

HOW TO SUCCESSFULLY NAVIGATE THE STORMY WATERS OF QUALIFIED BENEFICIARIES, INTERESTED PERSONS, AND REPRESENTATION UNDER THE TRUST CODE

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Short summary:

This presentation will help attorneys to determine who are qualified persons and interested persons under the trust code, and how the representation statute may be utilized to comply with a trustee's notice and accounting requirements. The presentation will include some instructional fact patterns and a walk through of how these statutes are applied so that the trustee can fulfil their fiduciary duties to inform and account to all required parties.

A. Interested Persons, Beneficiaries and Qualified Beneficiaries under the trust code: Understanding the differences and why it matters.

A trustee has the duty under section 736.0813 to inform and account to *qualified beneficiaries* of a trust once the trust becomes irrevocable. The trustee also has a duty to notify qualified beneficiaries once a trust becomes irrevocable, provide a complete copy of the trust, notify them of their rights to trust accountings, and respond to requests from qualified beneficiaries for relevant information about the assets and liabilities of the trust. These duties are mandatory under section 736.0105 and cannot be changed or waived by the trust document.

A common task that all trustees and attorneys must perform is identifying who are the interested persons, beneficiaries, and qualified beneficiaries of a trust. It is not always an easy task. To add complication, if a trustee needs to modify a trust, who must be given notice so that the modification is legally binding? How does the concept of “representation” of others under the trust code come to bear on whether proper notice has been given? Whereas a trust modification of an irrevocable trust may only involve the trustee and the qualified beneficiaries, a non-judicial settlement agreement may involve and extend to all “*interested persons.*” A trust officer and attorney need to understand these basic terms, how to apply these terms in practice, and understand the legal significance of each.

1. Interested Persons

Starting with the broadest group and working our way down.

Section 731.201(23):

“Interested person” means any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved. In any proceeding affecting the estate or the rights of a beneficiary in the estate, the personal representative of the estate shall be deemed to be an interested person. In any proceeding affecting the expenses of the administration and obligations of a decedent’s estate, or any claims described in [s. 733.702\(1\)](#), the trustee of a trust described in [s. 733.707\(3\)](#) is an interested person in the administration of the grantor’s estate. The term does not include a beneficiary who has received complete distribution. The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings.

For instance, if an irrevocable trust is being modified to change the contingent trustees named in the document, the contingent trustees being removed are “interested persons” because their status is being affected.

Applicable Case Law:

Wheeler v. Powers, 972 So.2d 285 (Fla. 5th DCA 2008). In this case, Wheeler, an attorney, had prepared a will and trust for his client, Dorothy. Two weeks before being diagnosed as disoriented, paranoid, and suicidal, she changed her will with a new attorney to name her stepson as co-trustee of her trust (replacing Wheeler) and naming her stepson as alternative personal representative (replacing Wheeler), to serve along with her husband. The stepson in the prior estate planning documents had been disinherited. Wheeler filed a petition to revoke probate of the will contesting the husband's mental and physical ability to perform his duties and alleging that the new planning documents had been procured through undue influence by the stepson. The trial court dismissed Wheeler's petition finding that he lacked standing as an interested person. However, the Fifth District reversed, finding that Wheeler was an interested person because he had a sufficient interest in the proceeding as a potential personal representative and co-trustee.

Duff-Esformes v. Mukamal, 332 So.3d 17 (Fla. 3rd DCA 2021). This case involved the issue of whether the surviving spouse who was the sole income beneficiary of her late husband's trust had standing as an interested person to object to the co-personal representative's petition for payment of Estate administration expenses. It was undisputed that the trust had been fully funded from the estate except for a \$50,000 hold

back for administration expenses. Since the widow was a qualified beneficiary under the trust, she was also a beneficiary in the estate pursuant to section 731.201(2) because the co-personal representatives were also the co-trustees of the trust. The court therefore found that that the widow was an interested person for purposes of objecting to the petition for payment of estate expenses in the estate. The less the estate would have to pay, the more money would pour over into the trust.

Hayes v. Guardianship of Thompson, 952 So.2d 498 (Fla. 2006). This Florida Supreme Court case is one of the most important cases on the subject of interested persons, and emphasizes the concept that who is an interested person may vary according to the circumstances of the case. In this case, the Supreme Court rejected the use of a bright line test to determine who is an interested person. The analysis must be done a case by case basis.

2. Beneficiary

The trust code defines a beneficiary as “a person who has a present or future beneficial interest in a trust, vested or contingent, or who holds a power of appointment over trust property in a capacity other than that of trustee.” The term “beneficiary” refers to the universe of persons who have a beneficial interest in a trust. See Rachins v. Minassian, 251 So3d 919 (Fla. 4th DCA 2018).

736.0103(4):

“Beneficiary” means a person who has a present or future beneficial interest in a trust, vested or contingent, or who holds a power of appointment over trust property in a capacity other than that of trustee. An interest as a permissible appointee of a power of appointment, held by a person in a capacity other than that of trustee, is not a beneficial interest for purposes of this subsection. Upon an irrevocable exercise of a power of appointment, the interest of a person in whose favor the appointment is made shall be considered a present or future beneficial interest in a trust in the same manner as if the interest had been included in the trust instrument.

Application of definition in a practical example. An irrevocable trust provides that the trustee distribute income and principal for the life time of Paul. Upon Paul’s death, the trust provides that the trust corpus be paid to Bill if he is living, but if he is not living, the remaining amounts shall be distributed to Bill’s lineal descendants. In this example, Paul, Bill and Bill’s lineal descendants are all beneficiaries even though Bill’s lineal descants are contingent beneficiaries because they would not receive any funds upon Paul’s death if Bill was still alive.

3. Qualified Beneficiaries

The term qualified beneficiary encompasses only a limited subset of all trust beneficiaries. The definition of “qualified beneficiary” can be confusing, and even more so when applying it to real situations.

736.0103(19)

“Qualified beneficiary” means a living beneficiary who, on the date the beneficiary’s qualification is determined:

- (a) Is a distributee or permissible distributee of trust income or principal;
- (b) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (a) terminated on that date without causing the trust to terminate; or
- (c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated in accordance with its terms on that date.

The following is a practical step by step guide to determining who is a qualified beneficiary.

1. Based upon today’s date, which beneficiaries *may* the trustee distribute income and principal to? *Those beneficiaries are qualified beneficiaries.*
2. If today the beneficiary(s) who the trustee is permitted to distribute income or principal to were to die (or whose interest would otherwise terminate by the terms of the trust), which

- beneficiaries would be entitled to receive the remainder of the trust? *Those beneficiaries are qualified beneficiaries.*
3. If the trust were to terminate today in accordance with its terms (such as a date specific), which beneficiary would the trustee have to distribute the remaining trust corpus to? *Those beneficiaries are qualified beneficiaries.*
 4. The same analysis above applies to whether a charitable organization has the rights of a qualified beneficiary if a charitable organization is substituted above for “beneficiary.”
See 736.0110 (1)

Applicable Case Law:

In Rachins v. Minassian, 251 So3d 919 (Fla. 4th DCA 2018), the court examined who is a qualified beneficiary. In a classic battle of surviving spouse verses stepchildren, the children argued they were qualified beneficiaries of a Family Trust that their father had created. The Family Trust was funded during the gap year where there was no estate tax and therefore there was no marital trust created. As such, the stepmother was the sole trustee over the Family Trust and had unlimited power to invade the Family Trust. Upon her death, the remainder of the Family Trust would then be distributed to a new trust for the benefit of each of the grantor’s children. Even though it was entirely possible that the children could receive nothing upon the stepmother’s death, and that such funds

would be distributed to a new trust, the fact that the children would be distributees of the Family Trust if it terminated made the children qualified beneficiaries. The court found that the children were both beneficiaries and qualified beneficiaries of the Family Trust. “Stated another way, because any remaining property in the Family Trust would be distributed to a new trust created for the benefit of the children upon the wife’s death, the children will, at a minimum, have an equitable interest in any property in the Family Trust at that time.” Id. at 13.

Harrell v. Badger, 171 So3d 764, 769 (Fla. 5th DCA 2015). **Contingent remainder beneficiaries** are qualified beneficiaries under section 736.0103(16) because of their interest in the distribution of any principal remaining after the death of a lifetime beneficiary. In Harrell, before her death, a mother had set up trust for her stepson, Wilson, giving the trustee absolute discretion to make distributions, with the remainder, if any going to her two daughters. The court described the two daughters as “contingent remainder beneficiaries.” The two daughters were contingent remainder beneficiaries because there was no guarantee there would be any trust corpus to distribute to them given the trustee’s broad discretion in how much corpus could be distributed to Wilson. Indeed, the trial court noted that the qualified beneficiaries were not damaged when the trustee decanted the trust to a new trust without giving the qualified beneficiaries notice because the trust likely would have been

exhausted in any event. However, the contingent nature of the beneficiaries' interest did not eliminate their status as qualified beneficiaries and did not excuse the trustee's failure in not giving them notice of the intended decantation.

Hadassah v. Meicer, 268 So.3d 759 (Fla. 4th DCA 2019). This case involved the issue of whether three charities named in an irrevocable trust were qualified beneficiaries. The current distributees of the irrevocable trust were three sisters. The trust was created in 1989 at the death of Sylvia Gelt. A credit shelter trust was created for her husband for his life, and after his death, would be divided into three separate trusts for the benefit of the three daughters. The trust instrument provided that that upon the death of each daughter, the daughter's trust would terminate, and the balance of that trust would redistribute to the trust(s) of the remaining living daughters. Upon the last of the daughters to die, the remaining principal and the undistributed income would go to the three named charities. The trustee filed the action seeking to resign and named the three sisters as well as the three charities. The sister moved for summary judgment arguing the charities were not qualified beneficiaries. The trial court agreed and the trustee appealed. The Fourth District reversed finding that the three charities were qualified beneficiaries. The court pointed out that the qualified beneficiary statute required the **simultaneous** termination of the distributees, not the

sequential termination. Therefore, properly interpreted, the statute required that the charities be regarded as qualified beneficiaries because if all of the daughters' interest terminated, the charities would take the remainder.

Common factual scenarios and analysis of application of statute

Fact Pattern 1: Qualified Beneficiaries. Helen passes away with an irrevocable trust for her husband, Harold. The trust provides that the corporate trustee may distribute to him as much income and principal as he needs for his health, education, maintenance his life. Upon his death, the trust corpus stays in trust for the benefit of Helen's children, per stirpes, and may be distributed in the absolute discretion of the trustee. Helen has three children, Valarie, Steve, and Dave. Valarie and Steve each have three adult children. Dave died in a plane crash leaving one adult child, Scotty.

Who are the qualified beneficiaries of the trust that the trustee must serve accountings on ?

Harold, the present income beneficiary, is a qualified beneficiary. Valarie and Steve are also qualified beneficiaries (but not their children so long as Valarie and Steve remain living at the time of Harold's death). Since Dave already passed away, Dave's adult

child, Scotty, is also a qualified beneficiary since he takes his deceased father's share. The trustee would then need to serve accountings on Harold, Valarie, Steve, and Scotty.

Fact Pattern 2: Interested Persons. Dad died. Mom, surviving spouse, is trustee and wants to change the distribution standard from HEMS to her discretion. Her kids are takers in default, per stirpes, and all of her kids also have children. In other words, the grantor's grandkids are contingent beneficiaries but not qualified beneficiaries. So mom's children can represent the grandchildren in any action to modify trust so long as there is no conflict of interest between the kids and grandkids. Which brings us to the subject of representation under the trust code.

B. Representation Under the Trust Code

There are five types of representation under the trust code:

- representation by a fiduciary (trustee, guardian, or attorney in fact);
- virtual (such as an adult representing a minor, incapacitated person, unborn or unlocatable person)'
- court appointed (done by order of the court so that persons otherwise not represented will be represented);

- powers of appointment (holder of a general or special power of appointment binds those within the class of the power and takers in default of the power); and
- settlor designated representative (where the settlor specifically names a representative in the trust document).

Although the duty to notify qualified beneficiaries, account to qualified beneficiaries, and to respond to the request of a qualified beneficiary cannot be eliminated by a trust instrument (see section 736.0105(2)(r)-(t), a settlor can shift the trustee's disclosure requirements from one or more qualified beneficiaries to a designated representative or the holder of a power of appointment.

1. **Constitutionality of Virtual Representation.** The United States Supreme Court has recognized that, provided that certain factors are met, persons who are virtually represented by someone else are bound in a suit as if they were a party, and such binding effect does not violate the virtually represented persons' constitutional right to Due Process. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Taylor v. Sturgeli, 553 U.S. 880 (2008). The Florida trust code virtual representation statutes fall within the categories recognized by the Supreme Court.

2. Representation; Basic Effect 736.0301; Binding effect of the statute

736.0301

(1) Notice, information, accountings, or reports given to a person who may represent and bind another person under this part may serve as a substitute for and have the same effect as notice, information, accountings, or reports given directly to the other person.

(2) Actions taken by a person who represents the interests of another person under this part are binding on the person whose interests are represented to the same extent as if the actions had been taken by the person whose interests are represented.

(3) Except as otherwise provided in s. 736.0602, a person under this part who represents a settlor lacking capacity may receive notice and give a binding consent on the settlor's behalf.

(4) A trustee is not liable for giving notice, information, accountings, or reports to a beneficiary who is represented by another person under this part, and nothing in this part prohibits the trustee from giving notice, information, accountings, or reports to the person represented.

Commentary: Part III of the trust code related to representation of persons is one of the key sections of the code in determining whether the

trustee has complied with its duty to inform and account to the qualified beneficiaries. This part of the code allows certain persons who have an interest in a trust or a person who is a disabled settlor to be represented by others. Importantly, under the representation section, section 736.0301(1) and (2), notices (such as service of accountings), actions (such as any trust administration action), and consents (such as a consent to a trust modification or waiver of any objections) by persons who represent other persons have the same effect as if the person being represented actually received the notice, performed the action or gave the consent. The code under section 736.0301(4) expressly gives the trustee protection for giving notice to beneficiaries even though they are represented by another person. **As such, unless the trust document specifies otherwise, it is generally the better practice from a risk management standpoint to serve notices and accountings on all qualified beneficiaries, rather than relying upon the representation provisions.**

Where a settlor is under a disability (see section 736.301(3)), persons such as power of attorney or guardian may represent and bind a disabled settlor and may exercise certain rights of the settlor, but certain actions may require court approval and must otherwise comply with 736.0602. See also section 709.2202 (power of attorney); and section 744.441 (court approval needed by guardians).

3. Representation by Holder of a Power of Appointment

736.0302

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

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

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

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

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

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

Commentary: Under the power of appointment statute, where the statute applies, conflicts of interest by the holder of power of appointment **do not matter**. The holder of the power appointment binds those who are subject to his/ her power. The exception to this rule is where the holder of the power of appointment is also the sole trustee, or

where the holder acts in bad faith or through fraud. In such circumstances, the holder of the power of appointment cannot bind those persons subject to his or her exercise of the power.

Applicable Case Law:

Ammeen v. Sjogren, 313 So3d 157 (Fla. 1st DCA 2021).

Ammeen walks through the power of appointment statute and explains its application and effect in practice. In Ammeen, there is a complicated back story and some trust provisions made irrelevant upon the daughter's divorce from her husband. As such, it can be summarized for purposes of this discussion as follows. Mother set up an irrevocable trust for daughter. Daughter had the power to appoint the trust corpus through her will to leave any remaining funds to any of her lineal descendants. If daughter did not do so, the default beneficiaries were her lineal descendants. In 2009, daughter had consented to the trustee of her trust distributing its corpus to her brother and the settlor in order to resolve family litigation and in order to receive an interest in another asset.

The daughter died in 2015 without a will. In 2016, the ex-husband as guardian of her two minor children initiated an action against the daughter's trustee for breach of fiduciary duty, arguing that the two minor children were beneficiaries of the trust and that the prior consent

by their mother to dissolve the trust was invalid. The court disagreed, finding that the two minor children were only permissible appointees of their mother's power of appointment and were not beneficiaries.

The court noted that the trust document gave the trustee the power to terminate the trust, and if that happened, the daughter's lineal descendants were not guaranteed to get anything. As such, the minor children were only "permissible appointees, not beneficiaries, while the [daughter] was alive." As such, the daughter's consent to terminate the trust was valid and binding on her children under section 736.0302(1). Id. at 160.

The court also rejected the ex-husband's argument that the daughter's exercise of her power of appointment was done in bad faith, therefore negating the effectiveness of the representation. See section 736.0302(1). The court rejected this argument citing that there was no evidence of bad faith by the daughter.

See also Peck v. Peck, 133 So3d 587 (Fla. 2nd DCA 2014) where the court noted that section 736.0302, the holder of a power of appointment represents and binds contingent beneficiaries.

Illustrative Fact Patterns:

Fact Pattern 1: Sally is beneficiary of a trust set up by her father who passed away. The irrevocable trust provides Sally income for life, with principal distributions based upon

HEMS. If Sally does not exercise a power of appointment through her will, any remainder in the trust at the time of her death will go to her brother, Tim. The trust mandates that a corporate trustee serve.

Issue: The trust is now down to \$250,000 and Sally and her trustee want to petition the court to allow a judicial modification that would allow an individual to serve. Is Tim an indispensable party to the litigation? No. See Section 736.0302 - Representation by holder of power of appointment. Sally binds Tim.

Practice point— you may have good reason to name qualified beneficiaries notwithstanding the power of appointment. For instance, if there is any question whether the holder of power of appointment is acting in good faith, name the default takers.

Fact Pattern 2: Mom is sole trustee and sole income beneficiary of an irrevocable trust. She has a limited power of appointment as to the grantor's kids (who are her kids). She has two children; one is an adult son, and one is a minor daughter. Mom has already executed a will that exercises her limited power of appointment leaving everything to her adult

son. Mom now wants to change the trust's standard from HEMS to her complete discretion.

Question 1: Can mom represent the remainder beneficiaries ?
No, she is sole trustee and a beneficiary.

Question 2: Can the adult child represent minor? Possible conflict issue because mom exercised her power of appointment in favor of her son.

Question 3: What if adult child did not know that mom had exercised her limited POA in his favor? If mom kept her exercise of her power of appointment secret, probably no conflict.

The holder of the power of appointment can change the beneficiary of the power of appointment at any time before death. So, does it matter whether adult son knows that POA has been exercised?

How much questioning (if any) does a trustee have to do to inquire whether mom has exercised her power of appointment and who benefits to determine whether there is a conflict for the adult beneficiary to represent the minor beneficiary?

Conflicts are explored in more detail below.

4. Representation by Fiduciaries and parents

736.0303

To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

- (1) A guardian of the property may represent and bind the estate that the guardian of the property controls.
- (2) An agent having authority to act with respect to the particular question or dispute may represent and bind the principal.
- (3) A trustee may represent and bind the beneficiaries of the trust.
- (4) A personal representative of a decedent's estate may represent and bind persons interested in the estate.
- (5) A parent may represent and bind the parent's unborn child, or the parent's minor child if a guardian of the property for the minor child has not been appointed.

Commentary: Avoiding conflicts of interest is most important. The issue of conflicts as a practical matter is probably the most common trap that an attorney or trust officer can face when relying upon a parent representing the interest of a minor. The following factual situations

have been developed to illustrate where these conflicts can arise and hopefully will be illustrative of the potential types of conflicts.

Where a trust officer or an attorney is seeking judicial approval of an act (such as trust modification) and a parent or fiduciary is representing the interest of a minor or beneficiary, it is important to have the court make a finding of fact that the parent or fiduciary is free of a conflict of interest, and to have that finding expressed in the final judgment.

Applicable Case Law: Youngblood v. Taylor, 89 So. 2d 503 (Fla. 1956)(father suing in his representative capacity for minor son is separate and distinct from father suing in his individual capacity); Tallahassee Memorial Regional Medical Center, Inc. v. Petersen, 920 So.2d 75 (Fla. 1st DCA 2006)(ordinarily parents have right to make decisions for their minor without the need of appointment of a guardian ad litem unless showing of a significant harm to minor or conflict of interest); Johnson v. Clark, 2006 WL 3780511 (Fla. M.D. 2006)(trustee binds objecting beneficiary under previous virtual representation statute section 731.303); Weiss v. Courshon, 618 so.2d 255 (Fla. 3rd DCA 1993)(trustee's dismissal of action against former trustee did not preclude beneficiary's individual right to sue former trustee for a trust accounting where prior order explicitly preserved the rights of the beneficiaries to assert such claims).

Illustrative Fact Patterns:

Fact Pattern 1: Sally is the beneficiary of a trust set up by her father who passed away. The trust mandates the use of a corporate fiduciary. The irrevocable trust provides Sally income for life, with principal distributions based upon HEMS. Sally has one minor child, Tim. When Sally dies, the remaining funds, if any, goes to her lineal descendants. Sally now wants to seek a termination of the trust and a lump sum distribution to her because of the cost of the trust administration and the modest amount of remaining funds—just under one million dollars. Can Sally represent and bind her minor child? Unborn children? No, conflict! Sally stands to benefit from the termination because she will receive the cash and eliminate the possibility that her lineal descendants would receive any funds in trust upon her death. Someone other than the minor child and unborn children would have to be appointed by a court to represent their interests.

Fact Pattern 2: This scenario involves a different reason for a trust modification. An irrevocable trust owns 25% of a closely held business. The business is expanding and needs to increase its line of credit from 2 million to 3 million dollars. The business is the main source of income for the Trust. The bank is requiring that the

trustee guarantee the line of credit, but the trust document does not have the proper language that the bank wants to authorize the trustee to make the guarantee. Mom is trustee and the income beneficiary. Her children are the remainder beneficiaries. Since the guarantee would protect the trust's main asset and benefit the trust, mom as trustee can represent all beneficiaries, assuming there is no conflict of interest.

Fact pattern 3: Trustee wants to modify an irrevocable trust that dad put into place. Mom is income beneficiary. The remainder of the trust corpus goes to dad's three kids. Trustee wants the modification in order to put in a drug dependency clause to allow the trustee to refrain from distributing funds to a remainder beneficiary if the beneficiary has a drug dependency. One of grantor's kids has a known drug problem. Can the trustee represent and bind all the beneficiaries? As we know, a trustee can bind the beneficiaries if there is no conflict of interest. However, here, the one remainder beneficiary has a known drug addiction and his/her rights would be affected adversely by the amendment. This conflict of interest would likely prevent the trustee from representing the adversely affected beneficiary without that beneficiary also consenting.

Fact Pattern 4. Here we have an irrevocable “sprinkle” or “pot” trust that mom set up before her death for the benefit of dad. Upon dad’s death, the trustee may distribute as much of the trust to grantor’s lineal decedents, per stirpes, as the trustee in her absolute discretion deems appropriate. Grantor’s kids are Martha, George, and William. Martha has an adult child, Mark, who is competent and lives next door to her, and George has one minor child (George Jr.) who is 16 and has a drug addiction. The trustee seeks to modify the trust to put in a drug addiction clause that would give the trustee absolute discretion not to make distributions to any beneficiary with a drug addiction. The trustee names in the complaint dad, Martha, George, and William and states that Martha, George, and William can represent their children without a conflict of interest and that all interested persons are before the court.

Any issue ? Yes. Since this is a pot trust, George’s interest in the 1/3 pot for his blood line competes with his son’s interest, George, Jr. Since the amendment would potentially disqualify his son from receiving distributions, George has a conflict of interest representing his son. However, Martha (George Jr.’s aunt) could virtually represent George, Jr., her nephew, since her share is unaffected by whether George, Jr. is an eligible beneficiary. In

other words, the aunt has a “substantially identical interest” to George Jr.’s interest (see below).

Also, Martha could not represent the interests of her adult son, Mark, since her son is not incapacitated, is not a minor, and is an identifiable person whose location is known. Mark must be made a party to the modification action to be bound by the court’s decision since his interest in the pot trust is potentially affected by the change in the trust language.

5. Representation by persons having substantially identical interest

736.0304

Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another person having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

Commentary: This section of the code is commonly referred to as “virtual” representation of others. It is very important to note that there cannot be any “virtual” representation of an adult competent person whose location is known. Therefore, if there is a competent beneficiary who is difficult and will not consent to any action that the trustee may

request a consent, no matter how reasonable, such beneficiary cannot be “virtually” represented by another beneficiary with substantially identical interest if the difficult beneficiary’s location is known.

The other very important aspect of this section is that the person virtually representing the other interest must himself be **free of any conflict of interest**. If it is determined that a consent given to the trustee by a beneficiary who is also virtually representing a minor beneficiary had a conflict of interest with the minor, the consent is **invalid and not binding on the minor**. The following factual scenarios details situations where conflicts are present, and which would prohibit the application of this section.

Illustrative Fact Patterns:

Fact Pattern 1: A typical fact pattern where this type of virtual representation comes into play is the following. Mom is the sole beneficiary of an irrevocable trust. Upon her death, the trust corpus is distributed to her descendants, per stirpes. Mom has three adult children and 6 minor grandchildren. One of her children is pregnant. Here mom’s adult children may virtually represent the minor children and the unborn children’s interest.

Fact Pattern 2: Building upon the same “Sally” scenario in the previous section, Sally is the beneficiary of a trust set up by her father who passed away. The trust mandates the use of a corporate fiduciary. The irrevocable trust provides Sally income for life, with principal distributions based upon HEMS. Sally wants to dissolve the trust. So what if Sally has an adult son, Tom, who is also a remainder beneficiary of Sally’s trust, along with the minor child Tim. Can Tom represent and bind the interest of minor brother Tim in dissolving the trust? What about other unborn heirs? Likely yes, so long as Tom is free of a conflict of interest.

What if Tom received a \$10,000 distribution from mom to agree to the trust termination? No--CONFLICT! Be careful even of an unwritten understanding to make a distribution or provide some other benefit for cooperation. What if Tom was threatened with being disinherited from other assets if he did not cooperate?

What if Tim and Tom were both adult children, but Tim lives in England and is difficult to reach but his location is known. Could Tom represent Tim in dissolving the trust?

No— Tim is not a minor, his identity is known, and his location is known. He cannot be virtually represented.

Fact Pattern 3: Helen sets up an irrevocable trust for her husband, Harold. The trust provides that the corporate trustee may distribute to him as much income and principal as he needs for his health, education, maintenance, and support during his life. Upon his death, the trust corpus stays in trust for the benefit of Helen's lineal descendants and may be distributed in the absolute discretion of the trustee. Helen has three children, Valarie, Steve, and Dave. Valarie and Steve each have three adult children. Dave died in plane crash leaving one minor child, Scotty. Scotty's mother, who is not a beneficiary, is Martha.

The trustee needs to file a judicial action to get a declaratory judgment on whether a proposed distribution meets the HEMS standard. What parties does the trustee need to name in order to give proper notice to all qualified beneficiaries and interested persons who may be affected by the court's determination?

Harold, Valarie, Steve, the adult children of Valarie and Steve, and minor child Scotty must all be parties because they are qualified beneficiaries. Scotty can be represented by his mother, Martha, since Martha is his parent and is free of a conflict of interest.

Since the trust provisions provide that upon Harold's death, the trust will benefit Helen's lineal descendant's, Helen's unborn heirs have an interest since they are potential future beneficiaries

of the Trust. However, the unborn beneficiaries' interest can be represented by Steve and Valarie as they hold substantially identical interest as the unborn heirs and are free of a conflict.

6. Appointment of Representative under section 736.0305

736.0305

- (1) If the court determines that an interest is not represented under this part, or that the otherwise available representation might be inadequate, the court may appoint a representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown. If not precluded by a conflict of interest, a representative may be appointed to represent several persons or interests.
- (2) A representative may act on behalf of the individual represented with respect to any matter arising under this code, whether or not a judicial proceeding concerning the trust is pending.
- (3) In making decisions, a representative may consider general benefits accruing to the living members of the represented individual's family.

Commentary: In some circumstances, especially where a conflict of interest exists, or where there is doubt as to whether a conflict may exist or there is a chance that a conflict could develop, a representative can be

appointed by a court. There could be a situation where a parent even though free of conflict to represent their minor, may not possess the mental acuity or other skills necessary to give a consent on an issue that would affect their minor child's beneficial interest, and in such situation, the court, finding the representation to be inadequate, can appoint a representative for the child. The trust code makes clear, however, that a court appointed representative may bind another whether or not there is a pending judicial proceeding. So if a court appoints a representative for a beneficiary, the fact that the court action has terminated does not prevent the representative from continuing to bind the beneficiary as the trust administration continues. Last, this statute makes clear that a court appointed representative can consider the benefits accruing to the living members of the represented individual's family. Therefore, a representative can give preference to the benefits that living beneficiaries will receive as opposed to benefits that unborn future beneficiaries may receive.

7. Designated Representative 736.0306

736.0306

(1) If specifically nominated in the trust instrument, one or more persons may be designated to represent and bind a beneficiary and receive any notice, information, accounting, or report. The trust instrument may also

authorize any person or persons, other than a trustee of the trust, to designate one or more persons to represent and bind a beneficiary and receive any notice, information, accounting, or report.

(2) Except as otherwise provided in this code, a person designated, as provided in subsection (1) may not represent and bind a beneficiary while that person is serving as trustee.

(3) Except as otherwise provided in this code, a person designated, as provided in subsection (1) may not represent and bind another beneficiary if the person designated also is a beneficiary, unless:

(a) That person was named by the settlor; or

(b) That person is the beneficiary's spouse or a grandparent or descendant of a grandparent of the beneficiary or the beneficiary's spouse.

(4) No person designated, as provided in subsection (1), is liable to the beneficiary whose interests are represented, or to anyone claiming through that beneficiary, for any actions or omissions to act made in good faith.

Commentary: Where a settlor wants to limit the information that a beneficiary can receive, section 736.0306 provides a mechanism where the settlor can designate a person to receive notices and accountings and bind the beneficiary. For instance, a settlor may want to keep his or her adult grandchildren in the dark about the value of a trust set up for them.

The settlor is concerned that if the grandchildren learn about the significant funds put in trust for them, the grandchildren will lose their motivation to be productive citizens. As such, the settlor designates the grandchildren's parent as the designated representative to receive notices and the accountings.

The designated representative is not a fiduciary and is not liable to the beneficiary whose interest he or she binds so long as such actions or omissions are in good faith. Additionally, a designated beneficiary is not prevented from binding a beneficiary or receiving notices for a beneficiary even where the designated beneficiary has a conflict of interest the beneficiary being represented.

Illustrative Fact Patterns:

Fact Pattern 1: Grandpa Jones worked hard all his life to amass a fortune from buying and selling real estate. Grandpa Jones has three kids and 8 grandkids, all adults. Grandpa Jones wants to create an irrevocable trust for his family that will benefit his 3 children and grandchildren. His children are all productive citizens, but his grandchildren are still working to get established. Grandpa Jones asks his attorney to draft the trust so that each of his 3 children are the designated representatives for their respective children (Jones' grandchildren) in order to keep the corporate trustee from having to serve the grandkids with an annual

accounting. Grandpa Jones is concerned that if the grandkids knew about the amount of the fortune that they will be eligible to receive once they turn 40 years old, they will spend their days doing less useful things.

Fact Pattern 2: Grandpa Jones names one of his children, Tom, to be trustee. Can Tom also serve as a designated representative for Grandpa's grandchildren? No, a trustee may not be a designated beneficiary as this would in essence allow the trustee to be reporting to himself.

Questions? Feel free to email Alex Douglas at adouglas@shuffieldlowman.com

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