolutely bound for the result of his actions, except when he departs from the line of duty, or keeping within that line is wanting in diligence. "If he has exercised the proper care and diligence he is not responsible for mere error or mistake. Any other rule would cast upon a trustee a burden which no prudent man would ever assume." [Citations omitted].

Sometimes, circumstances are such that a trustee in the performance of his duties, has to have the assistance of others. In cases where the employment of agents is authorized, or it is reasonably necessary for the performance of the duties of the trust, if the trustee, while acting prudently and with reasonable care, employs an agent, who is apparently honest and properly qualified, and reasonable supervision is used over him, the trustees will not be held responsible for loss or damage caused by the negligence or dishonesty of the agent, 1 Perry on Trusts,

7th ed. 738, 682. But if the regular course of business in administering the trust does not require that the trustee part with the custody of the funds, or if any part of the trust property be put within control of persons who ought not to be entrusted with it, and a loss thereby eventually sustained, the trustee will be liable to make such loss good.[Citations omitted].

In *Laramore v. Laramore*, 64 So.2d 662 (Fla. 1953), the lower court had entered an order finding that Maggie was the widow and sole heir of the decedent and was entitled to all of the estate assets. After the estate assets were transferred to Maggie, it was discovered that she was not the decedent's widow. The beneficiaries of the estate sued the executor and the two banks that transferred the estate assets to Maggie. The executor argued that he was not liable because he acted on the advice of counsel (who also represented Maggie) in permitting Maggie to retain possession of the estate's assets and in joining in the petition that enabled Maggie to acquire possession of the estate assets. The lower court found in favor of the beneficiaries and the Florida Supreme Court affirmed. The Court reasoned that the executor was guilty of "gross inattention" to the duties of his trust, and it was improper for him to surrender or delegate to the attorney all of the functions and duties of the trust or to acquiesce in the complete management and control of the trust by the attorney. "[W]here the law places upon the personal representative the mandatory duty of collecting the assets and the debts due the estate... the advice of counsel will not relieve the executor from the exercise of active vigilance in the discharge of this responsibility, for he is bound, as a matter of law, to know his duty in this regard."

In *In re Estate of Rosenthal*, 189 So.2d 507 (Fla. 3rd DCA 1966), the executor had retained an attorney in connection with the administration of the estate and the sale of the decedent's residence. The title company made the check payable to the attorney and the funds were deposited into the attorney's trust account. The attorney embezzled the sale proceeds and died less than one month later. The parties stipulated that the executor was not negligent in employing the attorney and that the act of the embezzlement was solely the act of the attorney. The executor was ordered to repay the estate the embezzled funds. The appellate court, in reversing the trial court, held that it was proper and not a surrender of all of the functions and duties of the trust to allow the attorney to handle the real estate transaction for the executor. The appellate court reasoned that if a trustee uses ordinary care in the selection of the agent, and properly supervises the business entrusted to him, he cannot be liable for the acts of his agent.

## **APPENDIX 2**

### 518.112 Delegation of investment functions.—

(1) A fiduciary may delegate any part or all of the investment functions, with regard to acts constituting investment functions that a prudent investor of comparable skills might delegate under the circumstances, to an investment agent as provided in subsection (3), if the fiduciary exercises reasonable care, judgment, and caution in selecting the investment agent, in establishing the scope and specific terms of any delegation, and in reviewing periodically the agent's actions in order to monitor overall performance and compliance with the scope and specific terms of the delegation.

(2)(a) The requirements of subsection (1) notwithstanding, a fiduciary that administers an insurance contract on the life or lives of one or more persons may delegate without any continuing obligation to review the agent's actions, certain investment functions with respect to any such contract as provided in subsection (3), to any one or more of the following persons as investment agents:

1. The trust's settlor if the trust is one described in s. 733.707(3);
2. Beneficiaries of the trust or estate, regardless of the beneficiary's interest therein, whether vested or contingent;
3. The spouse, ancestor, or descendant of any person described in subparagraph 1. or subparagraph 2.;
4. Any person or entity nominated by a majority of the beneficiaries entitled to receive notice under paragraph (3)(b); or
5. An investment agent if the fiduciary exercises reasonable care, judgment, and caution in selecting the investment agent and in establishing the scope and specific terms of any delegation.

(b) The delegable investment functions under this subsection include:

1. A determination of whether any insurance contract is or remains a proper investment;
2. A determination of whether or not to exercise any policy option available under such contracts;
3. A determination of whether or not to diversify such contracts relative to one another or to other assets, if any, administered by the fiduciary; or
4. An inquiry about changes in the health or financial condition of the insured or insureds relative to any such contract.

(c) Until the contract matures and the policy proceeds are received, a fiduciary that administers insurance contracts under this subsection is not obligated to diversify nor allocate other assets, if any, relative to such insurance contracts.

(3) A fiduciary may delegate investment functions to an investment agent under subsection (1) or subsection (2), if:

(a) In the case of a guardianship, the fiduciary has obtained court approval.

(b) In the case of a trust or estate, the fiduciary has given written notice, of its intention to begin delegating investment functions under this section, to all beneficiaries, or their legal representative, eligible to receive distributions from the trust or estate within 30 days of the delegation unless such notice is waived by the eligible beneficiaries entitled to receive such notice. This notice shall thereafter, until or unless the beneficiaries eligible to receive income from the trust or distributions from the estate at the time are notified to the contrary, authorize the trustee or legal representative to delegate investment functions pursuant to this subsection. This discretion to revoke the delegation does not imply under subsection (2) any continuing obligation to review the agent's actions.

1. Notice to beneficiaries eligible to receive distributions from the trust from the estate, or their legal representatives shall be sufficient notice to all persons who may join the eligible class of beneficiaries in the future.
2. Additionally, as used herein, legal representative includes one described in s. 731.303, without any requirement of a court order, an attorney-in-fact under a durable power of attorney sufficient to grant such authority, a legally appointed guardian, or equivalent under applicable law, any living, natural guardian of a minor child, or a guardian ad litem.
3. Written notice shall be:

- a. By any form of mail or by any commercial delivery service, approved for service of process by the chief judge of the judicial circuit in which the trust has its principal place of business at the date of notice, requiring a signed receipt;
- b. As provided by law for service of process; or
- c. By an elisor as may be provided in the Florida Rules of Civil Procedure.

Notice by mail or by approved commercial delivery service is complete on receipt of notice. Proof of notice must be by verified statement of the person mailing or sending notice, and there must be attached thereto the signed receipt or other satisfactory evidence that delivery was effected on the addressee or on the addressee's agent. Proof of notice must be maintained among the trustee's permanent records.

(4) If all requirements of subsection (3) are satisfied, the fiduciary shall not be responsible otherwise for the investment decisions nor actions or omissions of the investment agent to which the investment functions are delegated.

(5) The investment agent shall, by virtue of acceptance of its appointment, be subject to the jurisdiction of the courts of this state.

(6) In performing a delegated function, the investment agent shall be subject to the same standards as the fiduciary.

History.—s. 3, ch. 93-257; s. 8, ch. 97-240.

### **APPENDIX 3**

#### Restatement (Second) of Trusts, § 225. Liability for Acts of Agents

(1) Except as stated in Subsection (2), the trustee is not liable to the beneficiary for the acts of agents employed by him in the administration of the trust.

(2) The trustee is liable to the beneficiary for an act of such an agent which if done by the trustee would constitute a breach of trust, if the trustee

(a) directs or permits the act of the agent; or

(b) delegates to the agent the performance of acts which he was under a duty not to delegate;  
or

(c) does not use reasonable care in the selection or retention of the agent; or

(d) does not exercise proper supervision over the conduct of the agent; or

(e) approves or acquiesces in or conceals the act of the agent; or

(f) neglects to take proper steps to compel the agent to redress the wrong.

Comment:

a. Agents employed by trustee. Although a trustee who in the administration of the trust employs an agent is liable to a third person on a contract made with the third person by the agent

within the scope of his authority or apparent authority and is liable for torts to a third person committed by the agent within the course of the employment (see §§262, 264), he is not liable to the beneficiary for losses resulting from the improper conduct of the agent, unless the trustee is himself guilty of a breach of trust.

The trustee is himself guilty of a breach of trust under the circumstances stated in Subsection (2) and is liable therefor.

b. Officers and employees of corporate trustee. A corporate trustee is liable to the beneficiary for the neglect or default of its officers or its own employees within the course of the employment. They are not agents employed in the administration of the trust within the meaning of the rule stated in this Section, which includes only such agents as are employed in connection with the administration of the trust and whose compensation can properly be paid out of the trust property.