

FLORIDA

Probate & Trust Litigation *Blog*

By Juan C. Antúnez of
STOKES MCMILLAN ANTÚNEZ P.A.



Trustee Sued for Breach of Trust Must Pay Back All Attorneys Fees to Trust

By Juan C. Antúnez on June 7, 2006

Brigham v. Brigham, ___ So.2d ___ (Fla. 3d DCA May 31, 2006)

This case should be printed out and kept in the desk drawer of every probate litigator in Florida. Whether you find yourself defending a trustee being sued for breach of trust or prosecuting this type of claim on behalf of trust beneficiaries, you will need to be aware

of this case and its profound implications.

The law in Florida is clear: a trustee defending himself in litigation involving any form of breach of trust cannot pay his legal defense fees with trust funds in the absence of a prior authorizing court order. That was Miami-Dade Judge Rothenberg's ruling at the trial court level, and here's how the Third DCA summed up this rule when it affirmed his order:



Appellees brought suit against Appellants in their trust roles and as individuals for trust mismanagement. Because Appellants defended against individual liability, their personal interests conflicted with their position as trustees. *See Shriner v. Dyer*, 462 So.2d 1122, 1124 (Fla. 4th DCA 1984). When a trustee's individual interests conflict with his or her duties to a trust, court approval is necessary before a trustee can use trust funds to pay his or her own attorneys' fees.

2005->Ch0737->Section%20403#0737.403">§
737.403, Fla. Stat. (2003).

By the way, this rule is retained under Florida's new trust code as new F.S. § 736.802(10) (see here). Although every case is different, this opinion provides one possible road map for getting to a final ruling on this issue. Here is an extended excerpt from the opinion tracking the procedural steps and time-line in this case:

The settlor died in 2002. In **June 2003**, Appellees filed a multi-count complaint against Appellants alleging, among other things, undue influence, breach of fiduciary duty, self-dealing, conversion of trust assets, mismanagement of trust assets, intentional interference, fraud, and conspiracy. Appellants were sued in their individual capacities as well as their capacities as trustee and successor trustee. After receiving an accounting, Appellees discovered that Appellants were using trust funds to pay their legal fees in the underlying litigation. In **November 2004**, Appellees filed a Motion to Restrict Payment of

Attorneys' Fees, arguing that Appellants were prohibited from paying their individual attorneys' fees with the trust funds and without prior Court approval. On **January 18, 2005**, the trial court, after a hearing, granted Appellees' motion in part, finding that Appellants were prohibited from paying their individual attorneys' fees with trust funds, and concluding that court approval was necessary to pay litigation expenses out of the trust, as a personal conflict may exist since Appellants were sued in their individual capacities as well as in their trustee roles. In **March 2005**, upon motion by Appellants, the trial court appointed a Special Master to assist the court in determining which of the attorneys' fees and costs, already paid by the trust, were for the benefit of Appellants as trustee and successor trustee rather than as individuals. In **June 2005**, the Special Master issued his Report and Recommendation, noting that he "does not believe that any of the fees incurred to date can be separated into [Dana Brigham's] individual defense as opposed to [Dana Brigham's] defense as

trustee,” and recommending that Appellants personally pay all attorneys’ fees necessary to defend themselves against the litigation, and return all monies taken out of the trust for payment of attorneys’ fees in the underlying litigation. After a hearing on Appellants’ Objection to the Report and Recommendation, the trial court adopted the Report and Recommendation and held that Appellants must pay the attorneys’ fees back to the trust and refrain from paying further attorneys’ fees and costs with trust assets without court approval.



Copyright © 2016, Juan C. Antúnez, Attorney At Law All Rights Reserved.

Stokes McMillan Antúnez P.A.

Juan C. Antúnez,

Attorney At Law

Two Datan Center, Suite 1901

9130 South Dadeland Boulevard

Miami, FL 33156

Phone: (305) 379-4008

Fax: (305) 379-4848

STRATEGY, DESIGN, MARKETING & SUPPORT BY **LEXBLOG**

