

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCS for HB 481 Trusts  
**SPONSOR(S):** Civil Justice & Claims Subcommittee  
**TIED BILLS:** None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice & Claims Subcommittee		MacNamara	Bond
1) Judiciary Committee			

### SUMMARY ANALYSIS

The Florida Trust Code governs express trusts, charitable or noncharitable, and trusts that are required to be administered in the manner of an express trust. An express trust is created by the intent of a settlor (the individual creating the trust), and is generally evidenced by a written instrument that details the terms of the trust. The trust is administered by a trustee, with the terms of a trust providing benefits for individuals known as beneficiaries. Except as otherwise provided, the terms of a trust prevail over any provision of the Code; the Code is used to fill in gaps and provides for the operation of the trust for issues not addressed in the terms of a trust.

Historically, a trust was administered with the primary intent of accomplishing the intent of the settlor. Recent changes to trust law may be interpreted to require the administration of a trust for the benefit of the beneficiaries instead. This bill deletes language related to benefiting the beneficiaries and thus makes the intent of the settlor the primary intent of trust administration.

The bill amends portions of the Code related to the trustee and their duties, liabilities, and powers. The amendments provide which provisions of the Code govern a trustee's duty to provide accounting to the beneficiaries and extend the period for beneficiaries to file actions alleging a breach of trust.

The bill also expands the state's decanting statute. Decanting describes a trustee's power to cure or avoid issues with a trust by distributing trust property from one trust to a second trust, as opposed to distributing property directly to a beneficiary. The amendments to the decanting statute include:

- Expanding a trustee's ability to decant trust principal under the terms of the trust,
- Providing support for disabled beneficiaries, and
- Imposing greater notice requirements when a trustee exercises their ability to decant trust principal.

Lastly, the bill amends portions of the Code related to notices for charitable trusts. The bill requires that notice be sent to only one entity, the Attorney General, rather than to a state attorney in some instances and the Attorney General in others. The bill defines the method by which the Attorney General is to receive notice and gives the Attorney General standing in actions related to charitable trusts.

The bill does not appear to have a fiscal impact on state or local governments.

The effective date for the bill is July 1, 2017. The sections related to the period for which beneficiaries may compel trust accounting apply retroactively to all cases pending or commenced on or after July 1, 2017.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Overview of the Florida Trust Code**

Chapter 736, F.S., is referred to as the "Florida Trust Code." The Code applies to express trusts, charitable or noncharitable, and trusts created pursuant to law, judgment, or decree that requires the trust to be administered in the manner of an express trust. An express trust is defined as a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property, which arises as a result of a manifestation of an intention to create it.

The term "terms of a trust" is defined to mean the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.<sup>1</sup> Under the Code, "settlor" is defined as a person who creates or contributes property to a trust.<sup>2</sup> A "beneficiary" of the trust is a person who has a present or future beneficial interest in the trust.<sup>3</sup> A trustee is the person in the trust transaction who holds the legal title to the property of the trust.

A trustee is essential to the creation and validity of a trust; however, occupancy of the position by a designated person is not essential since in the absence of a trustee, whether by failure of appointment, nonacceptance, disqualification, or other cause, a court will ordinarily appoint a trustee in order to administer a trust.

The trustee is granted certain powers and is subject to certain duties imposed by the terms of the trust, equity jurisprudence, or by statute. A trustee may have the power or duty to perform various acts of management in administering the trust estate. In some cases, a trustee has the power and duty to manage the trust estate as a primary, rather than an incidental, purpose of the trust. This may involve the continuance and operation of a business in which assets of the estate are embarked or the retention, making, and handling of investments.

It is from the trust instrument that a trustee derives his or her rule of conduct, extent and limit of authority, and measure of obligation. Thus, the extent of a trustee's duties and powers is determined by the trust instrument and by the applicable rules of law, and not by the trustee's own interpretation of the trust instrument or by his or her own belief as to rules of law. Under the Code, a violation by a trustee of a duty the trustee owes a beneficiary is a breach of trust. A breach of trust by a trustee gives rise to liability by the trustee to the beneficiary for any loss of the trust estate.

Except as otherwise provided in the terms of the trust, the Code governs the duties and powers of a trustee, relations among trustees, and the rights and interests any beneficiaries. The terms of a trust prevail over any provision of the Code, except as provided in s. 736.0105(2), F.S. In all, the Code currently provides 23 terms that are solely governed by the Code and cannot be changed, waived, or otherwise altered by the terms of the trust.<sup>4</sup>

#### **Current Florida Trust Code Provisions and Effect of Proposed Amendments**

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<sup>1</sup> s. 736.0103(21), F.S.

<sup>2</sup> s. 736.0103(18), F.S.

<sup>3</sup> s. 736.0103(4), F.S.

<sup>4</sup> See s. 736.0105(2)(a-w), F.S.

The bill amends portions of Florida's Trust Code related to the intent of the settlor and interest of the beneficiaries, the duties, compensation, and powers of the trustee, and procedural requirements for charitable trusts.

### Settlor Intent and Interest of the Beneficiaries

In order for a settlor to create an express trust, he or she must indicate an intention to create it. This requirement is what distinguishes an express trust from an implied trust, such as a constructive or resulting trust. In the case of an express trust, the settlor's intent usually is evidenced by a written trust document such as a will or a trust agreement that designates a trustee and indicates that the trustee is to hold the trust property in trust and designates the beneficial interests of the trust.<sup>5</sup> A written instrument, however, is not required to create a trust; rather, the terms of the trust may be established by clear and convincing evidence.<sup>6</sup> Under current law, however, the settlor's intent may be restricted in the interest of protecting the beneficiaries when interpreting and applying the Code.

Under s. 736.0105(2)(c), F.S., the trust and its terms is required to be for the benefits of the trust's beneficiaries. The Code also includes limitations on the purpose for which a trust may be created and the affect it would have on the beneficiaries of the trust. In order for a trust to be created, the trust must have a lawful purpose that does not contravene public policy, that is possible to achieve, and the trust and its terms must be for the "benefits of its beneficiaries."<sup>7</sup>

The bill amends ss. 736.0103(11), 736.0105(2)(c), and 736.0404, F.S., to remove the current language in those statutes that a trust and its terms be administered for the benefit of the beneficiaries. The effect is to establish the settlor's intent as the guiding principle with respect to the terms, interests, and purposes of a trust. Specifically:

- The definition of "interests of the beneficiaries" under s. 736.0103(11), F.S. is amended to mean the beneficial interests *intended by the settlor* as provided under the terms of the trust.
- The exception to the general rule that the terms of the trust prevail over provisions of the Code contained in s. 736.0105(2)(c), F.S., is amended to remove the mandatory requirement that the terms of the trust be for the benefit of the beneficiaries.
- Section 736.0404, F.S., is likewise amended to remove the requirement that trust and its terms be for the benefit of the beneficiaries. As amended, a trust's purpose only needs to be lawful, not contrary to public policy, and possible to achieve.

### The Trustee: Duty to Account

One duty a trustee is required to perform under the Code is a duty to account to trust beneficiaries. The trustee is required to keep beneficiaries reasonably informed and to provide the beneficiaries with a statement of the trust account annually. If the trustee does not keep clear, distinct, and accurate accounts, or if the trustee loses his or her accounts, all presumptions will be made against the trustee and the trustee will bear the costs of any resulting damages. In addition to the Code's requirements to inform and account to beneficiaries, current law provides standards for the form and content of the accounting.<sup>8</sup> Subsection (3) of s. 736.08135, F.S., provides the standards for the accounting and includes the language:

(3) This section applies to all trust accountings rendered for any accounting periods beginning on or after January 1, 2003.

A trustee's liability for failing to perform duties, such as providing trust accounting, is limited by s. 736.1008, F.S. This section provides the limitations on proceedings against the trustee, with

<sup>5</sup> The Code defines "interests of the beneficiaries" to mean the beneficial interests provided in the terms of the trust. s. 736.0103(11), F.S.

<sup>6</sup> s. 736.0407, F.S.

<sup>7</sup> s. 736.0404, F.S.

<sup>8</sup> s. 736.08135(1-2), F.S.

subsection (3) addressing a claim against the trustee for a breach of trust related to the trustee's accounting duties. Current law states that any claim against the trustee for a breach of trust based on a matter not adequately disclosed in a trust disclosure document is barred as provided in ch. 95, F.S. A cause of action for such claims begins to accrue when the beneficiary has actual knowledge of:

- (a) The facts upon which the claim is based if such actual knowledge is established by clear and convincing evidence; or
- (b) The trustee's repudiation of the trust or adverse possession of the trust assets.<sup>9</sup>

In *Corya v. Sanders*,<sup>10</sup> the Fourth District Court of Appeal used both ss. 736.08135(3) and 736.1008(3), F.S., in determining a case involving a trustee's liability for failing to prepare trust accounts and inform the beneficiaries of the trust. With respect to s. 736.08135(3), F.S., the court determined that a trustee was not required to prepare an accounting for dates prior to January 1, 2003, saying:

[W]e construe that language as limiting the beginning period for the first accounting, in situations where an accounting had never been done or was not prepared annually, to be no earlier than January 1, 2003.

In effect, this barred a beneficiary of an express trust from seeking to compel a trust accounting for all periods prior to January 1, 2003.

The court in *Corya* also held that a beneficiary of an express trust who has actual knowledge that he or she is a beneficiary of a trust and has not received a trust accounting is barred by s. 95.11(6), F.S.,<sup>11</sup> from seeking a trust accounting for any period more than 4 years prior to the filing of the action. In other words, the court held that the right of a beneficiary, with knowledge that they have not received a trust accounting, to seek an accounting is subject to a 4 year limitations period that begins to run as soon as a trust accounting is overdue.<sup>12</sup>

The bill amends s. 736.08135(3), F.S., to govern the form of content for all trust accountings rendered, including those for accounting periods prior to 2003. The bill amends s. 736.1008, F.S., to provide that a beneficiary's actual knowledge that he or she has not received a trust accounting does not cause a claim to accrue against the trustee for a breach of trust. Moreover, the beneficiary's actual knowledge of that fact does not commence the running of any statute of limitations concerning such claims.

### *The Trustee: The Decanting Statute*

In some instances, the terms of a trust may grant the trustee "absolute power" to perform certain duties and responsibilities for the trust. One absolute power that may be granted to a trustee is the power to distribute trust property, or "principal," to or for the benefit of one or more trustees. The term "decanting" describes a trustee's distribution of principal from one trust into a second trust (as opposed to distributing principal directly to the beneficiary).<sup>13</sup>

Decanting is generally used by trustees who wish to cure or avoid issues with the terms of the first trust without distributing to a beneficiary outright. In this way, decanting can fix issues with a trust while still preserving the settlor's intention of maintaining the assets in trust. Unlike a trust modification, which often times is only available through a court proceeding, a trust decanting is an exercise of the trustee's discretionary authority to make distributions. This exercise avoids having to expend trust funds for judicial involvement.

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<sup>9</sup> s. 736.1008(3), F.S.

<sup>10</sup> 155 So.3d 1279 (Fla. 4th DCA 2015).

<sup>11</sup> Related to "Laches."

<sup>12</sup> This holding is in direct conflict with *Taplin v. Taplin*, 88 So.3d 344 (Fla. 3d DCA 2012) and *Nayee v. Nayee*, 705 So.2d 961 (Fla. 5th DCA 1998).

<sup>13</sup> See *Phipps v. Palm Beach Trust Co.*, 196 So. 299 (1940).

Under s. 736.04117, F.S., a trustee is allowed to decant principal to a second trust from a first when the trustee has absolute power to make principal distributions.

Although it is not necessary that the trust instrument use the term "absolute," it is necessary that the trustee's invasion power not be limited to a specific or ascertainable purpose. Thus, a power to invade for a beneficiary's best interests, welfare, comfort, or happiness is an absolute invasion power under the statute but a power to distribute or invade for a beneficiary's health, education, maintenance, or support is not.<sup>14</sup> Moreover, and for purposes of the analysis, a trustee may only decant principal to a supplemental needs trust<sup>15</sup> when the terms of the trust provide that the trustee has absolute power to invade the principal for the benefit of a disabled beneficiary.

The trustee's decision to decant is held to the same fiduciary standards as the decision to make a discretionary principal distribution (i.e., the beneficiary can sue the trustee for a decanting distribution to the same extent the beneficiary could sue the trustee for an outright distribution). Current law also imposes both procedural and substantive restrictions on a trustee's exercise of decanting power. For instance, s. 736.04117(4), F.S. requires notice, in writing, be made to all beneficiaries of the first trust at least 60 days prior to the date the trustee exercises their power to invade the trust principal.

The bill substantially amends s. 736.04117, F.S., related to the trustee's power to invade principal and expands the ability of the trustee to decant when granted less than absolute power under the terms of the trust. The bill's three major effects can be summarized as follows:

1. The bill authorizes a trustee to decant principal to a second trust pursuant to a power to distribute that is not absolute. When such power is not absolute, the authorized trustee's decanting authority is restricted so that each beneficiary of the first trust must have a substantially similar interest in the second trust. The bill provides a definition for "substantially similar" to mean, in relevant part, "that there is no material change in a beneficiary's beneficial interest or in the power to make distributions and that the power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to the power under the first trust to make a distribution directly to the beneficiary."<sup>16</sup>
2. The bill authorizes a trustee to decant principal to a supplemental needs trust where a beneficiary is disabled. The trustee may take this action regardless of whether the authorized trustee has an absolute discretionary power or discretionary power limited to an ascertainable standard. The bill provides a definition for "supplemental needs trust" to mean a trust that the authorized trustee believes would not be considered a resource for purposes of determining whether the beneficiary who has a disability is eligible for governmental benefits.<sup>17</sup>
3. The bill expands the notice requirements under the state's current decanting statute. Specifically, notice is required to be provided to the settlor of the first trust, if the first trust was not a grantor trust and the second trust will be a grantor trust; all trustees of the first trust; and any person with the power to remove the authorized trustee of the first trust. Moreover, the notice must include copies of both the first and second trust instruments.

In addition to these major changes, the bill amends current law on decanting in the following ways:

- Provides definitions for purposes of interpreting and applying the provisions of s. 736.04117, F.S. Specifically, the bill defines the terms absolute power, authorized trustee, beneficiary with a disability, current beneficiary, government benefits, internal revenue code, power of appointment, presently exercisable general power of appointment, substantially similar, supplemental needs trust, and vested interest.
- Provides that, with respect to permissible or impermissible modification of certain trust provisions, the second trust may omit, create or modify a power of appointment.

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<sup>14</sup> s. 736.04117(1)(b), F.S.

<sup>15</sup> The assets in a supplemental needs trust are excluded in the determination of entitlements to government benefits.

<sup>16</sup> HB 481, lines 163-169.

<sup>17</sup> HB 481, lines 179-182.

- Expands the existing prohibition on reducing certain fixed interests to include vested interests.
- Provides that the second trust may extend the term of the first trust, regardless of whether the authorized trustee has an absolute discretionary power or discretionary power limited to an ascertainable standard.
- Adds additional tax benefits associated with the first trust that must be maintained in the second trust to include the gift tax annual exclusion, and any and all other tax benefits for income, gift, estate or generation-skipping transfer for tax purposes.
- Incorporates provisions regarding "grantor" trust status and the trustee's ability to decant from a grantor trust to a non-grantor trust.
- Provides that a second trust may be created under the laws of any jurisdiction and institutes certain safeguards to prohibit an authorized trustee from decanting to a second trust which provides the authorized trustee with increased compensation or greater protection under an exculpatory or indemnification provision.
- Provides that a trustee may decant to a second trust that divides trustee responsibilities among various parties, including one or more trustees and others.

### Notice for Charitable Trusts

Under s. 736.0110(3), F.S., the Attorney General may assert the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in the State of Florida. Section 736.0103(16), F.S., defines a "qualified beneficiary" as a living beneficiary who, on the date of the beneficiary's qualification is determined:

- (a) Is a distributee or permissible distributee of trust income or principal;
- (b) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (a) terminated on that date without causing the trust to terminate; or
- (c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated in accordance with its terms on that date.

A "charitable trust" for purposes of s. 736.0110, F.S., means a trust, or portion of a trust, created for a charitable purpose as described in s. 736.0405(1), F.S.. Charitable purposes include, but are not limited to, "the relief of poverty; the advancement of arts, sciences, education, or religion; and the promotion of health, governmental, or municipal purposes."<sup>18</sup> Part XII of ch. 736, F.S., governs all charitable trusts. Specifically, and in relevant part:

- s. 736.1205, F.S., requires that the trustee of a charitable trust notify the state attorney for the judicial circuit of the principal place of administration of the trust if the power to make distributions are more restrictive than s. 736.1204(2), F.S., or if the trustee's powers are inconsistent with s. 736.1204(3), F.S.
- s. 736.1206(2), F.S., provides that the trustee of a charitable trust may amend the governing instrument with consent of the state attorney to comply with the requirements of a private foundation trust as provided in s. 736.1204(2), F.S.
- s. 736.1207, F.S., specifies that Part XII of the Code does not affect the power of a court to relieve a trustee from restrictions on that trustee's powers and duties for cause shown and upon complaint of the state attorney, among others.
- s. 736.1208(4)(b), F.S., requires that a trustee who has released a power to select charitable donees accomplished by reducing the class of permissible charitable organizations must deliver a copy of the release to the state attorney.
- s. 736.1209, F.S., allows the trustee to file an election with the state attorney to bring the trust under s. 736.1208(5), F.S., relating to public charitable organization(s) as the exclusive beneficiary of a trust.

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<sup>18</sup> s. 736.0405(1), F.S.  
**STORAGE NAME:** pcs0481.CJC  
**DATE:** 2/16/2017

As such, there is some disconnect between s. 736.0110(3), F.S., and Part XII of the Code; they can be read to require that notice be given to the Attorney General for certain charitable trusts and to the state attorney of the proper judicial circuit for the same or other trusts.

The bill grants these powers and responsibilities solely to the Attorney General.

The bill amends s. 736.0110(3), F.S., to provide the Attorney General with standing to assert the rights of a qualified beneficiary in any judicial proceeding and amends the provisions in Part XII of the Code concerning the state attorney's office. The amendments provide that the Attorney General, rather than the state attorney, receive notifications, releases, and elections for charitable trusts under ss. 736.1205, 736.1207, 736.1208, and 736.1209, F.S., and the Attorney General, rather than the state attorney, must consent to a charitable trust amendment effectuated under s. 736.1206, F.S. Lastly, the bill defines how the Attorney General is to be given notifications, releases, and elections in s. 736.1201(2), F.S., and removes the state attorney from the definitions section of Part XII of the Code.

#### B. SECTION DIRECTORY:

Section 1 amends s. 736.0103, F.S., relating to definitions.

Section 2 amends s. 736.0105, F.S., relating to default and mandatory rules.

Section 3 amends s. 736.0110, F.S., relating to others treated as qualified beneficiaries.

Section 4 amends s. 736.0404, F.S., relating to trust purposes.

Section 5 amends s. 736.04117, F.S., relating to a trustee's power to invade principal in trust.

Section 6 amends s. 736.08135, F.S., relating to trust accounting.

Section 7 amends s. 736.1008, F.S., relating to limitations on proceedings against trustees.

Section 8 provides for the effect of ss. 736.08135 and 736.1008, F.S., to all cases pending or commenced on or after July 1, 2017.

Section 9 amends s. 736.1201, F.S., relating to definitions.

Section 10 amends s. 736.1205, F.S., relating to notice that this part does not apply.

Section 11 amends s. 736.1206, F.S., relating to power to amend trust instrument.

Section 12 amends s. 736.1207, F.S., relating to power of court to permit deviation.

Section 13 amends s. 736.1208, F.S., relating to release, property and persons affected, manner of effecting.

Section 14 amends s. 736.1209, F.S., relating to election to come under this part.

Section 15 provides an effective date of July 1, 2017, except as otherwise provided in the act.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill does not appear to have an impact on state revenues.

##### 2. Expenditures:

While the bill does not appear to have an overall impact on state government expenditures, the bill may lead to an increase in costs to the Attorney General's office and a corresponding decrease in work costs for the state attorney's offices. The exact costs associated with such shift is unknown and likely minimal.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

The bill does not appear to have an impact on local government revenues.

2. Expenditures:

The bill does not appear to have an impact on local government expenditures.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

n/a