**REAL PROPERTY, PROBATE AND TRUST LAW SECTION OF THE FLORIDA BAR**

**WHITE PAPER**

**Proposed amendments of §§ 736.08135 and 736.1008 to clarify**

**the period for which beneficiaries may compel trust accountings.**

1. **SUMMARY**

The appellate court opinion in *Corya v. Sanders*, 155 So. 3d 1279 (Fla. 4th DCA 2015) construes Florida statutes in a manner that is contrary to the intended operation of those statutes by improperly limiting a trustee’s duty to render trust accountings. First, the court construed section 736.08135 as limiting the beginning period for which a trustee of an irrevocable trust is statutorily required to render a trust accounting to no earlier than January 1, 2003. Second, the court construed Florida law as barring a beneficiary of an irrevocable trust who has actual knowledge of the existence of the trust and that he or she has not received a trust accounting from the trustee from seeking a trust accounting for any period more than four years prior to the filing of the action.

1. **CURRENT SITUATION**

**A. Trustee’s duty to account**

A trustee’s duty to account to trust beneficiaries existed at common law. In 1976, Florida codified the trustee’s duty to account with the enactment of section 737.303 (Duty to inform and account to beneficiaries), which provided that the trustee had a duty to keep beneficiaries reasonably informed and to provide the beneficiary with a statement of the trust accounts annually. The Florida Trust Code (enacted in 2007) renumbered this section as 736.0813 (Duty to inform and account).

In 2002, Florida enacted section 737.3035 (Trust accountings) to provide specific standards for the form and content of trust accountings rendered for accounting periods beginning on or after January 1, 2003. The new statute did not in any way abridge the existing duty to account. *See* §13(3) of Ch. 2002-82 of the Laws of Florida, expressly provides that section 737.303 continues to apply to accounting periods prior to January 1, 2003. Rather, the new statute (section 737.3035) merely created standards for the form and content of accountings rendered after January 1, 2003. The reference to January 1 2003, was only intended to make it clear that accountings rendered prior to that date were not subject to the new standards (i.e., the new trust accounting standards were not to be applied retroactively). Section 737.3035 (Trust accountings) was renumbered as 736.08135 when the Florida Trust Code was enacted in 2007.

The appellate court decision in *Corya v. Sanders*, 155 So. 3d 1279 (Fla. 4th DCA 2015) construes Florida statutes in a manner that is contrary to the intended operation of those statutes by improperly limiting a trustee’s duty to render trust accountings. First, the court construed section 736.08135 as limiting the beginning period for which a trustee of an irrevocable trust is statutorily required to render a trust accounting to no earlier than January 1, 2003.

The *Corya* court misconstrued section 736.08135 in holding that “trustees of irrevocable trusts could not be statutorily required to render accountings prior to January 1, 2003” and that the “beginning period for the first accounting, in situations where an accounting had never been done or was not prepared annually, [would] be no earlier than January 1, 2003, as stated in section 736.08135.” *Corya* at 1287. The court based its erroneous conclusion on the effective date language in section 736.08135 (the statute that merely enacted specific standards for the form and content of trust accountings). The effective date language in that statute was only intended to make it clear that the new standards governing the form and content of trust accountings did not apply retroactively. The effective date language was never intended to abridge any aspect of a trustee’s duty to account, including the beginning time period for which a trustee is accountable to beneficiaries.

The effect of this *Corya* holding is to erroneously bar the beneficiary of an irrevocable trust from seeking to compel a trust accounting for all periods prior to January 1, 2003.

**B. Limitations on proceedings against trustees**

 The opinion in *Corya* also held that a beneficiary of an irrevocable trust who has actual knowledge that he or she is a beneficiary of a trust and has not received a trust accounting is barred by section 95.11(6) from seeking a trust accounting for any period more than four years prior to the filing of the action. In other words, the court held that the right of a beneficiary (who has actual knowledge that he or she is a beneficiary of a trust and has not received a trust accounting) to seek an accounting is subject to a four year limitations period that begins to run as soon as a trust accounting is overdue.

 This problematic holding, which directly conflicts with the well-reasoned decisions in *Taplin v. Taplin*, 88 So.3d 344 (Fla. 3d DCA 2012) and *Nayee v. Nayee*, 705 So.2d 961 (Fla. 5th DCA 1998), dramatically abridges a beneficiary’s fundamental right to hold the trustee accountable for the trust and its administration and establishes bad public policy by limiting a trustee’s core fiduciary duty to render trust accountings. This holding represents bad public policy and should be adamantly opposed.

1. **EFFECT OF PROPOSED CHANGES**
	1. **Trustee’s duty to account**

 The proposed amendment to section 736.08135(3) provides:

 (3) ~~This section applies to~~ Subsections (1) and (2) govern the form and content of all trust accountings rendered for any accounting periods beginning on or after January 1, 2003, and all trust accountings rendered on or after July 1, 2017. This subsection (3) does not limit the beginning period from which a trustee is required to render a trust accounting.

This proposal clarifies section 736.08135 to insure that: (i) subsection (3) of that statute will not be construed to abridge or limit the duty of a trustee to account from the date upon which the trustee became accountable; and (ii) the reference to January 1, 2003, in subsection (3) is construed as pertaining only to the applicability of the standards for the form and content of trust accountings (i.e., that date has no reference to the beginning time period for which a trustee is accountable). In addition, this proposal would make the trust accounting standards in subsection (2) applicable to all trust accountings rendered after July 1, 2017, including those for accounting periods prior to 2003.

* 1. **Limitations on proceedings against trustees**

 The proposed amendment to section 736.1008(3) provides:

 (3) When a trustee has not issued a final trust accounting or has not given written notice to the beneficiary of the availability of the trust records for examination and that claims with respect to matters not adequately disclosed may be barred, a claim against the trustee for breach of trust based on a matter not adequately disclosed in a trust disclosure document is barred as provided in chapter 95 and accrues when the beneficiary has actual knowledge of:

1. The facts upon which the claim is based if such actual knowledge is established by clear and convincing evidence; or
2. The trustee's repudiation of the trust or adverse possession of trust assets.

Paragraph (a) applies to claims based upon acts or omissions occurring on or after July 1, 2008. A beneficiary’s actual knowledge that he or she has not received a trust accounting does not cause a claim to accrue against the trustee for breach of trust based upon the failure to provide a trust accounting required by s. 736.0813 (or former s. 737.303), nor commence the running of any period of limitations or laches for such a claim, and neither paragraph (a) nor chapter 95 bars any such claim.

The Florida Trust Code contains a comprehensive statute governing limitations for proceedings against trustees for breach of trust (section 736.1008). A trustee’s failure to provide accountings is a breach of trust. *See* Fla. Stat. § 736.1001(1). Inexplicably, the *Corya* Opinion expressly stated that:

Because it was not addressed in the briefs, we do not discuss the application of section 736.1008, Florida Statutes (2008), and its predecessor, section 737.307 . . . .

*Corya*, 155 So. 3d at 1288, fn. 11. Because section 736.1008 is the governing limitations statute for actions against trustees, the proposed fix is being placed in that statute.

Subsection (3) of 736.1008 provides a time-bar for claims against trustees for breach of trust based on matters not adequately disclosed in a trust disclosure document except in cases where the trustee has issued a final accounting and given the required notice regarding the availability of trust records to the beneficiary. The proposed amendment to section 736.1008(3) clarifies that a beneficiary's actual knowledge that he or she is a beneficiary and has not received a trust accounting will not commence the running of any period of limitations or latches for a breach of trust claim based upon the failure to render a required trust accounting.

However, a beneficiary’s actual knowledge of facts constituting a breach of trust, other than a breach of trust based upon the failure to account, will start the running of a limitations period under Ch. 95. The new proposed language merely clarifies that a beneficiary’s “actual knowledge” cannot be used to time-bar that beneficiary’s cause of action for breach of trust based upon the trustee’s failure to account. Accordingly, the proposal does not change the fact that section 736.1008(3) may operate to bar claims related to particular transactions, whether or not adequately disclosed in a trust disclosure document, if the beneficiary had actual knowledge of the facts upon which the claim is based.

The proposed new language protects the entire claim or cause of action for breach of trust based upon the trustee’s failure to render a required trust accounting, including the remedies of removal, surcharge, compelling an accounting, etc.).

1. **FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

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

1. **DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR**

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

1. **CONSTITUTIONAL ISSUES**

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

1. **OTHER INTERESTED PARTIES**

Florida Bankers Association.

MIA\_ACTIVE 4518666.3