

FLORIDA THIRD DISTRICT COURT OF APPEAL

Genna Demircan, etc., et al. v. Igor Mikhaylov, et al.

Genna Demircan, etc., et al. v. Igor Mikhaylov, et al., 294 So. 3d 430 (Fla. 3d DCA 2020) (Fla. 3d DCA 2020) · No. 3D18-2054 & 3D18-1684

SUMMARY

The Florida Third District Court of Appeal affirmed modification of an irrevocable trust under the common law **Preston** rule, holding that the Florida Trust Code does not abrogate the right of a settlor and all beneficiaries to jointly consent to modification. The court also held that a trustee has standing to appeal as an “interested person,” and that a person with only the power to appoint trustees is not an indispensable party. The denial of attorney’s fees to the former trustee was reversed because the trust’s indemnification clause required payment absent a finding of bad faith or reckless indifference.

CASE DETAILS

COURT	Florida Third District Court of Appeal
WRITING FOR THE COURT	LOBREE, J.; LOGUE; SCALES; LOBREE
JURISDICTION	Florida
DOCKET	3D18-2054 & 3D18-1684
DISPOSITION	affirmed in part; reversed and remanded in part
PROCEDURAL POSTURE	Consolidated appeal from probate division final order modifying trust and civil division order denying attorney's fees.
STANDARD OF REVIEW	De novo for trust construction, legal interpretation, and standing. Legal entitlement to attorney's fees reviewed de novo; denial reviewed for abuse of discretion.
PRECEDENTIAL VALUE	published
PARTIES	Genna Demircan, Nelson Rincon v. Igor Mikhaylov, Sergei Mikhaylov, Alexandra Mikhaylov, Anastasia Mikhaylov, Audrey Mikhaylov

TOPICS

- trusts
- civil procedure
- standing
- attorney fees
- fiduciary duty

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the current trustee has standing to appeal modification of the trust.
2. Whether an indispensable party was not joined.
3. Whether the trial court erred as a matter of law in modifying the trust under the common law rule of *Preston v. City National Bank of Miami*.
4. Whether the trial court erred in denying attorney's fees mandated by the trust terms.

HOLDINGS

1. The current trustee has standing to oppose modification on appeal because the trust conferred upon trustees standing to seek modification or sue for a declaration against removal, and trustees are 'interested persons' under sections 736.0811 and 86.041(3).
2. Zinoviev was not an indispensable party because a complete and efficient determination of the equities and rights between the other parties was possible without joining him; his interest as a person designated to appoint trustees is not greater than that of the trustees he appoints.
3. Common law trust modification under *Preston*—based on consent of the settlor and all beneficiaries—is not abrogated by chapter 736 and does not require findings under section 736.04113; section 736.04113(4) expressly preserves common law rights.
4. A waiver of revocation or amendment power by the settlor does not preclude *Preston* modification unless the trust expressly conditions modification on the trustee's assent, which this trust did not; a trustee has no reason in law or equity to oppose modification where settlor and all beneficiaries consent.
5. The trial court erred as a matter of law in denying the former trustee's attorney's fees mandated by the trust's indemnification provision, as the trust required such fees to be paid absent a final determination of bad faith or reckless indifference, and no such finding was made.

KEY QUOTATIONS

“The terms of a trust may be modified if the settlor and all the beneficiaries consent. Having the power to terminate, they obviously have the power to create a new trust or to modify or change the old.” (at 8)

“The provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.” (at 11)

“The argument in favor of permitting the beneficiaries and settlor to terminate the trust, even though the purposes for which it was created have not yet been accomplished, is that there is no reason to keep the trust in existence if all those beneficially interested in it desire its termination . . . [I]f the settlor has had a change of heart and no longer wants [the trust's original] instructions to be carried out, and all the beneficiaries agree, there is no good reason for a court to insist on doing so . . . [They] may compel termination of the trust, whether or not doing so would defeat a material trust purpose . . . [T]he settlor and all of the beneficiaries may together modify the terms of the trust. This proposition follows logically . . . from the proposition that the settlor and all of the beneficiaries may together compel termination . . . There is plainly

no reason to require them to terminate the trust, accept a transfer of the property from the trustee, and then reconvey it on a new trust. Instead, [they] can, in a single transaction, direct the trustee to hold the property on different terms.” (at 10)

FACTUAL BACKGROUND

Settlor Igor Mikhaylov created an irrevocable trust with \$25 million to fund a shopping mall development and benefit his children. Disagreements among the settlor, the former trustee Genna Demircan, and Anatoly Zinoviev (who held removal/appointment power) over the development scale led the settlor to halt funding, saddling entities with debt. Settlor and beneficiaries sued to modify trust, stripping Zinoviev's powers and removing the former trustee; the former trustee resigned. After refileing in probate court and amending, the trial court modified the trust based on consent of settlor and all beneficiaries.

PROCEDURAL HISTORY

Settlor and beneficiaries filed suit in civil division to modify trust, naming former trustee; complaint dismissed and voluntarily dismissed. Same day, refiled in probate division, not naming Zinoviev but later amending to add current trustee. Former trustee resigned and sought dismissal. Trial court carried motions with final hearing, granting modification and denying removal. Former trustee moved for fees in civil action; motion denied. Trustees appealed both orders.

DISPOSITION

affirmed in part; reversed and remanded in part

REMAND INSTRUCTIONS

Remanded to determine reasonable attorney's fees and costs pursuant to the trust's terms, absent a finding of bad faith or reckless indifference on the former trustee's part. Fees and costs recoverable from trust assets or beneficiary distributions, not settlor's personal assets.

CASES CITED

- Preston v. City Nat'l Bank of Miami, 294 So. 2d 11 (Fla. 3d DCA 1974)
- Brigham v. Brigham, 11 So. 3d 374 (Fla. 3d DCA 2009)
- Credo LLC v. Speyside Invs. Corp., 259 So. 3d 893 (Fla. 3d DCA 2018)
- Herbits v. City of Miami, 207 So. 3d 274 (Fla. 3d DCA 2016)
- Radosevich v. Bank of N.Y. Mellon, 245 So. 3d 877 (Fla. 3d DCA 2018)
- Kumar Corp. v. Nopal Lines, Ltd., 462 So. 2d 1178 (Fla. 3d DCA 1985)
- Sierra v. Morton, 405 U.S. 727 (1972)
- Reid v. Temple Judea, 994 So. 2d 1146 (Fla. 3d DCA 2008)
- Wells v. Wells, 24 So. 3d 579 (Fla. 4th DCA 2009)
- Dep't of Revenue ex rel. Preston v. Cummings, 871 So. 2d 1055 (Fla. 2d DCA 2004)
- Sylvester v. Sylvester, 557 So. 2d 599 (Fla. 4th DCA 1990)

- MacFarlane v. First Nat'l Bank of Miami, 203 So. 2d 57 (Fla. 3d DCA 1967)
- Smith v. Mass. Mut. Life Ins. Co., 156 So. 498 (Fla. 1934)
- Nelson v. Nelson, 206 So. 3d 818 (Fla. 2d DCA 2016)
- Peck v. Peck, 133 So. 3d 587 (Fla. 2d DCA 2014)
- Minassian v. Rachins, 152 So. 3d 719 (Fla. 4th DCA 2014)
- Bellamy v. Langfitt, 86 So. 3d 1170 (Fla. 3d DCA 2012)
- Horgan v. Cosden, 249 So. 3d 683 (Fla. 2d DCA 2018)
- Featherston v. Tompkins, 339 So. 2d 306 (Fla. 3d DCA 1976)
- Perosi v. LiGreci, 98 A.D.3d 230 (N.Y. App. Div. 2012)

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