

**FIDUCIARY LIABILITY AND MORE:  
MODIFICATION, REFORMATION AND  
CONSTRUCTION  
OF TESTAMENTARY INSTRUMENTS**

**By**

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- Duties owed by fiduciary: good faith, loyalty, impartiality, reasonable care, skill, caution
- Same for PR and Trustee—733.602(1)

- First things first—how does attorney get paid
- 736.0802(10)—notice of intent to use trust assets to pay attorney fees
- Practical considerations

- Investments—518.11
- Prudent investor
- Overall strategy—risk and return considered
- Special skills=higher standard of care

- Test of conduct, not resulting performance
- Fiduciary is not an insurer of the investments
- Preexisting investments—must assess early
- Diversification—produce income and safety of capital with impartiality; avoid over concentration

- Deviating from prudent investor act—are provisions clear? Instructions?
- Delegate investment function—monitor agent performance
- 6 month limitations period regarding investment performance

- Fiduciary conflicts—can cause trouble
- *McCormick*—fiduciary compensation, attorney compensation and conflicts
- *Brigham*—attorney who is acting as fiduciary
- *Turkish* – use of trust assets to pay taxes that benefitted son/trustee at expense of sister
- *Lehman v. Lucom*—misuse of assets to fund other litigation

- 733.610—conflicted transaction by PR voidable unless consent or provision in Will
- Sanctioned conflicts of interest are ok—*Belin; Turkish*



- Creditor claims—dichotomy: oppose contingent claims, embrace established creditors
- Failure to object if proper basis exists—breach
- Failure to give proper notice and insufficient assets—breach—*Estate of Baer*
- Notice given in good faith—PR not liable
- Exception creditors: reserve may be required by trustee

## REMEDIES

- 733.609—PR liable for loss or damage
- 736.1001—Trustee subject to loss; greater of amount to restore value or appreciation; other relief

## MODIFICATION OF TRUSTS

- Purpose of trust not being fulfilled—  
736.04113
- Broad power to change trust terms
- Consider: terms, purposes, facts regarding creation, extrinsic evidence, spendthrift provisions

- Modify trust for best interests of beneficiaries-736.04115 (c)(3)
- Opt out—shorter perps period; and prohibit modification
- Modify trust for tax purposes—736.0416

- Nonjudicial settlement—terms could be approved by court/not unauthorized by modification provisions of Code
- Modification by trust protector
- *Minassian v. Rachins*

# REFORMATION OF WILLS AND TRUSTS

- Intent is critical
- Extrinsic evidence permitted
- Standard of proof--clear and convincing
- Scrivener's errors can be fixed

- Broad application of remedial statute--  
*Megiel*
- Drafter's testimony is important, but may be disregarded—*Reid*
- Time limit for reformation?? Common law v. statutory laches

- Reforming a will—732.615-like a trust
- Modifying a will to achieve tax objectives-732.616—like a trust



- Construction of a Will or Trust
- Arguments by opposing attorneys about the interpretation does not mean the language is ambiguous-*Minassian*
- Consider: terms, circumstances, property devised, relationships, financial condition *Pancoast*
- Reasonable construction; avoid absurd result
- Court can transpose, insert and eliminate words to effectuate intent

- Draftsperson cannot testify about their own interpretation of language-*Lenahan*
- Latent ambiguity—extrinsic evidence admissible
- Patent ambiguity—extrinsic evidence usually admitted
- Attorney fees in construction proceeding—  
733.106(3); 736.1005

The End

Thank you!!

