

IN THE DISTRICT COURT OF APPEAL
SECOND JUDICIAL DISTRICT
STATE OF FLORIDA

IN RE: GUARDIANSHIP OF LEON BLOOM,
an alleged incapacitated person.

Case No: 2D16-2985
L.T. No. 2014-GA-003747-NC

MARSHALL BLOOM, individually,

Appellant,

v.

DOROTHY B. BLOOM, individually,

Appellee,

and

ROBERT M. ELLIOTT, as Trustee of the
Leon Bloom Revocable Living Trust
u/a/d 11/18/1988, as Restated on 10/22/2009

Appellee.

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Twelfth Judicial Circuit
in and for Sarasota County, Florida.

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I. INTRODUCTION

After an evidentiary hearing spanning several days on a motion to disqualify Marc J. Soss, Esq. (“Soss”) as Successor Trustee of Leon Bloom’s Trust on the basis of conflict of interest, which motion was brought by Marshall Bloom (“Marshall”), as Personal Representative of the Estate of Leon Bloom and later individually (R.301-16, 829-30) (“Disqualification Proceeding”), the Lower Court entered an order on April 7, 2016 that, among other things, removed Soss as Successor Trustee of Leon Bloom’s Trust (the “Removal Order”) (R.2448-2455.)

The Removal Order found that while Soss was representing his client Dorothy Bloom in her \$500,000 claim against Leon Bloom’s Trust, Soss assumed the role of Trustee of that Trust, which created an irreconcilable conflict of interest. (R.2451.) The Removal Order further found that the conflict was not cured by Soss’ subsequent stipulation to counsel substituting in for him as counsel for Dorothy Bloom, since Soss owes the same duty of loyalty to a former client. (Id.) The Removal Order relied on the testimony of the expert hired by Marshall’s counsel for these findings. (Id.)

Marshall subsequently moved for an order of entitlement to attorney’s fees and costs for the Disqualification Proceeding, citing the law of the case doctrine based on this Court’s order awarding Marshall his appellate attorney’s fees under Florida Statutes 733.106 and 736.1004-1005 on Soss’ appeal of the order substituting

Marshall in as party to this case in Appeal 2D15-4864 (R.2463-2465, 2445-2447), and argued in the alternative the statutory bases under sections 736.1004-.1005 of the Florida Trust Code and the common fund theory. (R.2577-84; R.2603-04.)

The Lower Court's Order denying Marshall any entitlement to attorney's fees and costs for the Disqualification Proceeding found that there were no equitable, statutory or contractual bases for awarding Marshall's counsel fees and costs for the Disqualification Proceeding. (R.2588.) It is from this order that Marshall appeals.

References to the pages in the Record on Appeal are designated (R.___), references to the pages and lines of the transcripts of the Disqualification Proceeding contained in the Record on Appeal are designated (RT.__:__) and references to exhibits admitted at the Disqualification Proceeding contained in the Record on Appeal are designated (RX.__).

II. STANDARD OF REVIEW

Generally, the standard of review of a trial court's order regarding attorney's fees is abuse of discretion. *Jean-Pierre v. Glaberman*, 192 So. 3d 613, 613 (Fla. 4th DCA 2016); see also *Miller v. Florida Ins. Guar. Ass'n, Inc.*, 41 Fla. L. Weekly D1649, 2016 WL 3766630 (Fla. 2d DCA 2016). However, to the extent a trial court's order on fees is based on an issue of law, appellate courts apply *de novo* review. *Id.*

In the Lower Tribunal, Marshall argued entitlement to fees under three theories: law of the case doctrine, the Florida Trust Code, and the common fund theory. The Lower Court denied Marshall Bloom's entitlement to fees by concluding that "[t]here is no statutory authority or contractual basis for attorney's fees." Accordingly, the Lower Court's legal conclusion, based upon the Lower Court's interpretation of the law, is reviewed *de novo*. *Id.*; *Davis v. Estate of Davis*, 77 So. 3d 703, 704 (Fla. 3d DCA 2011). (In the instant case, the Court made no factual findings based on the record.)

III. STATEMENT OF THE FACTS

A. Initiation of Proceedings and Settlement Order.

The background facts of this case were set forth in Marshall's Response to Petition for Writ of Certiorari in appeal No. 2D15-4864, on Soss' appeal of the Order substituting Marshall in as a party. The background facts were also set forth in sum in the Lower Court's Removal Order (R.2448-2452), and will be set forth herein as well. The incapacity proceeding (at case number 2014-GA-3746-NC) and guardianship proceeding (the instant lower case) involving Leon Bloom ("Leon") were brought by Senator Robert Johnson ("Johnson"), Leon's long-time lawyer, who was also serving as the Successor Trustee of the Leon Bloom Revocable Living Trust u/a/d 11/18/1988, as Restated on 10/22/2009 (the "Trust" or "Leon's Trust"). (R. 2448; R.25-34.)

Among Johnson's concerns was that Leon's wife, Dorothy Bloom ("Dorothy") was refusing to account for sizable sums of money that Leon's Trust transferred to her as well as for Leon's Social Security and/or pension she received, and was refusing to communicate with Johnson regarding certain Trust expenditures (R.28.) Johnson named as the proposed guardian Marshall Bloom ("Marshall"), who was Leon's close nephew. (R.31.)

On September 22, 2014, Marc J. Soss, Esq. ("Soss") appeared as co-counsel for Dorothy, along with Ira Wiesner, Esq. (R.54.) Dorothy claimed that she had expended sizable amounts of her own funds for Leon's care and for the upkeep of the home, for which Leon's Trust was liable. (RX.1807-1808, 1903.)

The guardianship proceedings, the issues relating to Leon's Trust, and Dorothy's claims for reimbursement from Leon's Trust were resolved in mediation by Motion and Stipulation signed by all counsel, in addition to Marshall, (RX.1387-1395), which was approved on February 11, 2015 by entry of an Order Ratifying Global Settlement, Ordering a Less Restrictive Alternative, Naming a Corporate Trustee for the Leon Bloom Revocable Trust u/a/d 11/18/1988, as Amended and Reserving Jurisdiction for Enforcement of Global Settlement (the "Settlement Order"). (RX.1396-1402.)

Among other things, the Settlement Order made no finding as to Leon's capacity (RX.1396), added Leon's Trust and Marshall as parties to the settlement

(RX.1396; 1401); accepted the resignation of Johnson as Successor Trustee and the renunciation of Marshall as Successor Trustee (RX.1396-97); and appointed Caldwell Trust Company (“Caldwell”) as a Successor Trustee of the Trust to administer the same “under its terms as specifically described under the terms of this stipulated order.” (RX.1397.)

The Settlement Order goes on to direct Caldwell to establish a marital trust for Dorothy (R.1397), which Dorothy receives outright if Leon predeceased her, and the Settlement Order directs Dorothy is to receive trust income from the balance of the Trust assets during her lifetime. (RX.1398.) Prior to the Settlement Order’s modification to the Trust, Leon’s Trust only provided for a Marital Deduction Trust for Dorothy during her life (RX.1721-1722), with the remainder to be distributed to various beneficiaries, after which the Trust terminated. (RX.1723-1728.)

The Settlement Order also provides a procedure to resolve Dorothy’s claims against the Trust since August of 2012, when Johnson became the Successor Trustee (the “Reconciliation Procedure”). (RX.1399-1400.) The Reconciliation Procedure appointed an independent CPA to review Dorothy’s application for reimbursement for funds she claims she advanced since August 2012 for Leon’s care and for the upkeep and expenses of the marital home, along with monthly bank statements of Leon’s bank accounts since 2012. (RX.1399.) The CPA’s report on the same was to, among other things, provide “what reimbursements should be questioned on

Dorothy's application for reimbursements". (RX.1399-4000.) Thereafter, if the issues were not resolved in thirty days, mediation was scheduled before a named mediator within thirty days, and any unresolved issues were to be heard and decided in arbitration to be scheduled within thirty (30) days thereafter. (R.1400.)

The Reconciliation Procedure also provided for payment of reasonable fees and costs to the prevailing party. (Id.) (The Settlement Order had provided for payment from the Trust of the fees and costs for all counsel of record through the date of the Settlement Order. (Id.)) Additionally, the parties were directed to fully comply with any appropriate resolution they have made regarding these matters, and the court-appointed Trustee, Caldwell, was provided the right to have its representatives attend any of these proceedings. (Id.)

Significantly, the Settlement Order reserves jurisdiction in the Court over the parties and for enforcement, (RX.1401), and the parties proceeded in the guardianship under the Settlement Order in March of 2015 with the focus now on Leon's Trust. See *Paulucci v. General Dynamics Corp.*, 842 So.2d 797, 803 (Fla. 2003). Leon Bloom died on May 14, 2015.

Dorothy, through her counsel Soss, was almost immediately non-compliant with the Reconciliation Procedure, as more detailed below (and also detailed in Marshall's Motion to Enforce Settlement Order, Compel Arbitration and Award

Fees, (R.318-400)¹ which is incorporated herein), including submitting an application for Dorothy's reimbursement that, among other things, contained expenses -even whole categories of expenses- that predated the August 2012 start date specified in the Settlement Order. (RX.1480-1495, RT.1005:10-24.) Soss then attempted to schedule mediation, and then arbitration prior to the CPA submitting his Report on July 10, 2015. (RT.1025:7 to 1026:22, 1596.)

B. Caldwell's Resignation as Successor Trustee and Soss' Assumption of the Role of Successor Trustee of Leon's Trust.

In the meantime, on July 2, 2015, Caldwell, the Trustee appointed under the Settlement Order, petitioned to resign as Successor Trustee. (RX.1663-1664.) At the hearing thereon, Soss argued that his client, Dorothy, as income beneficiary, may appoint a successor trustee under Article XXVII of Leon's Trust, and Johnson had no standing with respect to such appointment, while Johnson argued the Settlement Order superseded the Trust by modifying certain provisions thereof, including appointing an independent Trustee and making Dorothy an income beneficiary, so Johnson requested that the Court appoint a successor trustee.

The Court's July 22, 2015 order did not specify that Dorothy could select a Successor Trustee, but directed that the proposed Successor Trustee "shall be

¹ Soss' non-compliance with the Reconciliation Procedure are also detailed in Johnson's Objection to Soss as Successor Trustee (RX.1678-1716) and in Marshall's Response to Soss' Petition for Writ of Certiorari in Appeal No. 2D15-4864.

presented for appointment” by end-of-day on July 23, 2015 and that Johnson had standing for purposes of notice and objection to the proposed Successor Trustee (the “Trustee Order”). (RX.1421.)

On or about July 23, 2015, Johnson was served with a “Notice of Appointment of Successor Trustees”, which purported to appoint, as Successor Trustees of Leon’s Trust, Raymond James Trust, N.A., and Marc J. Soss, and which was signed only by Soss. (RX.1425-1426; RX.1585-1587.)

Johnson promptly filed an Objection to Soss as Successor Trustee, based largely on conflict of interest, stating that given the pending Reconciliation Procedure (and Soss’ noncompliance with the same), Johnson objected to placing Soss in a position of authority over a Trust which will pay –or not pay– monies to Soss’ client Dorothy (and pay prevailing party attorney fees), pursuant to her claim. (RX.1678-1716.) Johnson did not object to the appointment of Raymond James Trust, N.A., as Successor Trustee. (RX. 1684.)

After learning from Soss that Raymond James Trust declined to serve as successor trustee, Caldwell filed a Motion for Direction with the Court (RX.273-276), and within a few days thereafter, Caldwell transferred Leon’s Trust funds, in the approximate amount of \$1.5 Million (RX.1645), to an account under Soss’ control at Raymond James & Associates. (RT.1061:21-1062:13; RT.1074:11-18.)

C. The Setting of the Disqualification Proceeding.

On August 31, 2015, while Caldwell was finalizing the transfer of the Trust funds to Soss, Johnson died. Because the Reconciliation Procedure was still not resolved and because Soss' assumption of the role of Successor Trustee was improper and presented a conflict of interest, Marshall, as Personal Representative of Leon Bloom's Estate, timely moved to substitute in for Johnson as a party in this case (R.286-88), which was granted by Order dated October 23, 2015 (the "Substitution Order"). (R.300.) (Marshall was also a party to the Settlement Order (RX.1396-1402, *passim*) and signed the Motion and Stipulation for entry of the Settlement Order (see 1388 of RX.1387-1395.))

Marshall promptly filed the Motion to Disqualify Soss as Successor Trustee and Motion to Appoint Independent Trustee ("Motion to Disqualify Soss") (R.301-316), and a Motion to Enforce the Settlement Order and to Compel Arbitration, and to Award Fees, directed to Soss' noncompliance with the Reconciliation Procedure, (R.318-400.) After Soss, now as Trustee, filed a Petition for Writ of Certiorari in this Court, appealing the Substitution Order, the Lower Court then *sua sponte* stayed the proceedings below pending this Court's decision on Soss' appeal. (R.491).

On December 18, 2015, Marshall moved on an emergency basis to have the Court hear the Motion to Disqualify Soss (R.518-547), which alleged, among other things, that since Soss had assumed the role of Trustee, Soss had ceased

communicating with Marshall about the Reconciliation Procedure and that Soss initiated, as Trustee, a separate lawsuit in the Circuit Civil division against Marshall and his counsel for alleged fraud and conversion on issues related to the Settlement Order. (R.521-522.)

The Court held a case management conference on December 30, 2015 (the “CMC”) and agreed to hear Marshall’s Motion to Disqualify and, at Soss’ urging, also agreed to hear Soss’ Petition to Remove Marshall as Personal Representative of the Estate (“PR Petition”) before rendering any decision on the Motion to Disqualify. (RT.856:16 to 857:18.) At the CMC, the Court scheduled the evidentiary hearing for January 15, 2016, and stayed all pending discovery, directing the parties to proceed on the hearing without discovery.

The Court held the evidentiary hearing, the Disqualification Proceeding, on January 15, 2016, which was continued to January 29, 2016 and February 1, 2016, and then continued to March 11, 2016, the latter date focusing largely on Soss’ PR Petition. (R.2450.)

D. The Evidence Adduced at the Disqualification Proceeding.

1. Soss’ conflict of interest precluded him from serving as Trustee.

The evidence adduced at the Disqualification Proceeding established that Soss represented Dorothy from September 22, 2014 to January 13, 2016 (RT.996:5-20; RX.1508), and was representing Dorothy in connection with her approximately

\$500,000 claim against the Trust (RT.1001:12-1003:16; RX.1480-1495; see also RX.1403-08), when he assumed the role of Trustee of the Trust on July 23, 2015 (RX.1425-26). After Soss assumed the role of Trustee, Soss continued to represent Dorothy in her claim against the Trust (see e.g. RX.1418-19), and hired himself as counsel for the Trustee of the Trust. (See RX.1588-89.)

This created an irreconcilable conflict of interest, according to Marshall's trust expert, Barry Spivey, Esq. (RT.866:25-867:16.) Soss' subsequent stipulation to Allan Baily, Esq., substituting in for him as Dorothy's counsel on January 13, 2016 (two days before the commencement of the Disqualification Proceeding) did not cure the conflict because lawyers owe the same duties for former clients, and so Soss could not oppose his former client's claim, but as Trustee, Soss owes a duty of loyalty to the Trust beneficiaries. (RT.867:17-868:4; 883:2-9.) Accordingly, Soss was precluded from serving as Trustee of Leon's Trust.

2. Soss' actions, as Trustee, were to the detriment of the Trust.

The evidence adduced at the Disqualification Proceeding also revealed, as detailed below, that, to the detriment of the Trust and its beneficiaries (a) Soss assumed the role of Trustee in violation of the Trustee Order; (b) Soss, as Trustee, falsified documents and mislead the opposing parties, Trust beneficiaries, and the former Trustee, Caldwell, with respect to the purported appointment as Successor Trustee; (c) Soss, as Trustee, misappropriated Trust funds for himself as well as to

pay the attorney he hired to defend his position as unauthorized Trustee; (d) Soss, as Trustee, threatened opposing counsel; (e) Soss, as Trustee, initiated an unwarranted civil suit against Appellant and his counsel on behalf of the Trust and on behalf of Dorothy, incurring unnecessary Trust expense; (f) Soss failed to comply with the Settlement Order with respect to the Reimbursement Procedure before and after he assumed the role of Trustee; and the record establishes that (g) Soss repeatedly undertakes representation in this case under a conflict of interest.

a. Soss violated the Trustee Order.

Pursuant to the Trustee Order requiring that the Successor Trustee be presented for appointment by the end of the business day on July 23, 2015 and Johnson is to be notified (RX.1421), Soss prepared a “Notice of Appointment of Successor Trustees” (“July Notice”) (RX.1425-1426), and served it on Johnson. (RT.1134:12-1135:1; RX.1584-1587.) Soss never presented himself for appointment to the Court and proceeded as an unauthorized Trustee. (R.2449.)

b. Soss served misleading and false Trust documents.

The July Notice discussed above that indicated that Soss and Raymond James Trust were appointed as Successor Trustees of the Trust (RX.1425-1426), listed at the end under the “name and address of the successor trustees of the Trust” the names and addresses of Soss and Raymond James Trust, and is signed, under a certificate of service dated July 23, 2015, by Soss. (RX.1426.) Although the certificate of

service on the July Notice indicates service on all 45 or so Trust beneficiaries listed (RX.1426), Soss, who initially testified that he sent the July Notice to “each and every one” of the Trust beneficiaries (RT.926:13-23), later testified that he never sent the July Notice to the Trust beneficiaries contrary to the certificate of service. (RT.1009:19-25; 1154:7-11.) Also on July 23, 2015, Soss signed not one, but two different Acceptances. Soss’ first Acceptance (“First Acceptance”) (RX.1422) indicated that Dorothy “selected Marc J. Soss and Raymond James Trust to serve as Successor Trustees of the Trust” and was signed by Soss before a notary on July 23, 2015. (RT.923:6-14). Later that same day, Soss signed before a notary another Acceptance (“Second Acceptance”) (RX.1423), which indicated that Dorothy Bloom has “selected Marc J. Soss to serve as Successor Trustees [sic] of the Trust” and made no mention of Raymond James. (RT.923:23-924:15.)

By August 14, 2015, Soss knew from his close friend and Raymond James account executive, Michael Tatcher (RT.1013:2-17) that Raymond James had declined to serve as Trustee. (RX.1677, RT.1114:6- 1115:8.) As detailed below, Soss advised no one of this fact until cornered by Caldwell.

On the first day of the Disqualification Proceeding², Soss denied that he failed to inform the Trust beneficiaries that Soss was serving as sole trustee, testifying that

² Although Soss was served with a *subpoena duces tecum* to testify and bring his file (RX.1498-1506), on the first day of the Disqualification Proceeding, January 15th, Soss did

he sent to each Trust beneficiary the required notices, and acceptance, and other required documents. (RT.926:13-23.) With respect to the “beneficiary packet”, Soss further testified that the documents “specifically stated that [Soss] was the sole trustee” (RT. 928:6-13), and that the beneficiary packet contained a document that “specifically enumerated this Notice of Appointment, and that Raymond James Trust had not accepted at that point in time, and that [Soss] had accepted.” (RT.929:15-19) and/or that “affirmatively advised them that [Soss] had accepted the appointment”. (RT.930:23- 931:7.)

By significant contrast, the evidence adduced on January 29, 2016, when the parties had actual copies of the beneficiary packets sent by Soss in August (RX.1526-1555; RX 1556-1584)³ revealed that, with respect to the appointment of the Successor Trustees, Soss only included a cover letter (discussed below) and a

not bring his file, claiming such subpoena was “discovery”, which the Court had stayed. (RT.906:23-907:5; 932:8-933:15.) Consequently, Soss could not identify enclosures or attachments to various documents he sent or authored, until the next day of hearing (January 29th) when he brought his file. As just one example, Soss could not recollect, or even approximate, the total of Dorothy’s claim against the Trust, on which he had for the previous year been representing her, even when shown his cover letter with the claim attached and the total. (RT.906:9-908:13;RX.1480-1495.) (See e.g. the list on R.1326-27, with citations to the transcript of the Disqualification Proceeding.)

³ Soss identified Exhibit 50 (RX.1526-1555) as the beneficiary packet he sent and then retrieved from his file the same beneficiary packet, which was identified as Exhibit 57 (RX.1556-1584). (RT.1006:20 to 1007:11.) The only difference between Exhibit 50 and Exhibit 57, other than the order of the documents, is that Exhibit 50 has a copy of the front of the envelope. (RT.1007:16-20; RX.1526.) Appellant will refer to RX.1556-1584 in discussing the documents in the beneficiary packet.

“Notice of Appointment of Successor Trustees” with a certificate of service date of August 14, 2015 (the “August Notice”). (RT.1006:13-19; RX.1560-1561.) (Soss also testified that the packet was not mailed to the beneficiaries until August 17, 2015. (RT.1007:18 to 1009:8.)) Contrary to Soss’ earlier testimony, there was no document in the packet that specifically or affirmatively stated that although Soss and Raymond James Trust were appointed, only Soss had accepted or would be serving. (See RX.1556-1584.)

Aside from certain formatting and the service date, the August Notice to the beneficiaries differed from the July Notice to Johnson only in that listed at the end under the “name and address of the successor trustees [sic] of the Trust” is the name and address of Soss alone. (RX.1561.) In addition to the ambiguous August Notice, Soss’ cover letter to the beneficiaries stated that Dorothy Bloom appointed Soss and Raymond James Trust as successor trustees of the Trust (thereby trading on the reputation and credibility of Raymond James Trust). (RX.1557.) The letter then goes on to list the numerous distributions to each beneficiary under the Trust (RX.1557-1558), to advise regarding the beneficiary’s entitlement to a copy of the Trust instrument (RX.1558); to request email addresses (RX.1558), to advise regarding the beneficiary’s right to contest the Trust (id.), and then finally, at the end, to list the “name and address of the successor trustee(s)”, under which Soss listed only himself. (Id.)

At *no* point in the letter does Soss affirmatively state that Raymond James Trust has not yet accepted or, more accurately, that Raymond James Trust had declined to serve. (RX.1556-1558.) And even though Soss testified on the first day of the hearing that he sent a Notice of Appointment “in addition to the acceptance” to the beneficiaries (RT.926:13-23), the beneficiary packets contained no Acceptance (RX.1556-1584), despite Soss’ execution of two such Acceptances a month prior. (Even after the beneficiary packet, which belied Soss’ testimony on the first day of hearing, was admitted to evidence on the second day of hearing, Soss testified on the third day of hearing, again, that he served the beneficiaries with his Acceptance. (RT.1137:13-21.))

Similarly, although Raymond James Trust subsequently signed a Declination of Nominated Successor Trustee on August 26, 2015 (RT.925:17-24; RX.1424), the Declination was not served on the beneficiaries. (RT.925:25-926:2.) In contrast to his earlier testimony about the specific and affirmative statements that only Soss was serving as Trustee, Soss testified that there was no need to advise the Trust beneficiaries that Raymond James Trust had declined to serve since the same is “implied by the absence of their address on the second page of the notice” in the beneficiary packet. (RT.1013:18-1014:3.)

Even counsel for Caldwell, Christopher Staine, Esq., testified that there was confusion about who was serving as successor trustee, which confusion was

referenced in paragraph 9 of his Motion for Direction. (RT.1056:9-1057:19; 1058:2-7; RX.1672-1675.) Mr. Staine testified to receiving the July Notice on August 24, 2015. (RT.1076:21-1077:13), but on July 23, 2015, the date the Trustee Order required the successor trustee to be presented (RX.1421), Mr. Staine received nothing indicating appointment. (RT.1076:12-20.)

Mr. Staine further testified that when Soss in August began demanding transfer of the funds to an account under Soss' control at Raymond James & Associates, Mr. Staine, who had only received by that time the First Acceptance signed by Soss, then requested an Acceptance signed by Raymond James. (RT.1056:22-1057:6.) As paragraph 7 and 8 of the Motion for Direction makes clear (RX.1673), Caldwell, having received no document indicating appointment (RT.1066:14-23), was therefore under the impression initially that Raymond James & Associates (which is not the same entity as Raymond James Trust) was named as successor trustee and then declined. (RX.1673.) In reality, Soss, who was aware Raymond James Trust had declined, selected Raymond James & Associates to house the Trust funds under an account in the name of Soss, Trustee. (See RX.1608-1612.)

After learning Raymond James Trust declined to serve, Mr. Staine then requested from Soss a declination signed by Raymond James Trust and an acceptance indicating Soss only as successor trustee. (RT.1057:7-19.) Mr. Staine testified that he did receive an "amended corrected acceptance" from Soss

(RT.1068:1-4) which was Soss' Second Acceptance, listing only Soss as being appointed (RX.1423) and Raymond James Trust's signed Declination (RX. 1424), and, as a result of receiving what he perceived to be the appropriate documents from Soss, transferred the Trust funds to Soss. (RT.1067:18-1068:16; 1074:10-18.)

Soss' disqualification and removal as Trustee ensures that no further misleading, false, or incomplete documents will be sent by Soss, as Trustee, to the Trust beneficiaries or opposing counsel.

c. Soss misappropriated Trust Funds to Pay himself and his Attorneys.

In addition, not only was Soss never appointed as Trustee by the Court, Soss appropriated substantial sums of money from that Trust for the benefit of himself, as well as the attorney he hired to defend his actions, which were unauthorized, and defend his position as Trustee, which was assumed under a conflict of interest. Soss testified that he paid himself a monthly trustee's fee of approximately \$2,572 retroactive to July 23, 2015. (RT.1017:5-1018:24; 1032:19-1034:25), which includes fees for "extraordinary services" Soss claims he performed (RT.1016:7-14).

Soss testified that he also paid his counsel, John J. Waskom ("Waskom"), hired on October 23, 2015 (RT.959:17-960:8; R.300), a retainer for fees and costs of \$42,500.00 (RT.1015:21-1016:6), notwithstanding the fact that Waskom, in his

opening statement just hours before, proclaimed “not one dime has been paid to anyone from this trust” (RT.860:23).

Soss also placed \$20,000.00 from the Trust funds into his own IOTA trust account for additional fees, “as a precaution” in case Appellant’s counsel attempted to have the Trust funds frozen (RT.1018:25-1019:13). Then, between the evidentiary hearing on January 29, 2016 and March 11, 2016, Soss paid Waskom another \$40,000, representing \$7,000 in legal fees and \$33,000 to put in Waskom's IOTA trust account for additional fees in case Appellant’s counsel got the Trust funds frozen. (RT.2354:24- 2355:12; RT.2357:18-23.)

In total, Soss paid himself, from the Trust, approximately \$25,000 in trustee’s fees from July of 2015 to April of 2016, secreted an additional \$20,000 in legal fees in his IOTA account, and paid his attorney, Waskom, \$82,500 in fees and costs for his six months of representation. Soss appropriated such sums notwithstanding the fact that he was maintaining an obvious and irreconcilable conflict of interest.

Soss’ disqualification and removal as Trustee ensures that no further unauthorized sums will be expended from the Trust by Soss, as Trustee, for Soss’ sole benefit.

Additionally, Marshall’s Amended Motion for Order Compelling Return of Any Fees Paid From the Trust remains pending. (R.2481-2503.) Soss’ response to Marshall’s initial Motion for Order Compelling Return of Any Fees Paid from Trust

(R.766-778) illustrates the level of hysteria and animosity exhibited by Soss toward Appellant's Counsel for challenging his right to be Trustee and to misappropriate sums as unauthorized Trustee. (Bizarrely, Soss even seeks a "psychiatric examination" of Appellant's counsel, which is not even a cognizable remedy under the law, on the basis of a list of factual inaccuracies. (R.770-771.))

Soss' disqualification and removal as Trustee also ensures that Soss' further frivolous and hysterical filings will no longer be charged to the Trust.

d. Soss acted inappropriately and threatening toward opposing Counsel.

As touched on above with respect to Soss' growing level of hysteria surrounding his appointment and his actions as Trustee, Soss' actions to opposing counsel became generally inappropriate and even threatening.

For example, Soss threatened Caldwell and its counsel unless the Trust funds were transferred to him. Despite the filing of Johnson's Objection to Soss as Trustee (RX.1678-1716) and despite Caldwell's Motion for Direction regarding the Trust assets (RX.1672-1675), Christopher Staine, counsel for Caldwell, testified that Soss sent him an email on August 26, 2015 (RX.1428-1436) threatening to sue Caldwell and threatening to have Mr. Staine disqualified as Caldwell's counsel (RT.1059:4-15; RX.1428), and also intimating negative publicity to Caldwell unless the Trust funds were transferred that day by 4pm. (RT.1060:14-1061:3.) Mr. Staine testified

that he was perplexed about Soss' urgency, the adversarial tenor, and unreasonable deadline under threat of a lawsuit, especially since Mr. Staine did not yet have the required documents from Soss to effect the transfer. (RT.1059:19-1060:13.) (Despite Mr. Staine's testimony, Soss testified later that he did not receive the funds until September due to actions of Appellant's counsel. RT.1165:6-14.))

As another example, Soss initiated an online campaign to defame Appellant's counsel, which intensified after Marshall substituted in as a party largely to move to disqualify Soss and to compel compliance with the Settlement Order. As stated in the Emergency Motion to have the Motion to Disqualify heard (R.518-547), after the mediation that resulted in the Settlement Order, Soss began publishing defamatory comments about Appellant's counsel online, including the creation of a website ("Unethical Florida Lawyers") that targeted Appellant's counsel, and the creation of a fake website and a fake Facebook page, both under the name of Appellant's counsel's firm, all created to disparage Appellant's counsel (paragraphs 8-9 of R.520). Shortly thereafter, Appellant's counsel's firm parking lot was spiked with caltrops (military grade spikes) on the morning of December 9, 2015, the same morning on which Soss threatened to come to Appellant's counsel's offices to inspect discovery documents and was warned regarding trespass. (See paragraphs 10-11 of R.520-521.)

At the Disqualification Proceeding, Soss initially denied posting defamatory comments on a Facebook page of Appellant Counsel’s former client, “Keep Marise”, (RT.950:25-952:3; 953:1-15; RX.2632-2636), including posting a link to the “Unethical Florida Lawyers” website, twice. (RX.2632 & 2633.) Soss then admitted to posting those comments when impeached by his own Response (RT.957:5-19) dated just a month prior (RX.1442-1451) to the Complaint filed against him by Appellant’s counsel to the Twelfth Judicial Circuit Professionalism Panel about the defamatory online postings. (RT.956:10-957:19.)⁴

Soss’ disqualification and removal as Trustee ensures that no further threats or inappropriate actions will be made by Soss, at least as Trustee, to opposing counsel.

e. Soss initiated a separate civil action against Appellant and Appellant’s counsel for issues related to this case.

As an unauthorized Trustee, Soss filed on behalf of himself as Trustee and on simultaneously behalf of Dorothy a separate Circuit Civil action against Appellant and his counsel for issues –which could have been resolved by motion in this case– arising from the Trust, and, specifically, arising under the Settlement Order,

⁴ Appellant’s Counsel’s defamation and trespass allegations in the Emergency Motion to have the Motion to Disqualify heard, about which he was examined at length (RT. 2214:22-2306:22) are incorporated into a Complaint for defamation and trespass filed in the Twelfth Judicial Circuit in and for Sarasota County at Case no. 2015-CA-6741-NC.

incurring unnecessary and unwarranted expenses. (RT.998:8-12; RT.999:18-1000:3; RT.1285:4-24; RX.1509-1525.) Dorothy, Soss' infirm, eighty-nine year old client, testified that she did not know Soss had sued Marshall's counsel, James Essenson ("Essenson") for fraud. (RT.1224:13-1225:11; RT.1240:1-5.)

Soss' disqualification and removal as Trustee ensures that no further fees and costs will be expended from the Trust by Soss, as Trustee, to prosecute this and other frivolous actions.

f. Soss failed to comply with the Reconciliation Procedure.

Soss failed to comply with the Settlement Order with respect to the Reconciliation Procedure for resolving Dorothy's claims against the Trust (R.1399-1400). Soss's March 11, 2015 application for Dorothy's claim for reimbursement (RT.1001:12-16; RT.1002:24-1003:13; RX.1480-1495) (the "March Submittal"), included claims outside the date parameters (RT.1004:4 to 1005:20; RX.1484, 1488, 1490, 1492-94), undated claims (RX.1483, 1484-85), and even whole categories of claims outside the date parameters. (RX. 1482, 1491.) Soss also submitted no bank account statements by March 11, 2015 pursuant to the Settlement Order, only eight pages of so-called "proof of statements" in April. (RT.1243:1-24; RX.1357-1365.)

On April 30, 2015, a day before the Report by Ray Suplee, CPA ("Suplee") was due under the Settlement Order, Appellant's counsel invited Suplee to request a 30-day extension. (RX.1590.) Suplee did so request by letter dated May 1, 2015.

(RX.1596.) Thereafter, Soss attempted to mediate then arbitrate Suplee's May 1, 2015 letter ("May Letter"), advising the Arbitrator that the May Letter was the Report. (RT.1024:16-1026:19.)

On June 1, 2015, Suplee clarified (RX.1597) that he was working on the Report but that Soss advised him that since Appellant's counsel's firm failed to grant the extension sought by Suplee in his May letter, the May Letter, according to Soss, constituted the Report under the Settlement Order. (RT.1026:23-1027:10.) On July 10, 2015, the Arbitrator held a conference on Soss' unilaterally scheduled arbitration and then filed a report, stating that Soss' attempt to schedule arbitration on a Report that has not yet issued was non-compliant with the Settlement Order. (RX.1496.) Coincidentally, also on July 10, 2015, Suplee issued his Report. (RT.1027:17-1028:1; RX.1598-1602.)

At the end of July, Soss, having assumed the role of Trustee of the Trust a week prior, objected to the Arbitrator's Ruling and sought to disqualify the Arbitrator (RX.1403-1408), which compelled the Arbitrator to file a Motion (RX.1409-1417) stating that clarification was warranted because "[r]ead as a whole, Mr. Soss's Objection is disingenuous at best and outright lying at worst." (RX.1413 at para. 13; RT.1086:2-1087:8.)

After Soss assumed the role of Trustee, he advised Raymond James Trust, by memo dated on July 28, 2015 (RX.1661), that the parties are mediating Dorothy's

claims against the Trust under a Settlement Agreement, but that Dorothy is **also** due approximately \$155,000 from the Trust in **addition** for expenses **outside** the date parameters in the Settlement Order. (RT.1035:20-1037:15.) Soss conspicuously omits in the memo any mention that he is representing Dorothy in these –now two– claims against the Trust. (RX.1661-62; RT.1037:14-24; 1038:9-21.)

Also within days of assuming the role of Trustee, Soss was demanding from Johnson’s counsel that Dorothy (for whom he was counsel) be reimbursed in the amount of \$416,099.59 from the Trust (of which he was Trustee and for which he was counsel). (RX.1418-1419.)

Following Soss’ receipt of the Trust funds at the end of August, however, he ceased communicating with Appellant’s counsel altogether regarding the Reconciliation Procedure (RT.1263:1-5). Abandoning all pretense of complying with the Reconciliation Procedure under the Settlement Order, Soss, after assuming the role of Trustee, “immediately” hired Suplee to determine whether reasonable documentation existed to support Dorothy’s claim for reimbursement, which was almost the opposite of Suplee’s duties under the Settlement Order. (RT.1261:20-1262:22.) Soss testified that he intended to include the amount of Dorothy’s reimbursement, as determined by Suplee, on an accounting served only on the Trust beneficiaries (RT.1247:4-24; RT.962:10-963:8), a procedure also not in compliance with the Settlement Order (See RX.1399-1400).

In fact, Suplee generated a letter on January 28, 2016 (a day prior to the second Disqualification Proceeding hearing day) for Soss, as Trustee, which was not admitted into evidence. (See RX.1366-69; RT.1263:6-7; RT.1249:3-8.) In any event, the January 28, 2016 “Report” indicated that Soss, as Trustee, provided to Suplee the total of the reimbursement to Dorothy, Soss’ client, as well as the documents and the summary of expenses for her claim. (See RX.1366-67).

Finally, on the first day of the Disqualification Proceeding, Soss, as Trustee, filed a Petition to Terminate the Trust, proposing to distribute to Dorothy her present value interest in the Trust along with the reimbursement for her claim(s) and distribute the remainder to the Trust beneficiaries, which would, Soss claimed, serve the purpose of resolving “all the outstanding issues” and allow for closure of the Leon’s Bloom’s Estate, the instant case, and related proceedings. (R.673-679.)

Soss’ disqualification and removal as Trustee prevented a premature termination of the Trust by Soss, as Trustee, and a premature and unauthorized resolution of Dorothy’s claim against the Trust, by Soss as Trustee (not to mention a premature termination of the judicial oversight of Soss’ court-order violating actions).

g. Soss repeatedly undertakes representation that creates conflicts of interest in this case.

The record also reflects that Soss has repeatedly assumed positions that create impermissible conflicts of interest in this case. Soss' first conflict of interest in this case occurred in November of 2014, while the incapacity and guardianship proceedings against Leon Bloom were pending, when Soss drafted a Trust amendment (RX.1764-1772) for 96 year old Leon Bloom to execute, changing the Successor Trustee of the Trust from Robert Johnson to Soss' client, Dorothy (RT.1265:12-1266:11), even though Soss knew that Dorothy had a claim against that Trust and Soss knew that Leon had a court-appointed attorney, Audrey Bear, Esq. (RT.1265:4-9), with whom Soss neither consulted nor informed about this Trust Amendment. Additionally, the Examining Committee, who examined Leon within ten days of his signing of the Trust Amendment, unanimously found him to be incapacitated and unable to execute testamentary instruments. (See e.g. R.92-100, especially 93 and 95.)

Soss admitted that, at the time, he was representing Leon's wife Dorothy Bloom (RT.1270:6-9) (who had a claim against Leon's Trust) as well as Leon Bloom (RT.1271:4-6), in the preparation of the amendment that made Dorothy Leon's Trust's successor trustee. (Dorothy was never named by Leon as successor or even alternate trustee of his Trust (RX.1719, 1735, 1736.))

Johnson, the acting Successor Trustee learned about the Trust Amendment from the financial institutions holding Leon's Trust funds and advised he knew nothing about it. Consequently, Soss sent a letter to the financial institutions holding Leon's Trust funds demanding they honor the Trust Amendment or freeze the accounts (see e.g. RX.1762-63; RT.1267:3-1268:13), despite Soss' repeated testimony that Appellant's Counsel froze the accounts. (RT.1039:1-10; 1203:11-14.) The Settlement Order voided this Trust Amendment. (RX.1397 at paragraph 4.)

Then, of course, Soss assumed the role of Successor Trustee of the Trust against which he was representing Dorothy on a substantial claim for reimbursement (one-third of the value of the Trust res) and fought to maintain that position. (See e.g. R.626-672.) While acting as Trustee and representing Dorothy, Soss also represented himself as counsel for the Trustee. (RT.1014:19-1015:14; RX.1588.) In fact, Soss testified that he only ceased representing Dorothy in the guardianship on January 13, 2016 (R.600) because he was served with a subpoena for testimony as a material witness under Bar Rule 4-3.7. (RT.964:20-25; 1180:24-1181:12)

Subsequent to the Removal Order, Soss appeared in these proceedings as counsel for the "Former Trustee". (R.2468.)

Finally, subsequent to the filing of the instant appeal, Soss has re-appeared as counsel for Dorothy Bloom in these proceedings as well as, evidently, in this appeal. (Marshall has filed a Petition for Writ of Certiorari in this Court with respect to the

Order Denying his Emergency Motion to Disqualify Soss as Dorothy’s counsel. See Appeal No. 2D16-4185.)

E. The Order Removing Soss as Successor Trustee.

Based on the evidence adduced at the Disqualification Proceedings, the Removal Order (R.2448-2455) found that Soss, who was not presented for appointment, had failed to comply with the Trustee Order. (R.2449.) The Removal Order also found that Soss, who was representing Dorothy in her claim against Leon’s Trust and then assumed, without authority, the role of Successor Trustee of that Trust, had an irreconcilable conflict of interest that precluded him from acting as Trustee of that Trust. (R.2451.)

The Removal Order further found that the conflict was not cured by Soss stipulating in January of 2016 to Allan Baily, Esq., substituting in for him as counsel for Dorothy Bloom in the claim against the Trust, since Soss “owes the same duty of loyalty to a former client”. (Id.) The Removal Order cites to the testimony of Marshall’s expert, Barry Spivey, Esq., for the conflict created by the dual role undertaken by Soss. (Id.) The Removal Order, among other things, removed Soss and appointed Robert Elliott as Successor Trustee. (R.2453.)

F. Post-Disqualification Proceeding: Motion for Fees and Costs.

Subsequent to the Disqualification Proceeding, on March 23, 2016, this Court issued its *per curiam* opinion in Appeal No. 2D15-4864 affirming the Order of

Substitution of Marshall as a party, which order Marshall filed in the Lower Court. (R.2004-2007.) Also on March 23, 2016, this Court awarded Marshall entitlement to fees on the appeal, stating “Respondent's motion for appellate attorney's fees is granted pursuant to sections 733.106 and 736.1004-.1005, Florida Statutes,” remanding for the trial court to determine the amount and source of fees to be awarded (the “Fee Order”). Marshall also filed this Fee Order in the Lower Court. (R. 2445-2447.)

Following the entry of the Removal Order on April 7, 2016, Marshall moved for fees and costs on the appeal under the Fee Order (R.2460-2462) and obtained an order determining the amount pursuant thereto. (R.2523-2526.) Marshall also timely moved for fees and costs for the successful Motion to Disqualify Soss (“Motion for Fees”) (R.2463-2465), submitting a Memorandum of Law in Support (R.2577-84). Entitlement was based on the law of the case doctrine pursuant to this Court’s appellate Fee Order (R.2447; R.2579-81) on its dismissal of Soss’ Writ (R.2006-07), and, alternatively, application of sections 736.1004 or 736.1005, or the common fund theory (R.2581).

At the hearing on the Motion for Fees, Marshall’s counsel argued that Marshall received the appellate Fee Order for Soss’ appeal of the Order Substituting Marshall, which was fairly perfunctory, but in the appeal, Marshall briefed this Court about the issues with the Settlement Order and Soss’ assumption of the role of

Trustee under a conflict of interest. (R.2600-02.) Accordingly, Marshall's counsel argued that if Marshall received entitlement at the appellate level to fees for benefitting the Trust (under section 736.1005) or for an action challenging the exercise of a trustee's powers (section 736.1004) in the appeal of the Order Substituting him in as party to move to disqualify Soss as Trustee, than Marshall's successful disqualification of Soss as Trustee should, *a fortiori*, be a benefit to the Trust or otherwise trigger entitlement under section 736.1004. (R.2602.)

Marshall also argued, in the alternative, if the law of the case doctrine is not applied, then the Lower Court must find that Marshall is entitled to the fees under sections 736.1004 or 736.1005 for successfully prosecuting the Motion to Disqualify Soss. (R.2603.) Marshall's counsel argued also that over \$100,000 was expended by Soss on his trustee fees, on his legal fees, and placed in his or his attorney's IOTA trust account, the return of which would create a common fund out of which Marshall would be entitled to payment under the common fund theory. (R.2603-04.)

At the hearing, counsel for the court-appointed Trustee of Leon's Trust, Logan Elliott, Esq., represented that the Trustee has no objection to Marshall's entitlement to fees (R.2605:18-21), but raised a technical objection under section 736.1005, that the qualified beneficiaries may be entitled to notice of the fee proceeding, and out of "an abundance of caution", the Trustee believes the remaining 40 or so Trust beneficiaries should be notified of the fee proceeding. (R.2604:20-2605:17.)

Dorothy, the current and only Trust income beneficiary, was noticed and represented by counsel at the proceedings, who argued against entitlement for lack of basis and lack of notice. (R.2508-09.) Counsel for the Trustee admitted that he had filed no written objection (R.2607:20-22) and Marshall's counsel suggested the defect was curable by notice to the Trust beneficiaries of the hearing on entitlement or the subsequent hearing on determination of the amount. (R.2606-08.)

The Court subsequently denied Marshall any entitlement to fees or costs for Marshall's Motion to Disqualify Soss ("Order Denying") (R.2586-89.) The Order Denying made mention of the alleged notice defect but declared that issue moot since entitlement was denied (R.2586-87.) The Order Denying also discussed this Court's Fee Order and found that this Court's ruling on the Fee Order was narrower than Marshall's counsel's reading. (R.2588.)

As to the remaining other theories (attorney fees generally for rendering services that benefitted the Trust under section 736.1005 or the common fund theory), the Court declined "to award attorney's fees as a matter of equity" and further stated that there is "no statutory authority or contractual basis for attorney's fees." (Id.) After denying Marshall his award of attorney's fees and costs for successfully disqualifying Soss as an unauthorized Trustee, by the entry of a Removal Order that relies on the testimony of an expert Marshall's counsel hired and paid for, the Order Denying directs Marshall to serve a copy of the Order

Denying to all the Trust beneficiaries, presumably at Marshall's, or his counsel's, own, and additional, expense. (Id.)

IV. SUMMARY OF ARGUMENT

The Lower Court erred in finding that there was no equitable, statutory or contractual basis for awarding Marshall's counsel his fees and costs for the Disqualification Proceeding. Such error constitutes reversible error because, contrary to the Lower Court's ruling, Marshall's counsel is entitled to an award of attorney's fees incurred in connection with the Disqualification Proceeding under Florida Statutes sections 736.1004 and/or 736.1005; under the Common Fund Doctrine; or pursuant to the law of the case, as established by this Court's Fee Order in Appeal No. 2D15-4864. The notice defect, if required, is curable.

V. ARGUMENT

A. MARSHALL'S COUNSEL IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER THE FLORIDA TRUST CODE FOR DISQUALIFYING SOSS AS TRUSTEE.

Section 736.1004 of the Florida Trust Code provides that the Court shall award taxable costs, including fees, in all actions challenging the exercise of a trustee's powers. Section 736.1004(1), which mirrored previous section 737.627 and is analogous to section 733.609(1) of Florida's Probate Code, authorizes the award of fees "as in chancery." The well-settled rule in chancery cases is that "a court of equity may, as justice requires, order that costs follow the result of the suit, apportion

the costs between the parties, or require all costs be paid by the prevailing party.” *Estate of Brock*, 695 So.2d 714, 716 (Fla. 1st DCA 1996). Accordingly, the court is authorized to award the fees to the prevailing party if justice so dictates under the circumstances of the case. Under the circumstances of this case, Marshall prevailed in an action to disqualify and remove Soss, ending the unauthorized exercise of Soss’ trustee powers. Accordingly, justice dictates an order of fees in this case.

Under the broader section 736.1005(1) of the Florida Trust Code, enacted in 2006 (which is substantively identical to predecessor statute relating to attorney’s fees, section 737.2035(2)), “[a]ny attorney who has rendered services to a trust may be awarded reasonable compensation from the trust.”

Florida Courts require that the services rendered under section 736.1005 (like its predecessor statute 737.2035(2)) must benefit the trust. See e.g. THE FLORIDA TRUST CODE, AT FL-CLE 18-1, §18.41. In fact, prior to the enactment of Florida Statutes section 736.1005, and its predecessor section 737.2035, “courts of equity have traditionally awarded attorneys’ fees to persons, who at their own expense, have successfully maintained suits for preservation of trust funds.” *In re Guardianship of Dean*, 319 So.2d 589, 591 (Fla. 2d DCA 1975). Indeed, Florida Statutes section 737.2035 was the codification of this long held principle, and provided courts with even broader authority for an award of attorneys’ fees in the contexts of trusts and estates. See Theodore E. Karatinos & Hugh C. Umsted, “BEYOND STATUTE, RULE,

AND CONTRACT: EQUITY AS A BASIS FOR AWARDING ATTORNEYS' FEES", February 2006, 80-FEB Fla. B.J. 41, at 41, 42.

However, even under the narrower, common law construct, the benefit to the trust sufficient to entitle an attorney to reasonable fees need not even be pecuniary in nature. *State of Del. ex rel. Oberly v. Belin*, 453 So. 2d 1177, 1179 (Fla. 1st DCA 1984) (holding that a proper valuation of trust assets sufficiently benefitted the trust to warrant an award of attorney's fees, though the claim was denied on other grounds). In fact, it was not even necessary that the action prevail, just merely that there be some benefit to the trust. See *Palmer v. Horton*, 469 So. 2d 903, 905 (Fla. 3d DCA 1985) (finding an award of attorney's fees to be appropriate despite the failure of an action to remove a trustee, because it did produce a finding that the trustee's actions were improper and prodded a return of stock to the trust.)

Section 733.106 of the Florida Probate Code further illustrates the statutory benefit theory and its parameters. Section 733.106, relating to the award of attorney's fees in probate estates, is analogous to the Trust Code's section 736.1005 and states in nearly identical language to section 736.1005 that "[a]ny attorney who has rendered services to an estate may be awarded reasonable compensation from the estate." § 736.106(3).

Like section 736.1005, it is well established under section 733.106(3) that any attorney is entitled to an award of attorney's fees from an estate when the attorney's

services benefitted said estate. *In re Estate of Paris*, 699 So. 2d 301, 302 (Fla. 2d DCA 1997) (holding that preventing the administration of a fraudulently obtained Will sufficiently benefitted the estate to warrant attorney's fees under Florida Statutes section 733.106). As with the cases interpreting a benefit to a trust sufficient to entitle attorney fees, Florida Courts have held that the benefit to an estate need not be pecuniary in nature to support an order of attorney fees:

The authorities are clear that the term, "benefit" as used in this context is not restricted to services that bring about an enhancement in value or an increase in the assets of the estate, but also includes services that are successful in simply effectuating the testamentary intention set forth in the will.

Samuels v. Estate of Ahern, 436 So.2d 1096, 1097 (Fla. 4th DCA 1983). In fact, Florida Courts do not restrict entitlement to fees under section 733.106 just to the two criteria above. In *Duncombe v. Adderly*, 991 So. 2d 1013 (Fla. 4th DCA 2008), the Appellate Court noted that the Trial Court relied on the *Samuels* quote above to deny fees for preventing probate of a disputed will and preventing another of decedent's children or that child's attorney from being named administrator of the estate due to an alleged conflict of interest. *Id.* at 1014-15. The Appellate Court went on to hold that it does not "read *Samuels* that narrowly" and reversed the order denying fees. *Id.* at 1015.

Also similar to section 733.106(3) is section 744.108(1) of Florida's Guardianship Law. *Price v. Austin*, 43 So. 3d 789, 790 (Fla. 1st DCA 2010). Like

sections 733.106 and 736.1005, Florida Courts have held that in order to be entitled to receive attorneys' fees under section 744.108, the attorney services must benefit the ward. *Butler v. Guardianship of Peacock*, 898 So.2d 1139, 1141 (Fla. 5th DCA 2005).

In *Metzger v. First National Bank of Clearwater*, 585 So. 2d 372 (Fla. 2nd DCA 1991), this Court cited to *In re Guardianship of Iris L. Dean*, 319 So.2d 589 (Fla. 2d DCA 1975) for the proposition that attorney's fees for services beneficial to a ward may be awarded even though those services were not rendered by the ward's guardian since courts of equity have traditionally awarded attorney's fees to “persons who, at their own expense, have successfully maintained suits for the preservation of trust funds.” *Metzger* at 373-374. This Court has acknowledged that these common law fee principles apply even in guardianship cases. *King v. Ferguson, Skipper, Shaw, Keyser, Baron, & Tirabassi, P.A.*, 862 So. 2d 873, 875 (Fla. 2d DCA 2003) (J. Villanti, Specially concurring).

Accordingly, under the current statutory framework set forth by the Florida Trust Code, an attorney who benefits through his representation, not just his client, but also the trust, is entitled to fees under section 736.1005(1). *Jervis v. Tucker*, 82 So. 3d 126 (Fla. 4th DCA 2012), *review denied*, 104 So. 3d 1084 (Fla. 2012) (holding that attorney entitled to fees under section 736.1005 if the trial court found that services rendered benefitted the trust). As was the case under the common law, and

under the Probate Code, such benefit can mean a pecuniary benefit **or** other benefit, including determining the settlor's intent. *Duncombe, supra* at 1014.

In the instant case, the actions taken by Marshall have resulted not only in a pecuniary benefit to the Trust, but also the benefit of giving effect to the intent of the Settlor by preventing the Trust from being commandeered and raided by Soss, who, at all times, was acting in an adversarial capacity with respect to the Trust, to the detriment of the Trust and the Trust beneficiaries.

As detailed above, the evidence adduced at the Disqualification Proceeding revealed that Soss was acting to the detriment of the Trust by: (a) assuming the role of Trustee in violation of the Trustee Order; (b) falsifying documents and misleading opposing parties, Trust beneficiaries, and the former Trustee, Caldwell, with respect to the purported appointment as Successor Trustee; (c) misappropriating Trust funds for himself as well as to pay the attorney he hired to defend his position as unauthorized Trustee; (d) threatening opposing counsel; (e) initiating an unwarranted civil suit against Appellant and his counsel on behalf of the Trust and on behalf of Dorothy, incurring unnecessary expense to the Trust; (f) failing to comply with the Settlement Order with respect to the Reimbursement Procedure before and after he assumed the role of Trustee; and (g) repeatedly undertaking representation in this case under a conflict of interest.

These actions, taken by Soss primarily while he was acting as Trustee, were all detrimental to the Trust itself, as well as the beneficiaries thereunder. The foremost of which detriment was Soss' placement of himself as Successor Trustee of the Trust, which, in order to accomplish, required Soss to, *inter alia*, violate the Court's Trustee Order, and serve misleading and false Trust documents on Trust beneficiaries, as detailed above. Without opposition, Soss would have been successful in placing himself in a position of authority over the Trust res, thereby obtaining the ability to settle the claim of his own client, Dorothy, and pay himself prevailing party attorney's fees from the Trust.

The removal of Soss as Successor Trustee prevented Soss from adjudicating the claim of Dorothy –his current, then former, client– against the Trust, which would have undoubtedly prejudiced the Trust and the Trust beneficiaries. Indeed, the Trust and its beneficiaries would have been prejudiced by Soss' service as Successor Trustee of the Trust because such service would likely have resulted in an inflated distribution paid to Dorothy from the Trust by virtue of Soss' concurrent representation of her as a claimant against the Trust.

The likelihood of such inflation is illustrated by Soss' submission of an application for Dorothy's reimbursement that contained expenses, and categories of expenses, that predated the August 2012 start date specified in the Settlement Order (RX.1480-1495, RT.1005:10-24); and by Soss' advising Raymond James Trust,

after Soss assumed the role of Successor Trustee, that Dorothy was also due approximately \$155,000 in additional monies from the Trust outside the Settlement Order. (RT.1035:20-1037:15.) The prevention of such a scheme, and the resulting substantial additional expense, is axiomatically beneficial to the Trust.

Moreover, the Trust and Trust beneficiaries would have been additionally prejudiced by Soss' continued service as Successor Trustee by, *inter alia*, the fact that the carefully negotiated Reconciliation Procedure under the Settlement Order would have been rendered a nullity, as Soss could not have represented both Dorothy and the Trust in the mediation and arbitration that were mandated under the terms of the Reconciliation Procedure.

In the context of the facts of this case, the requirement that services rendered 'benefit' the Trust, is a relatively low bar. Indeed, in light of the fact that under Florida Statutes section 736.1005 it is not even necessary that the action succeed, just that there be some benefit, it is clear that the actions taken by Marshall and his counsel qualify thereunder. In this case, the benefit conferred upon the Trust is unambiguous in that the action to disqualify Soss succeeded; an independent Trustee was appointed for the Trust; the Trust has grounds to recover money misappropriated from the Trust; further misappropriation was prevented; additional unnecessary expense was avoided; and the Reconciliation Procedure under the Settlement Order governs.

Moreover, Soss' disqualification and removal as Trustee ensures that no further misleading, false, or incomplete documents will be sent by Soss, as Trustee, to the Trust beneficiaries or opposing counsel; no further unauthorized sums will be expended from the Trust by Soss, as Trustee, for Soss' sole benefit; no further threats or inappropriate actions will be made by Soss, as Trustee, to opposing counsel; no further fees will be expended from the Trust by Soss, as Trustee, to prosecute frivolous actions; and that there will be no premature termination of the Trust by Soss, as Trustee, with a premature and unauthorized resolution of Dorothy's claim against the Trust, by Soss as Trustee.

Therefore, the removal of Soss as Successor Trustee has clearly benefited the Trust by, at a minimum, avoiding the prejudice inherent in allowing Soss to serve as Successor Trustee while concurrently representing Dorothy in her claim against the Trust. Instead, as a result of the actions taken by Marshall and his counsel, the carefully considered terms of the Reconciliation Procedure govern, which procedure was designed to arrive at a fair and just reimbursement to Dorothy rather than the inflated amount that would have undoubtedly resulted from Soss' settlement of his own client's claim.

In the Court's Order Denying, the Lower Court declined to award fees as a matter of equity, refusing to exercise its discretion to find that Marshall's counsel's services benefitted the Trust, and instead concluded that there is no statutory

authority for attorney fees. (R.2588.) Because there are at least two statutory bases under the Florida Trust Code for awarding Marshall and his counsel fees and costs for the Disqualification Proceeding, which prevented the unauthorized exercise of trustee powers by Soss as a rogue trustee and thereby benefitted the Trust, the Lower Court committed reversible error.

In fact, the Lower Court abused its discretion by refusing to award fees, as a matter of equity, on the particular facts in the record of this case by declining to make findings about the benefits Marshall's counsel's services conferred on the Trust by its actions. No reasonable person could find on the facts of this case that Marshall's counsel's services did not benefit the Trust.

Accordingly, because Marshall's counsel's services in connection with the Disqualification Proceeding prevented the unauthorized exercise of trustee powers by Soss as a rogue trustee and benefitted the Trust thereby, the Lower Court's Order Denying should be reversed.

B. MARSHALL'S COUNSEL IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER THE COMMON FUND DOCTRINE.

The common fund doctrine, "in its simplest terms, provides that when litigation contributes substantial benefits to persons not party to the litigation and a fund is established from which the benefits will be paid, the persons responsible for gaining the benefit should be entitled to costs and attorney's fees paid from the fund."

Nelson v. Wakulla County, 985 So. 2d 564, 570 (Fla. 1st DCA 2008) (quoting *Costello, P.A. v. City of Cape Coral*, 693 So.2d 48, 49 (Fla. 2d DCA 1997)). The common fund doctrine applies to trust litigation in which “the legal fees and other expenses of a beneficiary in an accounting or other trust proceeding will be allowed out of the trust funds only if the trust estate and the other beneficiaries are benefitted.” *Frymer v. Brettschneider*, 710 So. 2d 10, 12 (Fla. 4th DCA 1998).

The common fund doctrine is premised upon the following:

1. The existence of a fund over which the court has jurisdiction and from which fees can be awarded;
2. The commencement of litigation by one party which is terminated successfully;
3. The existence of a class which received, without otherwise contributing to the lawsuit, substantial benefits as a result of the litigation;
4. The creation, preservation, protection or increase of the fund as a direct and proximate result of the efforts of counsel for that party; and
5. A reasonable relationship between the benefit established and the fees incurred.

Cnty. Nat. Bank v. Rishoi, 567 So. 2d 1053, 1054-55 (Fla. 5th DCA 1990).

In the instant case, the actions taken by Marshall qualify for an award of attorney’s fees under the common fund doctrine because each and every element, as stated in *Rishoi* has been met. Indeed, (1) the Trust constitutes a fund over which the court has jurisdiction, and from which fees can be awarded; (2) Marshall

commenced the action to disqualify Soss as Trustee, which action was terminated successfully in that Soss was ultimately disqualified; (3) the beneficiaries of the Trust have received, without otherwise contributing to the lawsuit, substantial benefits as a result of the litigation in that, *inter alia*, the rogue, putative Trustee, Soss, has been removed and an independent Trustee has been appointed for the Trust; (4) the remaining Trust res has been preserved and protected by Soss' disqualification and further misappropriation and expense was prevented, and the Trust res will be increased as a direct and proximate result of the actions taken by Marshall's counsel on behalf of Marshall in that the evidence adduced at the Disqualification Proceeding provides a legal basis for the Trust to recover the funds misappropriated from the Trust by Soss to pay his fees and the fees of his attorney (as well as those monies parked in their respective IOTA accounts); and (5) the fees incurred by Marshall are reasonably related to the benefit established.

Accordingly, Marshall is entitled to an award of attorney's fees under the common fund doctrine as the litigation that was commenced by Marshall was successful and rendered a substantial benefit to the Trust, and the Trust beneficiaries.

C. MARSHALL'S COUNSEL IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES PURSUANT TO THE LAW OF THE CASE, AS ESTABLISHED BY THIS COURT'S FEE ORDER.

The doctrine of the law of the case is a principle of judicial estoppel, which applies when successive appeals are taken in the same case. *Florida Dept. of Transp.*

v. Juliano, 801 So. 2d 101, 105 (Fla. 2001). "The doctrine of the law of the case requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings." *Id.* It encompasses all rulings on questions of law presented and considered on a former appeal. *Id.* at 106. Indeed, under the law of the case doctrine, a trial court "is bound to follow prior rulings of the appellate court as long as the facts on which such decision are based continue to be the facts of the case." *Id.* at 106.

Additionally, the law of the case doctrine covers questions of law actually presented and considered on a former appeal and may also foreclose subsequent consideration of implicitly addressed issues. *Id.* In fact, the law of the case doctrine will bar subsequent consideration of issues "implicitly addressed or necessarily considered" by the appellate court's decision. *McKenzie Check Advance of Florida, LLC v. Betts*, 191 So. 3d 530, 535 (Fla. 4th DCA 2016) (quoting *Juliano*, 801 So. 2d at 106.)

In this case, this Court awarded Marshall his attorney fees on appeal for defending the Order Substituting Marshall in as a party in Appeal No. 2D15-4864. In Marshall's Response to Soss' Writ in that appeal, Marshall details the background of this guardianship, Dorothy's Trust claim, the Settlement Order, the procedure for resolving Dorothy's Trust claim thereunder, Soss' assumption of the role of Trustee, and Marshall's filing, after the Order Substituting was entered, the motion to

disqualify Soss as Trustee for conflict of interest (and Motion to Enforce the Settlement Order). If anything, the evidence adduced at the Disqualification Proceeding with respect to Soss' actions render the facts as set forth in the Response even more egregious.

Since the issue of Marshall's entitlement to attorney fees was before the Appellate Court in an appeal from this very case with the same facts, and the issue of entitlement was affirmatively decided under statutes governing fees for services rendered to a trust, such a decision on entitlement governs "the case in the same court and the trial court, through all subsequent stages of the proceedings." *Id.*

This Court had already determined that the actions being taken by Marshall constituted an entitlement to fees, before the action was even concluded. Thus, it is the law of the case that the actions undertaken by Marshall, ultimately successful, must entitle Marshall to fees. See *Langer v. Fels*, 93 So. 3d 1069, 1072 (Fla. 4th DCA 2012) (reversing a trial court order awarding fees under the law of the case doctrine when appellate attorney's fees under the same statutory provisions in the same case were denied during the original appeal on the merits).

Accordingly, under the law of the case doctrine, Marshall's counsel is entitled to an award of attorney's fees pursuant to the law of the case, as established by this Court's Fee Order in Appeal No. 2D15-4864. The Lower Court's conclusion in the

Order Denying that there is no statutory basis for an award of fees also violates the law of the case and must be reversed.

D. NOTICE TO THE TRUST BENEFICIARIES IS NOT REQUIRED OR, ALTERNATIVELY, IS NOT DISPOSITIVE ON THE MERITS.

The Order Denying found that the forty or so other Trust beneficiaries (in addition to Dorothy Bloom, who had been noticed) should have been noticed of the hearing under section 736.1005 of the Florida Trust Code, before the Lower Court declared the notice issue moot in light of the finding of lack of entitlement. (R.2586-87.) The lack of notice is a curable defect. See *M.M. v. Dep't of Children & Families*, 780 So. 2d 1024 (Fla. 4th DCA 2001).

In fact, the wording of section 736.1005 does not require the attorney to notice the beneficiaries when he applies for a fee order, but rather requires the order on those fees be entered only *after* beneficiaries have been noticed. See § 736.1005 (“The attorney may apply to the court for an order awarding attorney fees and, *after* notice and service on the trustee and all beneficiaries entitled to an accounting under s. 736.0813, the court shall enter an order on the fee application”) (emphasis added). Although the Order Denying was entered before notice was given to the beneficiaries, all the beneficiaries have been noticed of these proceedings, satisfying the requirement in section 736.1005. See Certificate of Service hereof.

In any event, notice is only required under section 736.1005. Section 726.1004 does not contain language requiring notice, and notice is not required under the common fund theory or under the law of the case. Notably, this Court's Fee Order, on which Marshall relies for law of the case, did not require a notice to the beneficiaries. Accordingly, the notice to the beneficiaries is not required under these circumstances, but, in any event, is curable and is not dispositive on the merits.

VI. CONCLUSION

The Lower Court erred in finding that there was no equitable, statutory or contractual basis for awarding Marshall's counsel his fees and costs for pursuing the disqualification of Soss as Trustee because Marshall is entitled to an award of attorney's fees incurred in connection with the Disqualification Proceeding under Florida Statutes section 736.1005 or 736.1004; under the Common Fund Doctrine; and/or pursuant to the law of the case, as established by this Court's Fee Order in Appeal No. 2D15-4864. The facts of this case clearly establish that Marshall's counsel's actions were necessary and benefitted the Trust, and any finding to the contrary is an abuse of discretion. Notice to the beneficiaries is not required under section 736.1004, the Common Fund Doctrine, or law of the case. Under section 736.1005, any notice required is curable or satisfied by notice to the beneficiaries before the fee order is entered.

WHEREFORE, Appellant prays that this Honorable Court reverse the Order Denying, find that Marshall Bloom's counsel has an entitlement to fees and costs, and remand the case to the Lower Court for determination of the amount of fees and costs after notice to the beneficiaries, if applicable. Appellant also prays that this Court award Marshall Bloom's counsel his attorney's fees and costs on appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October, 2016, a true and correct copy of the foregoing was electronically filed with the Second District Court of Appeal using the Florida Courts E-Filing Portal, and furnished via the Portal to the following counsel of record by electronic mail: **G. Logan Elliott**, Elliott Law, 5105 Manatee Ave. W. Ste. 15A, Bradenton, FL 34209-3706, logan@elliottelderlaw.com, counsel for Robert Elliott, Trustee; **Allan F. Baily, Esq.**, Law Offices of Baily & Baily, P.A., 46 N. Washington Blvd., Ste. 18, Sarasota, FL 34236, bailylaw@verizon.net, counsel for Dorothy Bloom; and **Marc J. Soss, Esq.**, P.O. Box 110127, Lakewood Ranch, FL 34211, mjs@fl-estateplanning.com, and via regular U.S. Mail (or email address where indicated) to all the Beneficiaries of Leon Bloom's Trust listed on the following page.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing is submitted in Times New Roman 14-point font, which satisfies the requirements of Florida Rules of Appellate Procedure 9.100(l) and 9.210(a)(2).

LAW FIRM OF JAMES L. ESSENSON

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Beneficiaries of the Leon Bloom Trust

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| <p>Ronald Bloom 520 West Ave. Unit # 1902 Miami Beach, FL 33139</p> | | <p>Sarasota Child Development Center 4620 17th Street Sarasota, FL 34235</p> |
| <p>Paul Bloom 5291 Orofino Drive Castle Rock, CO 80108</p> | | <p>Southeastern Guide Dog Program 4210 77th Street East Palmetto, FL 34221</p> |
| <p>Marcia Bloom and Larry Bloom c/o Larry Bloom 525 Coldstream Court Atlanta, GA 30328</p> | | <p>Boys and Girls Club of Sarasota County 3100 Fruitville Road Sarasota, FL 34237</p> |
| <p>Wilma Bloom Hammond Glen 335 Hammond Drive NE Apt. 505 Atlanta, GA 30328</p> | | <p>Sarasota YMCA Foundation, Inc. Black Achievers Program 1 South School Ave. Suite 302 Sarasota, FL 34237</p> |
| <p>Sheryl B. Adair 4 Bonnie Lane Atlanta, GA 30328</p> | | <p>Senior Friendship Centers, Inc. 1900 Brother Geenen Way Sarasota, FL 34236</p> |
| <p>Phyllis S. Steinmark 112 Bowline Circle Atlanta, GA 30328</p> | | <p>All Faiths Food Bank, Inc. 8171 Blaikie Court Sarasota, FL 34240</p> |
| <p>Richard Marks, Alan Marks, Jeffrey Marks, Michael Marks, Bruce Danneman, Neal Marks, and Phyllis Marks C/O Phyllis Marks 5040 Nesbit Ferry Lane Atlanta, GA 30350</p> | | <p>Sarasota-Manatee Housing Council 1951 North Honore Ave. Sarasota, FL 34235</p> |

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| Harris Smith 99 Dunwoody Springs Dr. NE Atlanta, GA 30328 | | The Jewish Home 3150 Howell Mill Rd. NW Atlanta, GA 30327 |
| Myron Smith 1225 Old Woodbine Rd. NE Atlanta, GA 30319 | | Temple Beth Shalom 1050 South Tuttle Ave. Sarasota, FL 34237 |
| Glenn Gilpin PO Box 242984 Montgomery, AL 36101 | | Ahavith Achim Synagogue 600 Peachtree Battle Ave. NW Atlanta, GA 30327 |
| Sarasota Power Squadron 2814 Hyde Park Street Sarasota, FL 34239 | | The Epstein School 335 Colewood Way NW Sandy Springs, GA 30328 |
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| Medical College of Georgia 1459 Laney Walker Blvd. Augusta, GA 30912 | | The Kobernick House 1959 Honore Ave. Sarasota, FL 34232 |
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