Justice Council

Meeting Packet

Wednesday, March 22, 2006
9:00 AM – 10:00 AM
404 House Office Building

Allan G. Bense
Speaker

Bruce Kyle
Chair

Council Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

Justice Council

Start Date and Time:	Wednesday, March 22, 2006 09:00 am
End Date and Time:	Wednesday, March 22, 2006 10:00 am
Location:	404 HOB
Duration:	1.00 hrs

Consideration of the following bill(s):

HB 3 Florida Birth-Related Neurological Injury Compensation Plan by Berfield
HB 73 Unlawful Taking of Personal Property or Equipment by Farkas
HB 147 Criminal Prosecutions by Kravitz
HB 157 CS Homestead Assessments by Littlefield
HB 411 Psychotherapist-Patient Privilege by Roberson
HB 425 CS Florida Trust Code by Mahon
HB 521 CS Probate by Hukill
HB 567 CS Notaries Public by Kyle
HB 1089 Construction Contracting by Galvano
HB 1167 CS Sexual Predators by Bean

NOTICE FINALIZED on 03/20/2006 15:17 by COCHRAN.MARGARET

HB 3

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 3 Florida Birth-Related Neurological Injury Compensation Plan
SPONSOR(S): Berfield; Goldstein
TIED BILLS: None **IDEN./SIM. BILLS:** SB 542

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	5 Y, 0 N	Kruse	Bond
2) Health Care General Committee	10 Y, 0 N	Ciccone	Brown-Barrios
3) Finance & Tax Committee	7 Y, 0 N	Levin	Diez-Arguelles
4) Justice Council			
5)			

SUMMARY ANALYSIS

The Florida Birth-Related Neurological Injury Compensation Plan (plan) is the alternative to medical malpractice claims for birth-related neurological injuries. The plan provides compensation and other services to persons with birth-related neurological injuries. The benefits are more restricted than the remedies that would be provided by tort law, but a claimant is not required to prove malpractice. One issue that arises in cases to determine whether a family is required to file for benefits under the plan is whether the mother was properly notified regarding the plan.

This bill provides that the Division of Administrative Hearings has the exclusive jurisdiction to decide whether the statutory notice provision has been met.

Additionally, the bill authorizes the Florida Birth-Related Neurological Injury Compensation Association (NICA), which administers the plan, to contract with the State Board of Administration to invest and reinvest plan funds. NICA currently has authority to invest plan funds, and the bill provides that the State Board of Administration is one of the entities with whom NICA may contract for this service.

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

This bill provides an effective date of upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Florida Birth-Related Neurological Injury Compensation Plan

The Florida Birth-Related Neurological Injury Compensation Plan (the "plan") was enacted by the Legislature in 1988.[1] Currently, Virginia is the only other state in the nation that has a no-fault coverage plan that is similar to Florida's plan.[2] The plan was created to provide compensation, long-term medical care, and other services to persons with birth-related neurological injuries. Although the benefits paid under the plan are more restricted than the remedies provided by tort law, the plan does not require the claimant to prove malpractice and provides a streamlined administrative hearing to resolve the claim.[3]

A "birth-related neurological injury" as defined in s. 766.302(2), F.S., is an injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 grams at birth caused by oxygen deprivation or by mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital. The injury must render the infant permanently and substantially mentally and physically impaired.

Florida Birth-Related Neurological Injury Compensation Association (NICA)

The entity charged with administering the plan is the Florida Birth-Related Neurological Injury Compensation Association (NICA or association). Under s. 766.315(4), F.S., NICA's duties include:

- Administering the plan;
- Administering the funds collected;
- Reviewing and paying claims;
- Directing the investment and reinvestment of any surplus funds over losses and expenses;
- Reinsuring the risks of the plan in whole or in part;
- Suing and being sued, appearing and defending, in all actions and proceedings in its name; and
- Taking such legal action as may be necessary to avoid payment of improper claims.[4]

The funding for the plan is derived from an appropriation by the Legislature when the plan was created and annual fees paid by physicians and hospitals.[5]

The plan pays, on behalf of a qualifying infant:

- Necessary and reasonable care, services, drugs, equipment, facilities, and travel;[6]

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[1] Chapter 88-1, ss. 60-75, L.O.F., was enacted by the Legislature in an attempt to stabilize and reduce malpractice insurance premiums for physicians practicing obstetrics, according to the legislative findings and intent cited in s. 766.301(1)(c), F.S.
[2] Governor's Select Task Force on Healthcare Professional Liability Insurance, *Report and Recommendations*, p. 307 (2003).
[3] See *Florida Birth-Related Neurological Injury Compensation Ass'n v. McKaughan*, 668 So.2d 974, 977 (Fla. 1996).
[4] Section 766.315(4), F.S.
[5] Section 766.314, F.S., requires non-participating physicians to pay $250 per year, participating physicians to pay $5,000 per year, and hospitals to pay $50 per infant delivered during the prior year.
[6] Expenses that can be compensated by state or federal governments, or by private insurers, are not covered by the plan.

- One-time cash award, not to exceed $100,000, to the infant's parents or guardians;[7]
- Death benefit of $10,000 for the infant; and
- Reasonable expenses for filing the claim, including attorney's fees.

Filing a Claim for Benefits

A claim for benefits under the plan must be filed within five years of the birth of the infant alleged to be injured.[8] The parents or guardians of the infant petition with the Division of Administrative Hearings (DOAH). DOAH serves a copy of the petition upon NICA, the physician(s) and hospital named in the petition, and the Division of Medical Quality Assurance.[9] Within ten days of filing the petition, the parents or guardian must provide NICA all medical records, assessments, evaluations and prognoses, documentation of expenses, and documentation of any private or governmental source of services or reimbursement relative to the impairments. An administrative law judge (ALJ) from DOAH will set a hearing on the claim to be conducted 60-120 days from the petition filing date.

The issue of whether the claim for compensation is covered by the plan is determined exclusively in an administrative proceeding.[10] The ALJ presiding over the hearing makes the following determinations:

- Whether the injury claimed is a birth-related neurological injury;
- Whether obstetrical services were delivered by a participating physician; and
- How much compensation, if any, is awardable under s. 766.31, F.S.[11]

If the ALJ determines that an injury meets the definition of a birth-related neurological injury, compensation from the plan is the exclusive legal remedy.[12] If the ALJ determines that the injury alleged is not a birth-related neurological injury or that the obstetrical services were not delivered by a participating physician, the ALJ will enter an order to that effect. The ALJ may also bifurcate the proceeding and address compensability and notice first, and address an award, if any, in a separate proceeding.[13] If any party chooses to appeal the ALJ's order under s. 766.309, F.S., the appeal must be filed in the District Court of Appeal.[14]

Notice Requirement

Section 766.316, F.S., requires any hospital with a participating physician on its staff, and each participating physician under the plan to provide notice to an obstetrical patient as to the limited no-fault alternative for birth-related neurological injuries. The notice must:

- be provided on forms furnished by the association; and
- include a clear and concise explanation of a patient's rights and limitations under the plan.

This section also provides that notice does not need to be provided to a patient when the patient has an emergency medical condition or when notice is not practicable. This section does not specifically address the effect of failure to provide notice to the obstetrical patient.

Courts have addressed the issue of who determines whether notice has been properly provided. Four of the five District Courts of Appeal have held that the ALJ has the exclusive jurisdiction to determine whether notice has been properly provided. However, in the Second District Court of Appeal, in

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[7] Often the award is paid out over time to assist the parents or guardians in making necessary modifications to living quarters to accommodate a disabled child.
[8] Section 766.313, F.S.
[9] Only infants born in a hospital are covered by the plan.
[10] Section 766.301(1)(d), F.S.
[11] Section 766.309(1), F.S. The determination of notice is not explicitly provided for in this section.
[12] Section 766.303(2), F.S., only allows a civil action in place of a claim under the plan where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property.
[13] Section 766.309(4), F.S.
[14] Section 766.311(1), F.S.

Bayfront Medical Center, Inc. v. NICA, 893 So. 2d 636 (Fla. 2nd DCA 2005), the court affirmed its approach that the ALJ's jurisdiction extends only to the determination of whether the child suffered a neurological injury that was compensable under the plan. The court recognized the conflict with the other district courts of appeal, but declined to recede from its holding and certified the conflict to the Florida Supreme Court.[15] In *Tabb v. Florida Birth-Related Neurological Injury Compensation Association*, 880 So. 2d 1253, 1256 (Fla. 1st DCA 2004), the First District Court of Appeal reasoned that "[i]n order to 'hear and determine' a claim, an ALJ must, almost of necessity, decide whether notice was given, because if no notice was given, the exclusivity provision of the statute does not apply." In addition, the court pointed to recent amendments to the statute that implicitly acknowledge the existing case law indicating that an ALJ has jurisdiction to determine whether notice was provided.

Effect of Bill

Notice

This bill amends s. 766.309(1), F.S., to provide that it is the exclusive jurisdiction of an administrative law judge of DOAH to determine whether the notice requirement in s. 766.316, F.S., has been met.

The bill also states that it is the intent of the Legislature that the amendment contained in this act clarifies that since July 1, 1998, the administrative law judge has had the exclusive jurisdiction to make factual determinations as to whether the notice requirements in s. 766.31, F.S., are satisfied.

Contracts for Investment

This bill also authorizes NICA, which administers the plan, to contract with the State Board of Administration[16] to invest and reinvest plan funds. NICA currently has the authority to invest plan funds, and this bill authorizes NICA to utilize the State Board of Administration to provide NICA an additional source for managing investments at no cost to the state. The State Board of Administration has agreed to invest the funds of NICA, should this bill become law.

C. SECTION DIRECTORY:

Section 1. Amends s. 766.309, F.S., to provide that an ALJ of DOAH has the exclusive jurisdiction to determine whether the notice requirement in s. 766.316, F.S., has been met.

Section 2. Provides that it is the intent of the Legislature that the amendment contained in this act clarifies that since July 1, 1998, an ALJ of DOAH has had the exclusive jurisdiction to make factual determinations as to whether the notice requirements in s. 766.31, F.S., are satisfied.

Section 3. Amends s. 766.315, F.S., to authorize the State Board of Administration to invest and reinvest funds for NICA.

Section 4. Provides an effective date of upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.
2. Expenditures:

   None.

[15] *Bayfront* at 637, 638.

[16] The State Board of Administration (SBA) is the professional investment organization for Florida. The SBA manages 25 funds, comprising more than $130 billion in assets under management at the end of fiscal year 2004.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

Florida courts have found that the Legislature has the authority to apply law retroactively as long as the new law does not impair a vested right.[17] Courts have used a weighing process to decide whether to sustain the retroactive application of a statute that has three considerations: the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected.[18] In this instance, the bill does not appear to impair a vested right of a claimant or defendant, but may rather seek to serve the public interest. The bill provides that an ALJ of DOAH has exclusive jurisdiction to determine if the notice requirements were met.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

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[17] *Dept. of Transportation v. Knowles*, 402 So. 2d 1155, 1157 (Fla. 1981). *Village of El Portal v. City of Miami Shores*, 362 So. 2d 275, 277 (Fla. 1978); *McCord v. Smith*, 43 So. 2d 704, 708-709 (Fla. 1949).

[18] Supra *Knowles* at 1158.

1 A bill to be entitled
2 An act relating to the Florida Birth-Related Neurological
3 Injury Compensation Plan; amending s. 766.309, F.S.;
4 requiring the administrative law judge to determine
5 whether factual determinations regarding required notice
6 to obstetrical patients of participation in the plan are
7 satisfied; providing exclusive jurisdiction to make such
8 determinations; providing legislative intent; amending s.
9 766.315, F.S.; authorizing the State Board of
10 Administration to invest and reinvest funds held on behalf
11 of the plan pursuant to certain requirements; providing an
12 effective date.
13
14 Be It Enacted by the Legislature of the State of Florida:
15
16 Section 1. Paragraph (d) is added to subsection (1) of
17 section 766.309, Florida Statutes, to read:
18 766.309 Determination of claims; presumption; findings of
19 administrative law judge binding on participants.--
20 (1) The administrative law judge shall make the following
21 determinations based upon all available evidence:
22 <u>(d) Whether, if raised by the claimant or other party, the</u>
23 <u>factual determinations regarding the notice requirements in s.</u>
24 <u>766.316 are satisfied. The administrative law judge has the</u>
25 <u>exclusive jurisdiction to make these factual determinations.</u>
26 Section 2. <u>It is the intent of the Legislature that the</u>
27 <u>amendment to s. 766.309, Florida Statutes, contained in this</u>
28 <u>act, clarifies that since July 1, 1998, the administrative law</u>

29 judge has had the exclusive jurisdiction to make factual
30 determinations as to whether the notice requirements in s.
31 766.316, Florida Statutes, are satisfied.
32 Section 3. Paragraph (e) of subsection (5) of section
33 766.315, Florida Statutes, is amended to read:
34 766.315 Florida Birth-Related Neurological Injury
35 Compensation Association; board of directors.--
36 (5)
37 (e) Funds held on behalf of the plan are funds of the
38 State of Florida. The association may only invest plan funds in
39 the investments and securities described in s. 215.47, and shall
40 be subject to the limitations on investments contained in that
41 section. All income derived from such investments will be
42 credited to the plan. The State Board of Administration may
43 invest and reinvest funds held on behalf of the plan in
44 accordance with the trust agreement approved by the association
45 and the State Board of Administration and within the provisions
46 of ss. 215.44-215.53.
47 Section 4. This act shall take effect upon becoming a law.

HB 73

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 73 Unlawful Taking of Personal Property or Equipment
SPONSOR(S): Farkas
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1328

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	7 Y, 0 N	Blalock	Bond
2) Business Regulation Committee	16 Y, 0 N	Watson	Liepshutz
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

Current law provides that it is a criminal offense to:

- Obtain property or equipment by trick or false representation with the intent to defraud the lawful owner;
- Hire or lease property or equipment with the intent to defraud the lawful owner; and
- Abandon or refuse to redeliver hired or leased property at the termination of the agreed upon time period with the intent to defraud the lawful owner.

However, this offense may not be prosecuted if the agreement between the lessor and lessee is a rental-purchase agreement, unless the lessor holds title to the personal property or equipment throughout the agreement.

This bill removes the exclusion regarding rental-purchase agreements, and the related exception to the exclusion regarding title to the personal property or equipment.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility -- This bill may expand the scope of s. 812.155, F.S. and thereby increase the number of persons that are subject to criminal penalties for failure to return leased personal property or equipment.

B. EFFECT OF PROPOSED CHANGES:

Background

Chapter 812, F.S., contains theft crimes. Section 812.155, F.S., creates a theft offense related to hiring, leasing, or obtaining personal property or equipment with the intent to defraud.

Subsection (1) provides that it is a crime to obtain any personal property by trick, deceit, or fraudulent or willful false representation. Subsection (2) provides it is a crime to hire or lease personal property with intent to defraud. Subsection (3) provides that it is a crime to fail to return rented personal property at the conclusion of the rental period if such failure to return is done with the intent to defraud, abandon, or willfully refuse to return the property. Subsections (4) and (5) provide conditions and evidentiary presumptions by which a court may infer that a lessee intended to defraud the lessor should the lessee fail to timely return the leased personal property or equipment.

The offense is a first-degree misdemeanor if it involves property valued at less than $300, and is a third-degree felony if the property is valued at $300 or more.[1]

When first enacted, the law contained an exclusion which provided that the criminal offenses at s. 812.155, F.S., would not apply to a "rental-purchase agreement that permits the lessee to acquire ownership of the personal property or equipment".[2] An exception to the exclusion was added in 2001.[3] The exception provides that the exclusion does not apply, and thus a person may be prosecuted under s. 812.155, F.S., if the "rental store retains title to the personal property or equipment throughout the rental-purchase agreement period."

The current law is unclear in several respects. It is unclear what the term "rental store" means and what persons or entities it includes, as the term is not defined by statute. As the rental store must retain title throughout the agreement period in order to preserve the store's ability to prosecute a lessee who fails to return personal property or equipment, it appears that a rental store cannot sell or assign the right to collect the payments due under the agreement.[4] Finally, as it is not common for a rental store to sell or assign the right to collect the lease payments, it appears that the exception may, in practice, render the exclusion meaningless in all but a few cases.

In criminal law, every element of the offense must be proven beyond a reasonable doubt. As to s. 812.155, F.S., elements of the offense that the prosecution must prove include: that the agreement between the lessor and the lessee/defendant was not a rental-purchase agreement or, if it is, that the

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[1] A first degree misdemeanor is punishable by a fine of up to $1,000 and imprisonment of up to one year. A third degree felony is punishable by a fine of up to $5,000 and imprisonment of up to five years. See ss. 775.082 and 775.083, F.S. The third degree felonies in this section are not ranked in the Offense Severity Ranking Chart, and thus default to a level 1 offense. See s. 921.0023, F.S.

[2] See amendment at 1992 Senate Journal, page 461, February 27, 1992.

[3] Chapter 2001-141, L.O.F.

[4] Sale or assignment of the right to collect payments would, in the case of a rental-purchase agreement, also involve transferring title of the personal property or equipment to the entity entitled to the collect the payments. This type of transaction is sometimes referred to as selling the commercial paper. There is no apparent public policy consideration for limiting or restricting the sale of commercial paper by a rental store.

rental store retains title to the personal property or equipment throughout the rental-purchase agreement period. In practice, the exclusion and the exception can create confusion as they require the prosecutor to prove the absence of a fact.

Effect of Bill

This bill amends s. 812.155, F.S., to delete the exclusion related to rental purchase agreements. Thus, a lessee may be prosecuted for failure to return leased property or equipment regardless of whether the agreement between the parties was a rental-purchase agreement, and regardless of whether the lessor retains title to the personal property or equipment throughout the rental-purchase agreement period.

C. SECTION DIRECTORY:

Section 1 amends s. 812.155, F.S., to delete the exclusion related to lease-purchase agreements.

Section 2 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This 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:

   Article I, s. 10, of the Florida Constitution provides that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." This bill as drafted may apply to a rental

purchase agreement effective prior to the effective date of the bill. It is possible that courts will limit application of this bill to rental-purchase agreements made on or after the effective date of the bill.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill has an effective date of July 1, 2006. Traditionally, general bills and bills affecting state revenues have an effective date of July 1, 2006, to correspond to the state's fiscal year. Bills affecting the criminal law traditionally have an effective date of October 1, 2006.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

1 A bill to be entitled
2 An act relating to the unlawful taking of personal
3 property or equipment; amending s. 812.155, F.S.; deleting
4 a provision specifying that the prohibition against
5 obtaining personal property or equipment with intent to
6 defraud does not apply to a rental-purchase agreement
7 unless the rental store retains title to the property or
8 equipment throughout the period of the rental-purchase
9 agreement; providing an effective date.
10
11 Be It Enacted by the Legislature of the State of Florida:
12
13 Section 1. Section 812.155, Florida Statutes, is amended
14 to read:
15 812.155 Hiring, leasing, or obtaining personal property or
16 equipment with the intent to defraud; failing to return hired or
17 leased personal property or equipment; rules of evidence.--
18 (1) OBTAINING BY TRICK, FALSE REPRESENTATION,
19 ETC.--Whoever, with the intent to defraud the owner or any
20 person lawfully possessing any personal property or equipment,
21 obtains the custody of such personal property or equipment by
22 trick, deceit, or fraudulent or willful false representation
23 shall be guilty of a misdemeanor of the second degree,
24 punishable as provided in s. 775.082 or s. 775.083, unless the
25 value of the personal property or equipment is of a value of
26 $300 or more; in that event the violation constitutes a felony
27 of the third degree, punishable as provided in s. 775.082, s.
28 775.083, or s. 775.084.

29 (2) HIRING OR LEASING WITH THE INTENT TO
30 DEFRAUD.--Whoever, with intent to defraud the owner or any
31 person lawfully possessing any personal property or equipment of
32 the rental thereof, hires or leases said personal property or
33 equipment from such owner or such owner's agents or any person
34 in lawful possession thereof shall, upon conviction, be guilty
35 of a misdemeanor of the second degree, punishable as provided in
36 s. 775.082 or s. 775.083, unless the value of the personal
37 property or equipment is of a value of $300 or more; in that
38 event the violation constitutes a felony of the third degree,
39 punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
40 (3) FAILURE TO REDELIVER HIRED OR LEASED PERSONAL
41 PROPERTY.--Whoever, after hiring or leasing any personal
42 property or equipment under an agreement to redeliver the same
43 to the person letting such personal property or equipment or his
44 or her agent at the termination of the period for which it was
45 let, shall, without the consent of such person or persons and
46 with the intent to defraud, abandon or willfully refuse to
47 redeliver such personal property or equipment as agreed, shall,
48 upon conviction, be guilty of a misdemeanor of the second
49 degree, punishable as provided in s. 775.082 or s. 775.083,
50 unless the value of the personal property or equipment is of a
51 value of $300 or more; in that event the violation constitutes a
52 felony of the third degree, punishable as provided in s.
53 775.082, s. 775.083, or s. 775.084.
54 (4) EVIDENCE OF FRAUDULENT INTENT.--
55 (a) In prosecutions under this section, obtaining the
56 property or equipment under false pretenses; absconding without

57 payment; or removing or attempting to remove the property or
58 equipment from the county without the express written consent of
59 the lessor, is prima facie evidence of fraudulent intent.
60 (b) In a prosecution under subsection (3), failure to
61 redeliver the property or equipment within 5 days after receipt
62 of, or within 5 days after return receipt from, the certified
63 mailing of the demand for return is prima facie evidence of
64 fraudulent intent. Notice mailed by certified mail, return
65 receipt requested, to the address given by the renter at the
66 time of rental shall be deemed sufficient and equivalent to
67 notice having been received by the renter, should the notice be
68 returned undelivered.
69 (c) In a prosecution under subsection (3), failure to pay
70 any amount due which is incurred as the result of the failure to
71 redeliver property after the rental period expires, and after
72 the demand for return is made, is prima facie evidence of
73 fraudulent intent. Amounts due include unpaid rental for the
74 time period during which the property or equipment was not
75 returned and include the lesser of the cost of repairing or
76 replacing the property or equipment if it has been damaged.
77 (5) DEMAND FOR RETURN.--Demand for return of overdue
78 property or equipment and for payment of amounts due may be made
79 in person, by hand delivery, or by certified mail, return
80 receipt requested, addressed to the lessee's address shown in
81 the rental contract.
82 (6) NOTICE REQUIRED.--As a prerequisite to prosecution
83 under this section, the following statement must be contained in
84 the agreement under which the owner or person lawfully

85 possessing the property or equipment has relinquished its
86 custody, or in an addendum to that agreement, and the statement
87 must be initialed by the person hiring or leasing the rental
88 property or equipment:
89
90 Failure to return rental property or equipment upon
91 expiration of the rental period and failure to pay all
92 amounts due (including costs for damage to the
93 property or equipment) are prima facie evidence of
94 intent to defraud, punishable in accordance with
95 section 812.155, Florida Statutes.
96
97 ~~(7) EXCLUSION OF RENTAL-PURCHASE AGREEMENTS.--This section~~
98 ~~does not apply to personal property or equipment that is the~~
99 ~~subject of a rental-purchase agreement that permits the lessee~~
100 ~~to acquire ownership of the personal property or equipment~~
101 ~~unless the rental store retains title to the personal property~~
102 ~~or equipment throughout the rental-purchase agreement period.~~
103 Section 2. This act shall take effect July 1, 2006.

HB 147

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 147 Criminal Prosecutions
SPONSOR(S): Kravitz
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	8 Y, 0 N	Kramer	Kramer
2) Justice Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

HB 147 creates a new section of statute which provides that in criminal prosecutions after the closing of evidence, the prosecuting attorney shall open the closing arguments, the accused or the attorney for the accused may reply, and the prosecuting attorney may reply in rebuttal.

The bill also repeals Florida Rules of Criminal Procedure 3.250 to the extent that it is inconsistent with the bill. The bill will take effect upon becoming law except that the repeal of the rule of procedure will take effect only if the bill is passed by a 2/3 vote of the membership of each house of the legislature.

This bill does not appear to have any fiscal impact.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:
Provide limited government: This bill grants the prosecution a statutory right to have the first and last closing argument in a criminal case. The order in which closing arguments occur is currently governed by court rule.

B. EFFECT OF PROPOSED CHANGES:

Florida Rule of Criminal Procedure 3.250 provides that:

> In all criminal prosecutions the accused may choose to be sworn in as a witness in the accused's own behalf and shall in that case be subject to examination as other witnesses, but no accused person shall be compelled to give testimony against himself or herself, nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his or her own behalf, *and a defendant offering no testimony in his or her own behalf, except the defendant's own, shall be entitled to the concluding argument before the jury.*

Florida Rule of Criminal Procedure 3.780 which applies to sentencing in a capital case, provides that:

> Both the state and the defendant will be given an equal opportunity for one opening statement and one closing argument. The state will proceed first.

The Florida Supreme Court has characterized the effect of these rules as follows:

> Both rules are clear and unambiguous--in a guilt phase proceeding, a defendant has the right to close in final argument only if the defendant presents no testimony other than his or her own; in a penalty phase proceeding of a death case, a defendant always has the right to close in final argument.

Wike v. State, 648 So.2d 683, 686 (Fla.1994); Lamar v. State, 583 So.2d 771, 772 (Fla. 4th DCA 1991)("The final phrase of said rule gives the defendant in a criminal case the right to closing argument unless he offers witnesses other than himself. Stated differently, the defendant is entitled to close the argument if he offers no witnesses, or if he offers simply himself as a witness, but not if he offers someone other than or in addition to himself.").

There are a large number of reported cases in which an appellate court reversed a felony conviction based on the fact that the defendant was not given the opportunity to have the last closing argument. The Florida Supreme Court has determined that the right to make the closing argument where no evidence except the defendant's own testimony has been introduced, "is a vested procedural right, the denial of which constitutes reversible error." Birge v. State, 92 So.2d 819 (Fla. 1957); Freeman v. State, 846 So.2d 552, 554 -555 (Fla. 4th DCA 2003)("This error is not subject to harmless error analysis."); Morales v. State, 609 So.2d 765, 766 (Fla 3rd DCA 1992)(reversing grand theft, burglary and resisting arrest convictions because "[i]n spite of the overwhelming evidence against [the defendant], the trial court did not scrupulously follow a required rule of procedure.")
The Florida Supreme Court has explained the history of this rule as follows:

> To fully understand the rights this state has historically provided to defendants regarding concluding arguments under either rule, it is necessary to examine the history of these rules. At common law, the generally accepted rule was that the party who had the burden of proof had the right to begin and conclude the argument to the jury. The rule applied to both civil and criminal cases. The rationale behind this common law rule was to provide the party who shouldered the disadvantage of the burden of proof with the advantage of the opening and

> closing arguments before the jury. In 1853, this common law rule was changed in Florida ..... to provide that a defendant who produced no testimony at trial was entitled to the advantage of making the concluding argument before the jury. That law was later codified as section 918.09, Florida Statutes.
>
> As early as 1858, this Court determined that a trial judge had no discretion in following the statutory predecessor of section 918.09 and that the erroneous denial of a defendant's right to concluding argument constituted reversible error. Throughout the years, Florida courts have never deviated from the holding that the denial of a defendant's right to close under this rule constitutes reversible error. In fact, this is true even though in 1968 section 918.09 was incorporated as rule 3.250 and in 1970 section 918.09 was repealed.

Wike, 648 So.2d 683, 686 (Fla. 1995)(citations omitted)

At least one court has urged a change in the Florida rule:

> Presently in the United States, forty-six states, the District of Columbia and all United States District Courts[1] allow the prosecution to close the final arguments in criminal cases. Florida is one of only four states that have a rule which provides the criminal defendant the right to close final arguments where the defendant presents no evidence other than his own testimony.....[W]e respectfully suggest that the time has come for our Supreme Court to revisit the wisdom of this provision.

Diaz v. State, 747 So.2d 1021, 1025 (Fla. 3rd DCA 1999).

HB 147 creates section 918.19, F.S., relating to closing arguments. The bill provides that, as provided in common law, in criminal prosecutions after the closing of evidence, the prosecuting attorney shall open the closing arguments, the accused or the attorney for the accused may reply and the prosecuting attorney may reply in rebuttal.[2]

The bill repeals Rule 3.250 of the Florida Rules of Criminal Procedure to the extent that it is inconsistent with the bill. The bill will take effect upon becoming law, except that the repeal of the rule of procedure shall take effect only in the act is passed by a two-thirds vote of the each house of the legislature.

C. SECTION DIRECTORY:

Section 1. Creates s. 918.19, F.S.; relating to closing argument in criminal cases.

Section 2. Provides for repeal of rule of criminal procedure.

Section 3. Provides effective date.

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[1] See Federal Rule of Criminal Procedure 29.1 which states: "After the closing of evidence the prosecution shall open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal."

[2] The bill also has several "whereas clauses" which state the following:

WHEREAS, the common law rule in criminal and civil cases granted the right to final closing argument to the party bearing the burden of proof, and

WHEREAS, the state has the burden of proving guilt beyond a reasonable doubt in criminal cases, and

WHEREAS, the Federal Rules of Criminal Procedure grant the right to final closing argument to the party which bears the burden of proof, and

WHEREAS, other states follow the common law rule in granting the right to final closing argument to the party bearing the burden of proof in civil and criminal cases, NOW, THEREFORE,

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

   The Florida Constitution provides that "[t]he supreme court shall adopt rules for the practice and procedure in all courts". Art. V. Section 2(a), Fla. Const. The separation of powers provision of the state constitution prohibits one branch of government from exercising a power given to another branch. Art. II, Section 3, Fla. Const. According to the constitution, a rule of court "may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature." The constitution does not give the Legislature the authority to replace the repealed rule with a legislative enactment. The constitution also does not preclude the Supreme Court from reenacting a rule that is similar or identical to one that the Legislature has repealed.

   Florida courts generally protect their rulemaking power by striking down laws that that they determine are "procedural" in nature. In January of 2000, the legislature passed the Death Penalty Reform Act (DPRA) of 2000 in order to reduce the amount of time spent in litigation of capital cases. The bill advanced the start of the postconviction appeals process in capital cases to have it begin while the case was on direct appeal. The bill also imposed time limitations at key points of the postconviction process, limited successive postconviction motions and prohibited amending a postconviction motion after the expiration of the time limitation. The bill repealed the rules of criminal procedure applying to

capital postconviction motions. In Allen v. Butterwoth, 756 So.2d 52 (Fla. 2000), the Florida Supreme Court held that the Death Penalty Reform Act of 2000 was an "unconstitutional encroachment" on the Court's "exclusive power to 'adopt rules for the practice and procedure in all courts'." Id. at 54.

It is possible that the statute created by this bill will be challenged on the grounds that it violates the separation of powers provision of the state constitution by dealing with procedural matters that are the province of the court. In ruling on the constitutionality of a statutory provision, the court determines whether the statute deals with "substantive" or "procedural" matters. As discussed earlier, although the court was not being asked to rule specifically on the issue of whether the rule was substantive or procedural, the Florida Supreme Court has characterized the defendant's right to have the final closing argument as a "vested procedural right". On the other hand, based on the fact that the court has reversed a number of criminal convictions because a defendant has not been given the right to a closing argument, it could be argued that the right is substantive in nature and therefore something that the legislature could alter.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

1 A bill to be entitled
2 An act relating to criminal prosecutions; creating s.
3 918.19, F.S.; prescribing rights of the prosecution in
4 closing arguments; repealing Rule 3.250, Florida Rules of
5 Criminal Procedure, relating to the accused as a witness
6 and being entitled to concluding arguments before the
7 jury, to the extent of inconsistency with the act;
8 providing an effective date.
9
10 WHEREAS, the common law rule in criminal and civil cases
11 granted the right to final closing argument to the party bearing
12 the burden of proof, and
13 WHEREAS, the state has the burden of proving guilt beyond a
14 reasonable doubt in criminal cases, and
15 WHEREAS, the Federal Rules of Criminal Procedure grant the
16 right to final closing argument to the party which bears the
17 burden of proof, and
18 WHEREAS, other states follow the common law rule in
19 granting the right to final closing argument to the party
20 bearing the burden of proof in civil and criminal cases, NOW,
21 THEREFORE,
22
23 Be It Enacted by the Legislature of the State of Florida:
24
25 Section 1. Section 918.19, Florida Statutes, is created to
26 read:
27 <u>918.19 Closing argument.--As provided in the common law,</u>
28 <u>in criminal prosecutions after the closing of evidence:</u>

29 (1) The prosecuting attorney shall open the closing
30 arguments.
31 (2) The accused or the attorney for the accused may reply.
32 (3) The prosecuting attorney may reply in rebuttal.
33 Section 2. Rule 3.250, Florida Rules of Criminal
34 Procedure, is repealed to the extent that it is inconsistent
35 with this act.
36 Section 3. This act shall take effect upon becoming a law,
37 except that section 2 of this act shall take effect only if this
38 act passed by a two-thirds vote of the membership of each house
39 of the Legislature.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 157 CS Homestead Assessments
SPONSOR(S): Littlefield
TIED BILLS: None **IDEN./SIM. BILLS:** SB 264

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	5 Y, 0 N, w/CS	Bond	Bond
2) Local Government Council	7 Y, 0 N	Camechis	Hamby
3) Finance & Tax Committee	7 Y, 0 N	Monroe	Diez-Arguelles
4) Justice Council			
5)			

SUMMARY ANALYSIS

The 1992 Save Our Homes amendment to the Florida Constitution places a "cap" on annual increases of the assessed value of homestead real property, providing substantial ad valorem tax relief to Florida homeowners. However, the amendment requires reassessment of homestead property to reflect the property's current just value when a "change in ownership", as defined by the Legislature, occurs. Reassessment generally results in higher annual ad valorem taxes assessed against the property due to the higher assessed value. The current statute defining "change in ownership" lists two types of title transfers that do not constitute a "change of ownership", but adding a co-owner to a homestead property is not included. Therefore, it appears that reassessment is required if a co-owner is added to the title for homestead property even when the original owner continues to qualify for the homestead exemption.

This bill amends the statute defining "change of ownership" to specify that adding co-owners of homestead property is not a "change in ownership" that requires reassessment of the homestead property if the same person is entitled to the homestead exemption as was previously entitled. Therefore, the assessed value of the property is not increased and higher ad valorem taxes on the property are avoided. However, if a new co-owner applies for a homestead exemption on the property, the application is considered a "change in ownership" that requires reassessment of the property to reflect its just value.

The bill does not have a direct fiscal impact on state government. However, the Revenue Estimating Conference has estimated that this bill would reduce local property tax revenues by 8.6 million, assuming there is no offsetting change to millage rates

The bill has an effective date of July 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Ensure lower taxes -- This bill prevents automatic reassessment of homestead real property when a co-owner is added to the deed if the same person continues to qualify for the homestead exemption, thereby preventing a potential increase in ad valorem taxes on the property.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

The local ad valorem tax is an annual tax levied by local governments based on the value of real and tangible personal property as of January 1 of each year.[1] Florida's Constitution prohibits the state government from levying an ad valorem tax except on intangible personal property. The taxable value of real and tangible personal property is the fair market value of the property adjusted for any exclusions, differentials, or exemptions allowed by the constitution or the statutes.[2] Tax bills are mailed in November of each year based on the previous January 1st valuation and payment is due by the following March 31.[3] Local ad valorem tax revenues in Florida were approximately $22.4 billion in 2004.[4]

Article VII, § 6, Fla.Const., authorizes an exemption from ad valorem taxation for homestead property owned by a taxpayer and used as the owner's permanent residence or the permanent residence of another who is legally or naturally dependent upon the owner. The value of the homestead exemption is currently $25,000 of the assessed value of the real estate.

In 1992, the electorate adopted an amendment to art. VII, § 4, Fla.Const., known as the "Save Our Homes" amendment. The amendment limits increases in the ad valorem taxation on homestead real property by limiting increases in the assessed value of such property. The amendment provided for a base year "just value" assessment for each homestead as of January 1, 1994, and restricts subsequent increases in assessments to the lower of either (a) three percent of the prior year's assessment, or (b) the percent change in the Consumer Price Index. Homestead real property purchased after 1994 has a base year "just value" set in the first year that the exemption is available, with the same limits on future increases in the assessed value. In 2004, the Save Our Homes amendment provided approximately $4.5 billion in property tax relief to Florida homeowners.[5]

The limitation on future increases in the assessed value of homestead real property is only available to a current owner of the homestead real property. Article VII, § 4(c)3., Fla.Const., provides:

> After any change of ownership, as provided by general law, homestead property shall be assessed at just value as of January 1 of the following year. Thereafter, the homestead shall be assessed as provided herein.

The statutory definition of a change of ownership is codified in s. 193.155, F.S., which provides:

> (3) Except as provided in this subsection, property assessed under this section shall be assessed at just value as of January 1 of the year following a change of ownership. Thereafter, the annual changes in the

[1] 2005 Florida Tax Handbook, p. 138, available from the House Finance & Tax Committee.
[2] 2005 Florida Tax Handbook, p. 138.
[3] 2005 Florida Tax Handbook, p. 136.
[4] 2005 Florida Tax Handbook, p. 135.
[5] 2005 Florida Tax Handbook, p. 139.

assessed value of the property are subject to the limitations in subsections (1) and (2). For the purpose of this section, a change in ownership means any sale, foreclosure, or transfer of legal title or beneficial title in equity to any person, except as provided in this subsection. There is no change of ownership if:

(a) Subsequent to the change or transfer, the same person is entitled to the homestead exemption as was previously entitled and:

1. The transfer of title is to correct an error; or
2. The transfer is between legal and equitable title;

(b) The transfer is between husband and wife, including a transfer to a surviving spouse or a transfer due to a dissolution of marriage;

(c) The transfer occurs by operation of law under s. 732.4015; or

(d) Upon the death of the owner, the transfer is between the owner and another who is a permanent resident and is legally or naturally dependent upon the owner.

It is not unusual for a homeowner to add an additional co-owner to their property. One common reason for this type of transaction is that an elderly person wishes to add adult children as co-owners of homestead property in an attempt to avoid probate. This type of transaction, however, may be deemed a change in ownership that will result in an increase in the assessed value of the property (that is, a loss of the Save Our Homes benefit) in the year following the transaction.[6]

Effect of Proposed Changes

This bill amends s. 193.155, F.S., to provide that when a change or transfer of title is by an instrument in which the owner is listed as both grantor and grantee of the real property, and one or more other individuals are additionally named as grantee, the change or transfer is not a change in ownership that would require an increase in the assessed value as long as the same person is entitled to the homestead exemption as was previously entitled. However, if any individual who is additionally named as a grantee applies for a homestead exemption on the property, the application is considered a change of ownership and reassessment is required.

C. SECTION DIRECTORY:

Section 1 amends s. 193.155, F.S., to provide an additional exception applicable to the Save Our Homes amendment of the Florida Constitution.

Section 2 provides an effective date of July 1, 2006.

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[6] See Attorney General Opinion 2001-31. See also:
http://pqasb.pqarchiver.com/sptimes/887477751.html?MAC=707a8e7ae0b21690200d46a180abdacb&did=887477751&FMT=FT&FMTS=FT&date=Aug+25%2C+2005&author=HELEN+HUNTLEY&pub=St.+Petersburg+Times&printformat=&desc=Many+are+trying+to+save+that+tax+cap

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: None.

2. Expenditures: None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The Revenue Estimating Conference has estimated that this bill would reduce local property tax revenues by $8.6 million, assuming there is no offsetting change to millage rates..

2. Expenditures: None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: As a result of this bill, an individual may add one or more co-owners to the deed for homestead property without losing the Save Our Homes benefit, assuming the individual continues to qualify for the homestead exemption on the property. If the Save Our Homes benefit is not lost, an increase in annual ad valorem taxes may be avoided.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: This bill reduces the authority that cities or counties have to raise ad valorem tax revenues in the aggregate. As such, the mandates provision would appear to apply. However, since the bill is implementing a constitutional provision, it can be argued that the mandates provision does not affect this bill. Nevertheless, it is recommended that the bill be passed by a two-thirds margin to avoid any possible constitutional issues.

2. Other: The Legislature may only grant property tax exemptions that are authorized in the constitution, and modifications to property tax exemptions must be consistent with the constitutional provision authorizing the exemption.[7] This bill implements Art. VII, § 4, Fla. Const., which authorizes the Legislature to define, by general law, what constitutes a change in ownership.

B. RULE-MAKING AUTHORITY: None.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On October 19, 2005, the Civil Justice Committee adopted one amendment to this bill. The language in the bill as filed was not an accurate reflection of technical terminology used in real property transactions. The amendment corrected language without changing the apparent intent of the bill. The bill was then reported favorably with a committee substitute.

[7] *Sebring Airport Authority v. McIntyre*, 783 So.2d 238, 247 (Fla. 2001).

CHAMBER ACTION

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1 The Civil Justice Committee recommends the following:
2
3 **Council/Committee Substitute**
4 Remove the entire bill and insert:
5 A bill to be entitled
6 An act relating to homestead assessments; amending s.
7 193.155, F.S.; providing an additional criterion for
8 determining no change in ownership of homestead property
9 for homestead assessment purposes; specifying a condition
10 for a change in ownership; providing an effective date.
11
12 Be It Enacted by the Legislature of the State of Florida:
13
14 Section 1. Paragraph (a) of subsection (3) of section
15 193.155, Florida Statutes, is amended to read:
16 193.155 Homestead assessments.--Homestead property shall
17 be assessed at just value as of January 1, 1994. Property
18 receiving the homestead exemption after January 1, 1994, shall
19 be assessed at just value as of January 1 of the year in which
20 the property receives the exemption.
21 (3) Except as provided in this subsection, property
22 assessed under this section shall be assessed at just value as
23 of January 1 of the year following a change of ownership.

24 Thereafter, the annual changes in the assessed value of the
25 property are subject to the limitations in subsections (1) and
26 (2). For the purpose of this section, a change in ownership
27 means any sale, foreclosure, or transfer of legal title or
28 beneficial title in equity to any person, except as provided in
29 this subsection. There is no change of ownership if:
30 (a) Subsequent to the change or transfer, the same person
31 is entitled to the homestead exemption as was previously
32 entitled and:
33 1. The transfer of title is to correct an error; ~~or~~
34 2. The transfer is between legal and equitable title; <u>or</u>
35 <u>3. The change or transfer is by means of an instrument in</u>
36 <u>which the owner is listed as both grantor and grantee of the</u>
37 <u>real property and one or more other individuals are additionally</u>
38 <u>named as grantee. However, if any individual who is additionally</u>
39 <u>named as a grantee applies for a homestead exemption on the</u>
40 <u>property, the application shall be considered a change of</u>
41 <u>ownership;</u>
42 Section 2. This act shall take effect July 1, 2006.

HB 411

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 411 Psychotherapist-Patient Privilege
SPONSOR(S): Roberson
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary Committee	14 Y, 0 N	Hogge	Hogge
2) Health Care Regulation Committee	9 Y, 0 N	Hamrick	Mitchell
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

HB 411 extends the psychotherapist-patient privilege to advanced registered nurse practitioners whose primary scope of practice is the diagnosis or treatment of mental or emotional conditions, including chemical abuse. Advanced registered nurse practitioners are persons licensed to practice professional nursing and certified in advanced or specialized nursing practice.

The Florida Evidence Code includes a number of privileges. Privileges render certain communications or records inadmissible as evidence. One such privilege under Florida law is the psychotherapist-patient privilege. This privilege makes communications between psychotherapists and their patients for the purpose of diagnosing or treating mental or emotional health conditions inadmissible as evidence.

The Legislature has on various occasions expanded the definition of "psychotherapist" to include other practitioners. Currently, "psychotherapist" includes licensed medical doctors, psychologists, clinical social workers, marriage and family therapists, and mental health counselors. Also included are other treatment personnel employed by certain licensed health facilities and engaged primarily in the diagnosis and treatment of mental health and substance abuse conditions.

Fiscal Impact: The bill does not appear to have a fiscal impact on state or local government.

The bill takes effect on July 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty-The bill could be seen as safeguarding individual liberty by expanding the protections given to certain communications between patients and their mental health professionals.

B. EFFECT OF PROPOSED CHANGES:

This bill extends the psychotherapist-patient privilege to advanced registered nurse practitioners whose primary scope of practice is the diagnosis or treatment of mental or emotional conditions, including chemical abuse. Advanced registered nurse practitioners are persons licensed to practice professional nursing and certified in advanced or specialized nursing practice. Many advanced nurse practitioners are already included within the current definition of "psychotherapist," and enjoy the privilege as staff of a licensed hospital, mental health facility or substance abuse center.

PRESENT SITUATION

Psychotherapist-Patient Privilege

The Florida Evidence Code contains a number of privileges.[1] Privileges render certain communications or records within a protected relationship inadmissible as evidence in civil and criminal proceedings.

Examples of protected relationships include:

- The relationship between attorney and client;
- Clergy and penitent; and
- Husband and wife.

Another is the psychotherapist-patient privilege. This privilege makes communications between psychotherapists and their patients for the purpose of diagnosing or treating mental or emotional health conditions inadmissible as evidence.

Concerning the psychotherapist-patient privilege, the operative language in the Code provides:

> A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist.[2]

This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.

The privilege has been extended to various mental health professionals since first incorporated into the Code. Initially limited to psychiatrists, the Legislature has extended the privilege to any person licensed or certified as a psychologist, clinical social worker, marriage and family therapist, or mental health counselor under Florida law and laws of any other state or, as applicable, any nation, and who is engaged in the diagnosis or treatment of a mental or emotional condition.

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[1] See Chapter 90, F.S.
[2] See s. 90.503(2), F.S.

Later, the Legislature extended it to cover treatment personnel of state-licensed hospitals, mental health facilities and substance abuse treatment centers, when those personnel are primarily engaged in mental health diagnosis or treatment; and state-licensed or certified social workers, marriage and family therapists, and mental health counselors, again, only if primarily engaged in mental health treatment or diagnosis.

Florida's psychotherapist-patient privilege may be asserted by the patient, by a guardian or conservator of the patient, or by the personal representative of the estate of a deceased patient. It may also be asserted by the psychotherapist, but only on the patient's behalf. An assertion of the privilege by the psychotherapist creates a rebuttable presumption that it is made on the patient's behalf.

Advanced Registered Nurse Practitioners

Nursing in Florida is regulated under the Nurse Practice Act, chapter 464, F.S. Under the Nurse Practice Act, nurses licensed in Florida may seek certification as advanced registered nurse practitioners. With this certification, they may "perform acts of medical diagnosis and treatment, prescription, and operation which are identified by" a joint committee of the Board of Nursing and the Board of Medicine.

Advanced registered nurse practitioners perform all duties of a registered nurse, in addition to advanced level nursing in accordance with established protocols, including managing selected medical problems, monitoring and altering drug therapies, initiating appropriate therapies for certain conditions, performing physical examinations, ordering and evaluating diagnostic tests, ordering physical and occupational therapy, and initiating and monitoring therapies for certain uncomplicated acute illnesses.

Advanced registered nurse practitioners may perform medical acts under the general supervision of a medical physician, osteopathic physician, or dentist within the framework of standing protocols identifying the medical acts to be performed and the conditions for their performance.[3] Although advanced registered nurse practitioners may prescribe medications in accordance with a protocol, they cannot prescribe controlled substances.

To be certified as an advanced registered nurse practitioner, a nurse must demonstrate one of the following:

- Successful completion of a course in advanced nursing which is at least one academic year in length and primarily meant to prepare nurses for advanced or specialized practice;
- Certification by an appropriate specialty board; or
- Graduation from a program leading to a master's degree in a nursing clinical area.

C. SECTION DIRECTORY:

Section 1. Amends s. 90.503, F.S., to add advanced registered nurse practitioners with a certain scope of practice to the definition of "psychotherapist" for purposes of the application of the psychotherapist-patient privilege.
Section 2. Provides an effective date of July 1, 2006.

[3] See s. 464.003 (3)(c), F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not require counties or municipalities to spend funds or take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

No additional rule-making authority is required to implement the provisions of this bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

1 A bill to be entitled
2 An act relating to psychotherapist-patient privilege;
3 amending s. 90.503, F.S.; redefining the term
4 "psychotherapist" to include certain advanced registered
5 nurse practitioners for purposes of the psychotherapist-
6 patient privilege of the Florida Evidence Code; providing
7 an effective date.
8
9 Be It Enacted by the Legislature of the State of Florida:
10
11 Section 1. Paragraph (a) of subsection (1) of section
12 90.503, Florida Statutes, is amended to read:
13 90.503 Psychotherapist-patient privilege.--
14 (1) For purposes of this section:
15 (a) A "psychotherapist" is:
16 1. A person authorized to practice medicine in any state
17 or nation, or reasonably believed by the patient so to be, who
18 is engaged in the diagnosis or treatment of a mental or
19 emotional condition, including alcoholism and other drug
20 addiction;
21 2. A person licensed or certified as a psychologist under
22 the laws of any state or nation, who is engaged primarily in the
23 diagnosis or treatment of a mental or emotional condition,
24 including alcoholism and other drug addiction;
25 3. A person licensed or certified as a clinical social
26 worker, marriage and family therapist, or mental health
27 counselor under the laws of this state, who is engaged primarily
28 in the diagnosis or treatment of a mental or emotional

29 condition, including alcoholism and other drug addiction; ~~or~~
30 4. Treatment personnel of facilities licensed by the state
31 pursuant to chapter 394, chapter 395, or chapter 397, of
32 facilities designated by the Department of Children and Family
33 Services pursuant to chapter 394 as treatment facilities, or of
34 facilities defined as community mental health centers pursuant
35 to s. 394.907(1), who are engaged primarily in the diagnosis or
36 treatment of a mental or emotional condition, including
37 alcoholism and other drug addiction; or~~.~~
38 5. An advanced registered nurse practitioner certified
39 under s. 464.012, whose primary scope of practice is the
40 diagnosis or treatment of mental or emotional conditions,
41 including chemical abuse, and limited only to actions performed
42 in accordance with part I of chapter 464.
43 Section 2. This act shall take effect July 1, 2006.

HB 425

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 425 CS Florida Trust Code
SPONSOR(S): Mahon; Stargel
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1170

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	7 Y, 0 N, w/CS	Shaddock	Bond
2) Elder & Long-Term Care Committee	8 Y, 0 N	Walsh	Walsh
3) Economic Development, Trade & Banking Committee	14 Y, 0 N, w/CS	Olmedillo	Carlson
4) Justice Council			
5)			

SUMMARY ANALYSIS

The Trust Code is that portion of the Florida Statutes which pertains to the administration of trusts. Committee Substitute for HB 425 repeals Chapter 737, F.S., and creates Chapter 736, F.S., a comprehensive new trust code loosely modeled on the Uniform Trust Code of 2000, with a number of changes that center primarily on updating current Florida law. The CS includes the requirements for trust creation, the treatment of revocable trusts, and the rights of creditors within this new Trust Code. Some current provisions of the trust code -- in particular, those dealing with representation and with trust modification, termination and reformation -- are updated and expanded.

The CS proposes significant changes to current law including:

- A lower standard for collecting child support and alimony notwithstanding spendthrift provisions of a trust;
- A person who receives a trust distribution is deemed to submit to personal jurisdiction of Florida courts on any matter involving the distribution by simply accepting a distribution from the trust;
- A presumption that a trust is revocable unless the terms specifically provide that the trust is irrevocable;
- A trustee who commits a breach of trust is liable for the greater of the profit made by reason of the breach and the amount required to restore the trust to the position it would have been in had the breach not occurred;
- Trust modifications that currently require court approval may be effective upon agreement of the parties to the trust without court approval; and
- A trustee is permitted to engage in affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company and receiving additional compensation for that investment.

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

The CS specifies that the Code takes effect on July 1, 2007, and includes specific rules relating to retroactive application.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government -- This bill will provide a trustee with additional flexibility in administering a trust.

Safeguard Individual Liberty -- This bill increases the options of an individual, organization or association regarding the conduct of his/her own affairs in the trust arena.

Personal Responsibility -- This bill expands the ability of a person to collect alimony and child support from an obligor who is the beneficiary of a trust.

B. EFFECT OF PROPOSED CHANGES: [1]

Background

A trust is generally 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 for the benefit of another person, which arises as a result of a manifestation of an intention to create it. . . . [A] "beneficiary of a trust" [is] one who has an equitable interest in property subject to a trust and who enjoys the benefit of the administration of the trust by a trustee. The trustee is the person who holds the legal title to the property held in trust, for the benefit of the beneficiary. The settlor, or trustor, is the person who creates the trust.[2]

A "grantor" is "one who creates or adds to a trust and includes 'settlor' or 'trustor' and a testator who creates or adds to a trust."[3] The term "trustee" as used in a technical or legal sense means the person who takes and holds the legal title to trust property for the benefit of another.[4] "Trustee" refers to "an original, additional, surviving, or successor trustee, whether or not appointed or confirmed by court."[5]

Trusts may be classified as express trusts or as trusts by operation of law. Another classification of trusts, from the aspect of whether they become effective after the death of the settlor or during his or her life, is into testamentary and *inter vivos* trusts. Express trusts have been divided into passive trusts, sometimes known as "nominal" or "dry" trusts, and active trusts, otherwise called "live" or "operative" trusts. Trusts may also be classified as either private or charitable.[6]

An express trust is a trust intentionally created by the direct and positive act of the settlor, by some writing, deed, or will, or oral declaration. Express trusts are distinguishable from trusts by operation of law, resulting

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[1] The bulk of this analysis is specifically derived from "Florida Trust Code Executive Summary" and "Florida Trust Code Scrivener's Summary" which was graciously supplied by The Ad Hoc Trust Code Revision Committee, hereinafter referred to as the "Committee". The Committee labored for four years to prepare a thorough new trust code for Florida. The Committee was co-chaired by Brian J. Felcoski and Laird A. Lile. Other members included William F. Belcher, Debra L. Boje, Sandra F. Diamond, Robert W. Goldman, John G. Grimsley, Rohan Kelley, William R. Lane, Jr., William T. Marks, Barry F. Spivey, F. Gordon Spoor, Laura P. Stephenson, Bruce M. Stone, Donald R. Tescher, Marjorie E. Wolasky and G. Charles Wohlust. Professor David F. Powell of the Florida State University College of Law served as Committee Scrivener.
[2] 55A Fla. Jur. 2d Trusts s.1.
[3] Section 731.201(17), F.S.
[4] 90 C.J.S. Trusts s.2.
[5] Section 731.201(35), F.S.
[6] 55A Fla. Jur. 2d Trusts s.2.

and constructive, in that the latter are respectively founded on an intention of the parties to a transaction implied in law, or on fraud or wrong irrespective of the intention of the parties concerned.[7]

Chapter 737, F.S., which is entitled "Trust Administration," is the current statutory scheme that governs trusts. This chapter encompasses: trust registration; the jurisdiction of the courts; the duties and liabilities of trustees; the powers of the trustee; charitable trusts; and rules of construction for trusts. It also sets forth the default rules for trust administration which can generally be limited or altered by the settlor.

CS for HB 425 repeals Chapter 737, F.S., and creates Chapter 736, F.S., a comprehensive new trust code loosely modeled on the Uniform Trust Code of 2000, with a number of changes that center primarily on updating current Florida law. The CS includes the requirements for trust creation, the treatment of revocable trusts, and the rights of creditors within this new Trust Code. Some current provisions of the trust code -- in particular, those dealing with representation and with trust modification, termination and reformation -- are updated and expanded.

What Is Different Under CS for HB 425?[8]

By way of preview, the following is a brief catalogue of some of the more important changes CS for HB 425 (hereinafter "FTC" or "Code") makes to existing Florida law. Each of these is examined in greater depth later in this Analysis.

- **Representation**: The FTC includes the very useful representation provisions found in the Uniform Code but expands the provision dealing with representation by a holder of a power of appointment[9] and adds a new provision permitting a settlor to designate a representative (e.g., a trust protector).[10]

- **Trust Creation**: The requirement that trusts containing land be evidenced by a signed writing is affirmed; the unique Florida requirement that the testamentary aspects of trusts be executed with the formalities required for a will is limited to revocable trusts;[11] and the capacity needed to create a revocable trust is specified to be the same as that required for the execution of a will.[12]

- **Trust Modification**: In general, the FTC includes the Uniform Code provisions dealing with trust creation, modification and termination, although UTC section 411, which has been the subject of considerable discussion on estate planning list serves, was replaced with Florida's existing trust modification provisions.[13]

- **Charitable Trusts**: The authority the Attorney General has at common law to enforce charitable trusts is codified[14] and standing to enforce charitable trusts is extended to the settlors who create them[15] and to charitable organizations designated in an instrument to receive distributions from them.[16]

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[7] *Id.* at s.8

[8] The Committee estimated that Florida Trust Code is comprised about 40 percent of provisions found in prior Florida law and about 60 percent of provisions based on the Uniform Trust Code (the Uniform Trust Code of 2000 has been enacted in fifteen states and is under consideration in several others). Of the provisions in this latter group, almost a third were revised in some substantive respect.

[9] *See* s. 736.0302, F.S. discussed infra at p. 13.

[10] See s. 736.0306, F.S. discussed infra at p. 15.

[11] *See* s. 736.0403, F.S. discussed infra at p. 18.

[12] *See* s. 736.0601, F.S. discussed infra at p. 27.

[13] *See* ss. 736.4113 - .412, F.S. discussed infra beginning at p. 19.

[14] *See* s. 736.0110(3), F.S.

[15] *See* s. 736.0405(3), F.S.

[16] *See* s. 736.0110(1), F.S.

- **Creditor's Rights**: For trusts created after the effective date of the Code, a spendthrift clause must restrain both voluntary and involuntary alienation,[17] and the exceptions for child support and alimony are no longer "last resort" exceptions.[18] Note that the Code does NOT permit the creation of self-settled asset protection trusts or adversely affect the asset protection features of third-party trusts.

- **Revocable Trusts**: With respect to revocable trusts, the Code provides that trusts are revocable by default,[19] that a method of revocation expressed in an instrument is exclusive,[20] and that while a trust is revocable, the trustee owes duties only to the settlor.[21] This last principle also applies when a beneficiary has a right of withdrawal over trust property. That is, a holder of a right of withdrawal is treated as a settlor while the power is exercisable.[22]

- **Affiliated Services**: A trustee is permitted to engage in affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company[23] and receiving additional compensation for that investment.[24]

- **Miscellaneous and Conforming**: The existing antilapse statute for *inter vivos* trusts is replaced with a new provision more broadly applicable to the descendibility of future interests in both testamentary and *inter vivos* trusts;[25] the Worthier Title Doctrine is abolished;[26] sections 731.103 (evidence of death or status) and 731.201, F.S. (definitions) now apply to chapter 736; a new definition for "power of appointment" has been added to section 731.201, F.S.; section 731.303, F.S. (representation) no longer applies to proceedings involving trusts; and section 732.603, F.S. (antilapse) now applies only to outright devises and appointments.[27]

What Is the Same?

The short answer is quite a lot. As was mentioned previously, almost 40 percent of the Code consists of provisions carried over from chapter 737, F.S. with either no or only slight modification. An informative but nonexclusive list of these carryover provisions includes:

- Section 737.204, F.S. dealing with the employment of agents and the review of compensation.[28]

- Section 737.206, F.S. dealing with the effect of fraud, duress, mistake and undue influence.[29]

- Sections 737.4031 and 737.4032, F.S dealing with judicial and nonjudicial modification of trusts.[30]

- Sections 737.3054 and 737.308, F.S. dealing with a trustee's duty to pay the expenses and obligations of a settlor's estate and to provide a notice of trust at the settlor's death.[31]

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[17] *See* s. 736.0502(1), F.S., discussed infra at p. 25.
[18] *See* s. 736.0503(2), F.S., discussed infra at p. 25.
[19] *See* s. 736.0602(1), F.S., discussed infra at p. 28.
[20] *See* s. 736.0602(3)(b), F.S., discussed infra at p.28 .
[21] *See* s. 736.0603(1), F.S., discussed infra at p. 28.
[22] *See* s. 736.0603(2), F.S., discussed infra at p. 28.
[23] *See* s. 736.0802(5), F.S., discussed infra at p. 39.
[24] *See* s. 736.0802(5), F.S..
[25] *See* s. 736.0926, F.S., discussed infra at p. 54.
[26] *See* s. 689.175, F.S., discussed infra at p. 60. Black's defines this doctrine as "[t]he common-law doctrine that if a beneficiary of a will would receive an identical interest as an heir under the laws of intestacy, the person takes the interest as an heir rather than as a beneficiary." Black's Law Dictionary, 1639 (rev. 8th ed. 2004).
[27] *See* s. 732.603, F.S., discussed infra at p. 53.
[28] *See* s. 736.0206, F.S., discussed infra at p. 12.
[29] *See* s. 736.0406, F.S., discussed infra at p. 16.
[30] *See* ss. 736.04113 through .0412, F.S., discussed infra beginning at p. 19.
[31] *See* ss. 736.0505 and .05055, F.S., discussed infra at p. 27.

- Section 737.306(6), F.S. dealing with the protection of successor trustees.[32]
- Section 737.3035, F.S. dealing with the contents of a trust accounting.[33]
- Section 737.402(4), F.S. dealing with certain powers involving a conflict of interest.[34]
- Section 737.4025, F.S. dealing with powers relating to environmental and human health and contaminated property.[35]
- Section 737.208, F.S. dealing with administration pending the outcome of a contest or other proceeding.[36]
- Sections 737.727, 737.2035, and 737.2041, F.S. dealing with costs and fees.[37]
- Sections 737.307 and 737.3061, F.S. dealing with limitations on actions against trustees in general and against a revocable trust, its beneficiaries and its trustees after the settlor's death.[38]
- Section 737.209, F.S. dealing with liability for improper distributions.[39]

There is much more that is the same. For example, the above list makes no mention of a trustee's powers to split and merge trusts, not because such powers are not important, but because the Code uses the UTC provision in this area, rather than the provision from Chapter 737, F.S. There are numerous other instances of the same thing. The discussion that begins next tells a more complete story.

The Code in Depth

In the interest of uniformity, the Florida Trust Code borrows its structure from the Uniform Trust Code.[40] The Code consists of 13 parts, which correspond in title and content to the eleven articles that make up the Uniform Code, plus two additional parts covering rules of construction and charitable trusts respectively.

GENERAL PROVISIONS AND DEFINITIONS (PART I)

Among the more important things,[41] the several sections of Part I of the FTC address the scope and applicability of the Code;[42] the meaning of important terms;[43] and the relative weight to be given to the

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[32] *See* s. 736.08125, F.S., discussed infra at p. 38.
[33] *See* s. 736.08135, F.S., discussed infra at p. 39.
[34] *See* s. 736.0814(2) and (3), F.S., discussed infra at p. 42.
[35] *See* s. 736.08163, F.S., discussed infra at p. 41.
[36] *See* s. 736.08165, F.S., discussed infra at p. 36.
[37] *See* s. 736.0904 through .09047, F.S., discussed infra at p.46.
[38] *See* s. 736.0905 and .09103, F.S., discussed infra at pp. 48.
[39] *See* s. 736.0914, F.S., discussed infra at p. 45.
[40] To the extent possible, the Code also borrows its section numbering scheme from the UTC. For example, FTC section 736.0101 covers the same subject as UTC section 101, FTC s. 736.0102 the same as UTC s. 102, etc. In the many instances where an FTC section is identical to or is based on a corresponding section of the UTC, the extensive comments to the UTC section provide important additional guidance and authority. The parallel numbering scheme used in the FTC should facilitate reference to the appropriate UTC comment. Unfortunately though, it was not possible to continue the parallel numbering scheme throughout the entire Code. Under the numbering scheme used in the UTC, a section such as 1010 would appear in Article Ten. Under the numbering scheme dictated by the Florida statutes, a section 736.01010 would appear in Part I, somewhere between sections 736.0101 and 736.0102. Accordingly, the desired parallelism between the two codes breaks down beginning with Part X of the Code.
[41] Sections 736.0101 and 736.0112, F.S. are not discussed in this summary. The former merely specifies a citation form and internal title for the Florida Trust Code. Section 736.0112,.F.S. dispenses with local qualification for certain foreign trustees who receive distributions from a local estate. The section is identical to s. 737.105, F.S.
[42] *See* s. 736.0102, F.S.
[43] *See* s. 736.0103, F.S.

Code, common law, and the terms of a trust.[44] Also covered are the rules defining when a person or an organization is considered to have knowledge of a fact;[45] the methods of giving and waiving notice;[46] the rules for determining and changing a trust's principal place of administration;[47] and the validity and permissible scope of nonjudicial settlement agreements.[48]

Scope and Applicability

The "scope" of the Code is identical to that of Chapter 737, F.S. It applies to charitable and noncharitable express trusts and to trusts created by statute, judgment or court decree. It does not apply to implied trusts,[49] business trusts, land trusts, or to any other arrangement that does not meet the definition of a trust under s. 731.201(34), F.S.[50] Consistent with that, and except as otherwise provided in Part XIII or in a particular section, the provisions of the Code apply retroactively to all Florida trusts.[51]

For express trusts having contacts in more than one jurisdiction, the Code provides that the law of the jurisdiction designated in the terms of the trust provided there is a sufficient nexus to the designate jurisdiction at the time of creation of the trust or during the trust administration.[52] In the absence of a designation in the terms of the trust, the law of the jurisdiction where the settlor resided at the time the trust was created is controlling.[53] However, a designation in the terms of the trust is not controlling as to any matter for which the designation would be contrary to the strong public policy of Florida.[54]

Important Definitions

Section 736.0103, F.S. includes definitions for terms that are used in more than one section of the Code. These definitions are supplemented by other definitions in individual Code sections and by the definitions found in s. 731.201, F.S. which a conforming amendment makes applicable to new Chapter 736, F.S.

Beneficiaries and Qualified Beneficiaries

Most of the definitions in s. 736.0103, F.S. are sufficiently obvious or straightforward that there is little need to examine them directly. The terms "beneficiary" and "qualified beneficiary," however, are used so pervasively throughout the Code that extended examination of these terms is desirable. And it is informative, at least, to catalog a few other terms as well.

Beneficiary: The term "beneficiary" refers to the universe of persons who have a beneficial interest in a trust as well as to any person who has a power of appointment over trust property in a capacity other than as trustee.[55] It is immaterial for this purpose whether the beneficial interest is present or future, vested or contingent, or whether the person having the interest is ascertainable or even living.[56]

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[44] *See* s. 736.0105 and .0106, F.S.
[45] *See* s. 736.0104, F.S.
[46] *See* s. 736.0109, F.S.
[47] *See* s. 736.0108, F.S.
[48] *See* s. 736.0111, F.S.
[49] *I.e.*, resulting and constructive trusts.
[50] *See* s. 736.0102, F.S.
[51] On the retroactive application of the Code, see "*Effective date*", infra p. 58.
[52] The designation is ineffective if it is contrary to a strong public policy of this state. *See* s. 736.0107(3), F.S.
[53] In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction where the settlor resides at the time the trust was first created will control. Section 736.0107(2), F.S. With respect to any particular matter, the designation is not effective if it is contrary to a strong public policy of this state. Section 736.0107(3), F.S.
[54] Section 736.0107(3), F.S.
[55] *See* s. 736.0103(3), F.S.
[56] Nor is it relevant how the person acquired the beneficial interest. The term 'beneficiary' includes persons who received their interests by assignment, exercise of a power of appointment, resulting trust, or by operation of an antilapse statute. *See* generally the discussion of "beneficiary" in the comments to UTC s. 103.

Example 1 — Meaning of Beneficiary. At his death, ninety-year-old D leaves $1,000,000 to T as trustee "to pay the income to D's spouse S for life, then to distribute trust property to such of D's descendants as S by will appoints, and in default of appointment in continuing trust to spray income among D's children from time to time living, and at the death of the last to distribute all trust property *per stirpes* to D's then living descendants and if there be none, to D's alma mater, QB University." D is survived by S, by two children, C1 and C2, by a grandson Bob (C1's child) and by a great-granddaughter Fay (Bob's child). On these facts, the beneficiaries of D's trust include S, C1, C2, Bob, Fay, QB University, and an indeterminate and unascertainable class of as yet unborn descendants of D. Note that T's power to spray trust income among D's children does not make T a beneficiary because T holds that power as a trustee.[57]

Qualified Beneficiary: The term "beneficiary" is to be contrasted with "qualified beneficiary."[58] The latter encompasses only a limited subset of all trust beneficiaries. In effect the class is limited to living persons who are current beneficiaries, intermediate beneficiaries, and first line remainder beneficiaries, whether vested or contingent.[59] An example may be helpful.

Example 2 — Meaning of Qualified Beneficiary. Same facts as **Example 1**. The qualified beneficiaries of D's trust, *as of his death*, include S, C1, C2 and Bob. S is included because she is a permissible distributee.[60] C1 and C2 are included because they would become permissible distributees were S's interest to terminate at D's death (i.e., were she to die at that time).[61] Bob is also a qualified beneficiary because he would take the trust property were the trust to terminate at D's death (because of the death of S, C1 and C2).[62] As of D's death, neither Fay nor QB University are qualified beneficiaries. Note however, that if Bob were to die after D's death, Fay would then become a qualified beneficiary because she would be entitled to trust property as a consequence of a hypothetical trust termination at that time. That is, the determination of who is a qualified beneficiary is made as of a specific point in time and can change over time.

Charitable trusts are created to benefit the community at large rather than for the benefit of ascertainable beneficiaries. Accordingly, the comments to UTC section 103 adopt the view that persons, including designated charitable organizations, receiving distributions from charitable trusts are not beneficiaries as that term is used in the Code. As a consequence, charitable trusts have no qualified beneficiaries.[63] To address this concern:

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[57] Suppose S's power in this example extended to D's descendants and their spouses. Would a current or future spouse of the descendants be beneficiaries by virtue of the fact that they are permissible objects of S's power? The better answer is no because, under traditional property law, the objects of a power of appointment have no beneficial interest in the property subject to the power; they have a mere expectancy.

[58] It is this latter term that the Code employs in the various provisions dealing with notice and consent.

[59] More precisely, the term includes only living beneficiaries who are either present distributees (or present permissible distributees) of trust income or principal or who would become present or permissible distributees if the interests of present distributees or the trust itself terminated on the date the class of qualified beneficiaries is being determined. *See* s. 736.0103(14), F.S.

[60] Section 736.0105(14)(a), F.S.

[61] Section 736.0105(14)(b), F.S.

[62] Section 736.0105(14)(c), F.S.

[63] A similar problem exists with trusts for the care of animals or for a specific noncharitable purpose, neither of which have ascertainable beneficiaries, but both of which are validated by other provisions of the Code. *See* s. 736.0408 (trust for animal) and s. 736.0409, F.S. (noncharitable trust without ascertainable beneficiary). The Code addresses this issue by extending the rights of a qualified beneficiary to any person appointed to enforce an animal or noncharitable purpose trust. *See* s. 736.0110(2), F.S.

- The Code extends the rights of a qualified beneficiary to any charitable organization expressly designated to receive distributions from a charitable trust if the organization would otherwise meet the definition of a qualified beneficiary.[64]

- In addition, the Code authorizes the Attorney General[65] to assert the rights of a qualified beneficiary with respect to charitable trusts.[66]

Other Important Terms

Much can be gained by browsing the other terms defined in s. 736.0103, F.S.:

- The term "affiliate" is defined as any person or entity that directly or indirectly through one or more intermediaries owns or controls, is owned or controlled by, or is under common control or ownership, with the fiduciary.[67]

- The term "settlor" includes anyone who either creates or transfers property to a trust, including a testator;[68]

- The term "trustee" includes additional, successor, and cotrustees;[69]

- A trust is "revocable" if it is revocable by the settlor without the consent of either the trustee or an adverse person;[70]

- A power of appointment[71] is a "general power" if it is exercisable in favor of its holder, the holder's estate, or the creditors of either the holder or the holder's estate;[72]

- The term "power of withdrawal" excludes powers exercisable by trustees "as trustee" and powers exercisable by others only with the consent of a trustee or a person having an adverse interest;[73]

- The definition of "ascertainable standard" tracks that used in the federal transfer tax system. It means a standard relating to health, education, support, or maintenance;[74]

- The term "trust instrument" refers to a written instrument executed by a settlor which contains the original or amended terms of a trust.[75] This should be contrasted with the more expansive "terms of a

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[64] *See* s. 736.0110(1), F.S. The rights referred to in the section are the right to information and the right to participate in actions taken with the consent of the qualified beneficiaries.
[65] The Committee had extensive discussion about giving the Attorney General the rights of a qualified beneficiary with respect to charitable trusts. On the one hand, the Committee recognized the common law authority of the Attorney General to police charitable trusts on behalf of the public. On the other hand, the Committee saw no advantage to requiring trustees to send unwanted and unneeded information to the Attorney General. The approach adopted in the Code is a compromise. Under the Code, a trustee of a charitable trust has no duty to send notices, information, accountings, etc. to the Attorney General unless and until he or she asserts the rights of a qualified beneficiary with respect to the trust.
[66] *See* s. 736.0110(3), F.S.
[67] *See* s. 736.0103(2), F.S.
[68] *See* s. 736.0103(16), F.S.
[69] *See* s. 736.0103(21), F.S.
[70] *See* s. 736.0103(15), F.S.
[71] A conforming amendment to s. 731.201, F.S. defines "power of appointment" to be "an authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property." Accord, Restatement (Second) of Property: Donative Transfers s. 11.1 (1986).
[72] *See* s. 736.0103(6), F.S.
[73] *See* s. 736.0103(12), F.S.
[74] *See* s. 736.0103(2), F.S.
[75] *See* s. 736.0103(20), F.S.

trust", which includes both the terms specified in a trust instrument and such terms as might be established by other evidence admissible in a judicial proceeding; and[76]

- The term "interest of the beneficiaries" refers to the collective beneficial interests of a trust as opposed to the individual interests or concerns of the beneficiaries.[77]

Sources of Trust Law; Default and Mandatory Rules

Although it is more comprehensive than Chapter 737, F.S., the Code does not try to anticipate all possible issues that can arise with respect to trusts. Instead, for matters not addressed in the Code, section 736.0106, F.S. provides that the Code is supplemented by the common law of trusts and by principles of equity.

The Code can, and usually will, be supplemented by the terms of a trust as well. Or, more accurately, the terms of the trust will be supplemented by the Code. The latter is more accurate because the provisions of the Code are default rules that apply only in the absence of a contrary provision in the terms of the trust.[78] Thus, as a general matter, a settlor is free to limit, expand, or override any Code provision. There are exceptions, of course, and all of the exceptions are listed in s. 736.0105(2), F.S. The exclusive list of exceptions found there can be organized into the following broad categories:

- Those relating to the requirements for the creation of a trust including trust formalities[79] and the requirement that the purpose of a trust be lawful, possible to achieve, and not contrary to public policy.[80]

- Those containing public policy restrictions on the designation of a principal place of administration[81] and the effect of penalty,[82] spendthrift,[83] and exculpatory clauses.[84]

- Those covering procedural matters including jurisdiction,[85] venue,[86] and limitations on commencing judicial actions.[87]

- Those dealing with court powers, including the power to adjust a trustee's compensation;[88] to act in the interests of justice;[89] to require, dispense with, modify, or terminate a trustee's bond;[90] and, except as otherwise provided elsewhere in the Code, the power to modify or terminate a private or charitable trust.[91]

- Those dealing with the duties of a trustee, including the duty to act in good faith and in accordance with the terms of the trust;[92] the duty to notify, account to[93], and respond to requests for information

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[76] *See* s. 736.0103(19), F.S. The difference between the two concepts can be seen in the context of an oral trust of personal property. Such a trust would have terms but no instrument.
[77] *See* s. 737.0103(9), F.S.
[78] *See* s. 736.0105(1), F.S.
[79] *See* s. 736.0105(2)(a), F.S.
[80] *See* s. 736.0105(2)(c), F.S.
[81] *See* s. 736.0105(2)(p), F.S.
[82] *See* s. 736.0105(2)(u), F.S.
[83] *See* s. 736.0105(2)(e), F.S.
[84] *See* s. 736.0105(2)(k), F.S.
[85] *See* s. 736.0105(2)(o), F.S.
[86] *Id.*
[87] *See* s. 736.0105(2)(m), F.S.
[88] *See* s. 736.0105(2)(g), F.S.
[89] *See* s. 736.0105(2)(n), F.S.
[90] *See* s. 736.0105(2)(f), F.S.
[91] *See* s. 736.0105(2)(d), F.S.
[92] *See* s. 736.0105(2)(b), F.S.
[93] The committee expressed the following comment. If the experience of other jurisdictions is an indication, it is likely that the mandatory provisions dealing with the duty to account and to provide information to qualified beneficiaries will be the subject of

by qualified beneficiaries;[94] and with respect to a revocable trust, the duty to file a notice of trust at the death of the settlor[95] and to pay the expenses and obligations of the settlor's estate.[96]

- Certain miscellaneous provisions including one giving qualified beneficiaries and the trustee of a dynasty trust the power to amend or terminate the trust[97] and another specifying the rights of third parties who interact with the trust, such as bona fide purchasers, tort or contractual claimants.[98]

Principal Place of Administration

The Code imposes a duty on a trustee to administer the trust at a place that is appropriate to its purposes and administration.[99] Subject to that duty, upon appropriate notice to the qualified beneficiaries, a trustee may move a trust's principal place of administration to another State or jurisdiction.[100]

In the absence of a valid designation in the trust instrument, s. 736.0108, F.S. retains existing Florida statutory law which provides that a trust's principal place of administration is the trustee's usual place of business, if any; otherwise the trustee's residence.[101] In addition, the section validates trust provisions designating a principal place of administration, provided the designated jurisdiction has a sufficient nexus to the trust or its beneficiaries.[102]

Factual Knowledge

Section 736.0104, F.S. clarifies when a person is considered to have knowledge of a fact. That occurs if the person has actual knowledge of the fact, has received a notice or notification of it, or, under all of the facts and circumstances known to the person, has reason to know it.[103] With respect to an organization operating through employees, the organization has notice or knowledge of a fact involving a trust only from the earlier of the time the information was received by an employee having responsibility to act on matters involving the trust or the time the information would have been brought to the employee's attention if the organization had exercised reasonable diligence.[104]

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keen interest and discussion. This is understandable because these provisions involve a necessary balancing between a settlor's control and privacy interests on the one hand and the competing interest the beneficiaries have in accessing the information necessary protect their interests on the other. More is said about this elsewhere in this Summary. *See Representation; Privacy; and the Right to Information,* infra at p.15. By way of preview, however, the Florida Code balances these interests differently from the Uniform Code in three important respects. First, the duty the UTC imposes on a trustee to notify qualified beneficiaries of the existence of the trust, the identity of the trustee, and their right to reports is mandatory only with respect to qualified beneficiaries who have attained age 25. The FTC makes no distinction based on the age of qualified beneficiaries. Compare UTC s. 105(b)(8) with s. 736.0105(2)(h), F.S. Second, the UTC gives all beneficiaries a right to request reports and information reasonably related to the administration of the trust. Under the FTC, all rights to accountings, reports and information and to a copy of the trust instrument itself are restricted to qualified beneficiaries. Compare UTC s. 813(a) and 105(b)(9) with s. 736.0813, F.S., discussed infra p. 39. Finally, revisions and additions to the representation provisions in Part III of the Code provide a means by which settlors can effectively withhold information from one or more qualified beneficiaries. *See* ss. 736.0302 and 736.0306, F.S., discussed infra at pp. 13 and 15, respectively.

[94] *See* ss. 736.0105(2)(h) – (j), F.S.

[95] *See* s. 736.0105(2)(t), F.S.

[96] *See* s. 736.0105(2)(s), F.S.

[97] *See* s. 736.0105(2)(r), F.S.

[98] *See* s. 736.0105(2)(l), F.S.

[99] Section 736.0108(4), F.S.

[100] *See* s. 736.0108(5), F.S. The contents of the required notice is set out in s. 736.0108(6), F.S.

[101] *See* s. 736.0108(2). Additional guidance dealing with cotrustees and the impact of interstate mergers tracks existing Florida statutory law on these subjects. Compare ss. 736.0108(2) and (3), F.S. with s. 737.101(1)-(3), F.S.

[102] The nexus requirement is mandatory. *See* s. 736.0105(2)(f), F.S. It is satisfied if the designated jurisdiction is the trustee's residence or principal place of business or a jurisdiction where all or part of the administration occurs. Other jurisdictions are judged on a case by case basis. *See* s. 736.0108(1), F.S.

[103] Section 736.0104(1), F.S.

[104] Section 736.0104(2), F.S. This may be a change in Florida law as there are some cases that suggest a stricter standard for organizations acting through employees. *See* e.g., *St. Petersburg Coca-Cola Bottling Co. v. Cuccinello*, 44 So. 2d 670 (Fla. 1950); *Harris v. Lewis State Bank*, 436 So. 2d 338 (Fla. 1st DCA 1983).

Methods and Waiver of Notice

Section 736.0109, F.S. provides that notice of judicial proceedings is to be given as provided in the Florida Rules of Civil Procedure.[105] Other notices and the sending of required documents must be accomplished in a reasonably suitable manner that is likely to result in receipt.[106] Notice and the sending of documents are not required for persons whose identity or location is not reasonably ascertainable by the trustee[107] or who have waived the sending of the notice or document.[108]

Nonjudicial Settlement Agreements

Under the Code, interested persons[109] may enter into a binding nonjudicial settlement agreement[110] with respect to any trust matter, provided:

- The terms and conditions of the agreement could be properly approved by a Court were court approval sought;[111] and
- The agreement does not produce a result that is not authorized under other provisions of the Code.[112]

Qualifications of Foreign Trustee

The Code dispenses with local qualifications for certain foreign trustees who receive distributions from a local estate.[113]

JUDICIAL PROCEEDINGS (PART II)

Part II collects in one place a number of the rules applicable to judicial proceedings involving the validity, administration, and distribution of trusts.[114] Among these are provisions that affirm that, in the absence of a court order, trusts are not subject to continuing judicial supervision;[115] that proceedings involving the validity, administration, or distribution of trusts are commenced by complaint and are governed by the Florida Rules of Civil Procedure;[116] and that the circuit court has original jurisdiction with respect to all matters arising under the Code.[117]

Sticking with the familiar, Part II also incorporates verbatim four provisions found in Chapter 737, F.S. These include:

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[105] Section 736.0108(4), F.S.
[106] *See* s. 736.0108(1), particularly the last sentence which contains a list of acceptable methods, including a properly directed facsimile or other electronic message.
[107] Section 736.0108(2), F.S.
[108] Section 736.0108(3), F.S.
[109] In this context, interested persons is defined to be those persons whose interest would be affected by the settlement. Section 736.0111(1), F.S.
[110] Corporate trustees are quick to note the usefulness of nonjudicial settlement agreements in harmonious situations to avoid the expense and delays of formal accountings at the termination of a trust. They can be useful in a variety of other contexts as well. For a nonexclusive list of matters that can be resolved by a nonjudicial settlement agreement, see s. 736.0111(4), F.S. One can only assume that the comfort level banks have with this technique will increase under the Code, both because settlement agreements are now authorized by statute and because the representation provisions in Part III should make it easier to get all interested persons "on board."
[111] Court approval may be requested by any interested person. Section 736.0111(5), F.S.
[112] *See* s. 736.0111(2) and (3), F.S.
[113] Section 737.105, F.S., is essentially identical to s. 736.0112, F.S.
[114] For a nonexclusive list of possible judicial proceedings, see s. 736.0201(4), F.S. The power of courts to take actions in judicial proceedings involving trusts may not be changed in a trust instrument. *See* s. 736.0105(2)(n), F.S.
[115] *See* s. 736.0201(3), F.S.
[116] *See* s. 736.0201(1), F.S.
[117] *See* s. 736.0203, F.S. This is a mandatory provision. *See* s. 736.0105(2)(o), F.S.

- Section 736.0204, F.S. dealing with venue for actions and proceedings concerning trusts.[118] The section is identical to s. 737.202, F.S.[119]

- Section 736.0205, F.S. dealing with the dismissal of trust proceedings involving matters relating to foreign trusts. The section is identical to s. 737.203, F.S.

- Section 736.0206, F.S., providing for notice and other rules relating to proceedings for the review of the employment of agents and the compensation of the trustee and trust employees. The section is identical to s. 737.204, F.S.

- Section 736.0207, F.S. preventing actions to contest the validity of a trust while it remains revocable. This aspect of the section is identical to s. 737.2065, F.S. In addition, s. 736.0207, F.S. includes a new exception for court approved actions by the guardian of the property of an incompetent settlor.

Lastly, s. 736.0202, F.S.[120] deals with personal jurisdiction over the trustee, beneficiaries, and recipients of trust distributions. The methods of obtaining jurisdiction detailed in the section are not exclusive.[121] With respect to a trust having its principal place of administration in Florida, s. 736.0202, F.S. provides that:

- A trustee submits to the jurisdiction of Florida courts either by accepting the trusteeship or by moving the principal place of administration to this state;

- The beneficiaries are subject to the jurisdiction of Florida courts with respect to any matter involving the trust; and

- Recipients who accept a distribution from a trust submit personally to the jurisdiction of Florida courts regarding any matter involving the distribution.[122] [123]

REPRESENTATION (PART III)

Part III of the Code includes, with some important modifications, the representation provisions of the Uniform Code. Of all of the Code, the representation provisions should be among the most useful because they facilitate planning and the efficient administration of trusts.

Background

In the context in which it is used here, "representation" refers to the authority of one person to act on behalf of another.[124] Under the Code, notice, information, accountings and reports sent to a representative have the

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[118] This is a mandatory provision. *See* s. 736.0105(2)(o), F.S.
[119] Venue lies in any county where it is proper under chapter 47, F.S., where the plaintiff or defendant beneficiary resides or has its principal place of business, or where the trust has its principal place of administration.
[120] Chapter 737, F.S. has no provision corresponding to s. 736.0602, F.S. Jurisdiction under existing law is obtained under the general long arm statutes found in ch. 48, F.S. The Committee believes that the inclusion of a long arm statute tailored specifically to trust matters is a beneficial addition to Florida law.
[121] Section 736.0202(3), F.S.
[122] Section 736.0202, F.S. is a mandatory provision. *See* s. 736.0105(2)(o), F.S.
[123] More is said about this provision for personal jurisdiction in the Constitutional Issues section, infra at p. 67.
[124] The concept of representation is not new to Florida law. Section 731.303, F.S. provides for limited representation in the administration of, or in judicial proceedings involving, decedent's estates and trusts. If the FTC is enacted, a conforming amendment to s. 731.303, F.S., will restrict its application to decedent's estates so all representation regarding trusts will be controlled by the provisions in the FTC. But the Code representation provisions are more extensive. They permit representatives to initiate or consent to actions and to receive accountings and information in both judicial and nonjudicial contests. They apply generically across all provision of the Code. And to a limited extent, they apply to settlors as well as to

same effect as those sent to the person being represented. And actions taken by a representative bind the person being represented to the same extent as actions taken by the person being represented.[125]

Types of Representation

The Code recognizes several different types of representation. Two of these – representation by holders of powers of appointment and by persons designated by the settlor in the trust instrument itself – present special considerations and are discussed in greater detail later. The remaining representation types include:

- **Fiduciary**: This category includes those provisions which permit a guardian of the property to represent a ward;[126] an attorney-in-fact to represent a principal;[127] and a trustee or personal representative to represent the beneficiaries of a trust or estate, as the case may be.[128] The Code also provides that a parent may represent an unborn or minor child if no guardian of the property has been appointed.[129]

- **Virtual**: If not otherwise represented, a minor, incapacitated, unborn, unascertainable or unlocatable person may be represented by another person having a substantially identical interest.[130] The classic example of virtual representation involves the representation of minor beneficiaries of a class gift by other adult members of the class.

- **Court appointed**: The court may appoint a representative for a person the court determines is not otherwise adequately represented.[131] A court appointed guardian ad litem would be an example of this category of representation. Uniquely, in making decisions, a court appointed representative may take into consideration benefits accruing to living members of the family of the represented individual.[132]

Limits on Representation

With two notable exceptions, representation under the Code is available only to the extent there is no conflict of interest between the representative and the person being represented. Representation by holders of powers of appointment and by settlor-designated persons are the exceptions. As detailed more fully below, the former are subject to a fraud or bad faith restriction; the latter are restricted more directly by limitations on who may be designated as a representative.

Special Florida Provisions
Representation by Holders of a Power of Appointment

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beneficiaries. *See* e.g., s. 736.0301(3), F.S. providing that notice or consent given to or by a representative of an incapacitated settlor is binding of the settlor's behalf.

[125] *See* s. 736.0301(1) and (2), F.S. Section 301(b) of the Uniform Trust Code provides that the consent of a representative is binding on the person being represented "*unless the person represented objects to the representation before the consent would otherwise have become effective.*" (emphasis added). The comments to the section suggest that, at least with respect to competent adults, the qualification may be constitutionally required. Despite this, section 736.0301 does not include a similar limitation because the Committee believes that the constitutional requirement may not apply with equal force to all types of representation. It may be that representation over the objection of the person being represented violates due process in all cases. It is also possible, however, that representation by the holder of a power of appointment (or by a settlor designated representative) is distinguishable because the underlying rationale for these types of representation is found either in an equivalency with ownership or in the settlor's intent. *See* note 135 infra p. 14. The Committee omitted the explicit limitation because it did not wish to preempt the issue.

[126] *See* ss. 736.0303(1) and (2), F.S.

[127] *See* s. 736.0303(3), F.S.

[128] *See* ss. 736.0303(4) and (5), F.S.

[129] *See* s. 736.0303(6), F.S.

[130] *See* s. 736.0304, F.S.

[131] *See* s. 736.0305(1), F.S.

[132] *See* s. 736.0305(3), F.S.

Section 736.0302, F.S. provides that a holder of a power of appointment may represent and bind the objects and takers in default of the power. As is the case with the representation provision found in the Probate Code,[133] but unlike the corresponding provision in the Uniform Trust Code[134] s. 736.0302, F.S. makes no distinction between general and nongeneral powers.[135] Representation applies to the holders of either.[136]

The Fraud and Bad Faith Limitation

As it turns out, one of the most discussed questions relating to the representation provision dealing with power holders was whether representation should be precluded if the power holder has a conflict of interest with the objects or takers in default. The Uniform Trust Code contains such a restriction. Explicitly and structurally at least, s. 731.303, F.S. of the Probate Code does not. It was the Committee's belief that incorporating a conflict of interest limitation would change existing Florida law.

Discussion on this point centered on the common situation where a life tenant of a trust is given a power to appoint trust property by will. The case for including a conflict of interest limitation can be found in the concern that, without one, as a representative of the objects and takers in default, the power holder could approve acts that improperly benefit his or her life interest.[137] The case against including a conflict limitation is found in the shared view of many on the Committee that the limitation would preclude most representation by holders of powers as there would usually be some conflict between the power holder and the objects and takers in default.

The Committee decided to include a provision precluding representation by power holders in matters involving fraud or bad faith by the trustee instead of one dealing more broadly with conflicts of interest. Ultimately, the Committee hoped that a good faith trustee will resist any attempt by the holder of a nongeneral or testamentary power to enhance his or her life interest.[138]

Powers Held by Trustees

Section 736.0302, F.S. places two other restrictions on the ability of a power holder to represent others under part III of the Code. Both address the same concern – that trustees not be in a position to approve their own

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[133] *See* s. 731.303(1), F.S.

[134] Compare UTC s. 302.

[135] Even so, the rationale supporting this type of representation varies with the type of power. For general powers, the rationale lies in the essential equivalency of these powers to ownership. The Committee believes the same rationale supports representation in the case of broadly drafted nongeneral powers, such as a testamentary power to appoint to anyone in the world except the holder of the power, the estate of the holder or the creditors of either. The restrictions on the objects of this type of power exist for tax purposes only.
The supporting rationale for more restrictive nongeneral powers is different. A commonly encountered example of this type of power would be a trust "to pay the income to spouse for life, then to distribute principal to such of settlor's descendants as spouse appoints by will with gift in default of appointment to the descendants *per stirpes*." In the Committee's view, these powers are used either because existing Florida law permits their use as a means to cut off the flow of information about the trust to the remaindermen during the life tenant's life or because they add flexibility to the trust disposition. In either case, practically speaking, holders of this type of power act as an agent of the creator of the power. If a settlor has sufficient confidence in the holder of a limited nongeneral power to vest him or her with the authority to determine the beneficial ownership of trust property, there is every reason to assume that the settlor would want the power holder to represent the objects and takers in default in other respects. Hence, representation by the holder of a limited special power is a mere manifestation of a principle expressed more formally elsewhere in the Code[135] that a trust settlor should be able to designate persons to serve as representatives of trust beneficiaries.

[136] Nor does s. 736.0302, F.S. make a distinction between presently exercisable (i.e. *inter vivos*) and testamentary powers. Note though, that no question of representation arises when a trust beneficiary has a presently exercisable general power of appointment. It such a case, the trustee's duties would be owed exclusively to the power holder; as long at the power remained exercisable, other trust beneficiaries would have no rights to represent. *See* s. 736.0603, F.S.

[137] The Committee was of the view that this is an unlikely possibility where a corporate trustee is involved. But not all trusts have corporate trustee, and the possibility that the trustee is also the holder of the power, is a particular concern.

[138] In a conforming amendment, a fraud and bad faith restriction was also added to s. 731.301(1), F.S.

actions and accountings. Thus, s. 736.0302, F.S. does not apply to the distribution powers of a trustee.[139] Nor may a beneficiary with a power represent others while the beneficiary is serving as sole trustee.[140]

Designated Representatives

Within limits discussed below, s. 736.0306, F.S. allows a settlor to appoint or designate a person to represent and bind a trust beneficiary or to receive notices, information, reports and accounts on the beneficiary's behalf. This section, which has no counterpart in the Uniform Code, contemplates that the designated representative could be appointed directly by the settlor or by others (such as a committee) pursuant to a process set out in the trust instrument. In either case, a person serving as a designated representative is not a fiduciary. He or she is not liable for acts or omissions made in good faith.

Trustee May Not Serve as Designated Representative

Section 736.0306, F.S. places two important restrictions on the authority of a designated representative to represent and bind a trust beneficiary. The first of these is that a designated representative who is also a trustee may not represent or bind a trust beneficiary while serving in that capacity.[141] This is a mandatory restriction that cannot be waived in the trust instrument.[142]

Certain Beneficiaries Serving as Designated Representatives

The second restriction, which is also mandatory,[143] applies to designated representatives who are also beneficiaries of the trust. Although there is no blanket prohibition on a beneficiary serving as a designated representative, the Code does restrict the situations where this is allowed. A beneficiary may serve as a designated representative only if:

- The beneficiary is designated by the settlor by name (as opposed to by others pursuant to a process detailed in the trust instrument); or

- The designated representative/beneficiary is a spouse, grandparent, or descendant of a grandparent of either the beneficiary being represented or that beneficiary's spouse.[144]

Representation; Privacy; and the Right to Information

Reference was made previously to the balance the Code attempts to make between a settlor's privacy and control interests on the one hand, and the interests qualified beneficiaries have in accessing trust information on the other. Because, the trustee's duty to notify, account to, and respond to requests for information by qualified beneficiaries is mandatory, a settlor may not directly affect this duty in the trust instrument. Nevertheless, with the judicious use of the representation provisions, particularly the power of appointment and designated representative provisions, it should be possible to prevent one or more qualified beneficiaries from gaining access to information the settlor does not wish them to have.[145]

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[139] Section 736.0302(2)(b), F.S.
[140] Section 736.0302(2)(c), F.S.
[141] Section 736.0306(2), F.S.
[142] *See* s. 736.0105(2)(h), F.S.
[143] *See* Id.
[144] *See* ss. 736.0306(3)(a) and (b), F.S.
[145] Although a settlor may be motivated by a desire to restrict access to information about a trust, the settlor's intent in this regard is merely precatory. That is, a trustee who gives notices, accountings, etc., directly to a person who is represented by another under the Code is not individually liable for doing so. Section 736.0301(5), F.S.

TRUST CREATION, VALIDITY, MODIFICATION AND TERMINATION (PART IV)

The first several sections of Part IV of the Code gather together what would be considered by most to be the traditional common law of trusts. The balance of Part IV covers the important area of trust modification, termination and reformation. Some of these later provisions are codifications of existing Florida statutes. Others find their source in the Uniform Code.

Trust Creation and Validity

Under the Code, a trust may be created by *inter vivos* or testamentary transfer, by a settlor's self declaration of trust, or by the exercise of a power of appointment.[146] In broad outline and subject to further refinement below, to create a trust a settlor having the capacity to do so[147] must intend to create a trust[148] for a purpose that is lawful, consistent with public policy and possible to achieve.[149] The trust must not be passive, meaning that the trustee must have enforceable duties to perform.[150] A trust or any portion of a trust is void to the extent the trust or trust portion is procured by fraud, duress, mistake, or undue influence.[151]

Ascertainable Beneficiaries

In addition to the above, a private trust must have ascertainable beneficiaries.[152] That said, it is not necessary that the beneficiaries be alive at the creation of a trust. It is sufficient if they can be ascertained at some point in the future within the period of the Rule against Perpetuities.[153] If a class of beneficiaries is ascertainable (such as descendants), the shares of each may be left to the discretion of the trustee.[154]

Charitable trusts

A trust may be created for a charitable purpose (e.g., the relief of poverty, the advancement of arts, sciences, education or religion, or the promotion of health, governmental or municipal purposes).[155] The ascertainable beneficiary requirement does not apply to such trusts[156] because the enforcement of charitable trusts is provided by other mechanisms.[157]

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[146] Section 736.0401, F.S.
[147] Section 736.0402(1)(a), F.S.
[148] Section 736.0402(1)(b), F.S.
[149] Section 736.0404, F.S.
[150] Section 736.0402(1)(d), F.S. Accord, *Elvins v. Seestedt*, 141 Fla. 266, 193 So. 54, 126 A.L.R. 1001 (1940); *Watson v. St. Petersburg Bank and Trust Company*, 146 So.2d 383 (Fla. 2d DCA 1962); *Baum v. Corn*, 167 So.2d 740 (Fla. 2d DCA 1964). The requirement that the trustee's duties be enforceable means that the same person may not be the sole trustee and sole beneficiary of the trust. Section 736.0402(1)(e), F.S. Accord, *Wiley v. Hoggson*, 90 Fla. 343, 106 So. 408 (1925).
[151] Section 736.0406, F.S.
[152] Section 736.0402(1)(c), F.S. The reason is obvious enough. It is the beneficiaries who have standing to enforce the trust, and beneficiaries, courts, and trustees alike need to know who they are.
[153] Section 736.0402(2), F.S.
[154] In a departure from orthodox common law, a power of a trustee to select from a class of indefinite beneficiaries (such as friends) is not invalid under the Code. Instead, the trustee is given a reasonable time to make a selection. If the trustee fails to do so, the trustee's power fails and the property passes to those who would have taken it had the power never been conferred. Section 736.0402(3), F.S. Accord, Restatement (Third) of Trusts s. 46 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts s. 122 (1959); Restatement (Second) of Property: Donative Transfers s. 12.1 cmt. e (1986). In this regard, the Code overrules *Kunce v. Robinson*, 469 So.2d 874 (Fla. 3rd DCA 1985).
[155] Section 736.0405(1), F.S. Where the intent to create a charitable trust is present but the terms of the trust do not indicate a particular purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries. Section 736.0405(3), F.S.
[156] Section 736.0402(1)(c)1, F.S.
[157] Although not stated explicitly, the Code continues the common law rule that charitable trusts are enforced by the state Attorney General. *See* s. 736.0110(3), F.S. under which the Attorney General may assert the right of a qualified beneficiary with respect to charitable trusts. In addition, the rights of a qualified beneficiary are given to charitable organizations expressly designated to receive distributions under the terms of a charitable trust. *See* s. 736.0110(1), F.S. Finally, in a departure from common law, the Code gives settlors standing to enforce the charitable trusts they create. Section 736.0405(3), F.S.

Trust for the care of animals

A trust may be created to provide for the care of one or more animals alive during the settlor's lifetime.[158] The trust lasts until the death of the last surviving animal at which time any remaining trust property is distributed as provided in the terms of the trust, or in the absence of such a provision, to the settlor, if living, otherwise as part of the settlor's estate.[159]

The settlor of an animal trust may designate someone to enforce the trust. In the absence of such a designation, the court will appoint a person to enforce the trust.[160] In either case, the presence of a designated enforcer (so to speak) means that an animal trust does not need ascertainable beneficiaries.

Trusts for general or specific noncharitable purpose

In much the same way that the Code validates trusts for the care of animals, it also validates (for 21 years) trusts for a general or specific noncharitable purpose.[161] Like animal trusts, trusts for a noncharitable purpose are enforced by a person designated by the settlor in the terms of the trust, or, in the absence of such a designee, by a person appointed by the court.[162] Hence, this type of trust need not have ascertainable beneficiaries either.[163]

Trust Formalities

A testamentary trust is valid only if the will in which it is contained is valid. With two important exceptions discussed next, an *inter vivos* trust is validly created under the Code if its creation complies either with the law of the place where it was executed or the law where the settlor was domiciled at the time of creation.[164] Thus, where either the execution situs or the settlor's domicile is a jurisdiction other than Florida, the Code can validate a trust that does not comply with Florida law. In the common case of a trust executed in Florida by a Florida domiciliary, however, the trust must comply with the requirements for a trust in Florida.[165]

Irrevocable trusts

Neither existing Florida law nor the Code require a writing to create a trust of personal property. Irrevocable oral trusts of personal property are enforceable[166] provided only that their terms can be established by clear

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[158] *See* generally, s. 736.0408, F.S. This provision is similar to s. 737.116, F.S.

[159] *See* s. 736.0408(1) and (3), F.S. Except to the extent the court determines that the property in the trust exceeds that necessary to accomplish the purposes of the trust, property in an animal trust may be applied only to its intended use.

[160] An action to request the appointment of someone to enforce an animal trust, or to remove a person serving in that capacity may be brought by anyone having an interest in the welfare of the animal. Section 736.0408(2), F.S.

[161] Section 736.0409(1), F.S. An example of a trust for a general noncharitable purpose would be a trust where the trustee is directed to apply the income annually "to such worthy purposes as the trustee selects." An example of a trust for a specific noncharitable purpose would be one where the trustee is directed to spend trust funds for the saying of masses for the settlor and his deceased spouse. Accord Restatement (Third) of Trusts, s. 47 (2003), cmt. d(1). It is worth noting, though, that this Code provision will not apply to the two most common types of trusts for a specific noncharitable purpose. These, respectively, are trusts for the care of animals, which are covered separately in Code s. 736.0409, F.S. discussed above, and trusts for the care and maintenance of cemetery plots, which, under Florida law are deemed to be charitable. *See* s. 689.13, F.S. The significance of this section is that trusts for the care and maintenance of cemetery plots are not subject to the twenty-one year limitation in Code section 736.0409(1); they may be perpetual.

[162] Section 736.0409(2), F.S. Also like an animal trust, except to the extent the court determines that the value of the property is excessive, trust property must be applied for its intended use and any property not required for that purpose must be distributed as provided in the terms of the trust or in the absence of such terms, to the settlor, if living otherwise to the settlor's estate. Section 736.0409(3), F.S.

[163] Section 736.0402(1)(c)3, F.S.

[164] Section 736.0403(1), F.S.

[165] The formalities discussed in this portion of the analysis do not apply to certain trusts established as part of deferred compensation plans. *See* s. 736.0403(3), F.S.

[166] Section 736.0407, F.S. Accord, *Bay Biscayne Co. v. Baile*, 73 Fla. 1120, 75 So. 860 (1917); *In re Estate of Pearce*, 481 So.2d 69 (Fla. 4th DCA 1986).

and convincing evidence.[167] Trusts containing Florida real property, however, must be evidenced by a signed writing.[168]

Revocable trusts

Nominally, revocable trusts are subject to the same rules. Practically speaking, however, revocable trusts present special considerations. In the first place, most plans involving revocable trusts also involve wills with pourover clauses. Under s. 732.513(1), F.S., a pourover clause is invalid unless the recipient trust is evidenced by a written instrument. More importantly, since 1995, s. 737.111, F.S. has provided that the testamentary aspects of most trusts[169] are void unless the trusts are executed with the formalities required for a will.[170] Similar requirements are imposed by section 736.0403(2)(b) of the Code, but only with respect to revocable trusts[171] created by Florida domiciliaries[172] on or after the effective date of the Code.[173] The practical bottom line then is that, under the Code, if revocable trusts are to serve the function they are intended to serve – to pass property at the death of the settlor to others – they must be executed with the formalities required for a will.

These basics aside, there are aspects to the application of section 736.0403(2)(b), F.S. that may not be apparent from a casual reading. These include the following:

- The section applies both at the creation of a revocable trust and to any subsequent amendments.[174]
- A failure to comply with the requirements of s. 736.0403(2)(b), F.S. does not result in the initial invalidity of a revocable trust. Rather, only the testamentary aspects of the trust are void. As under existing law, testamentary aspects means "those provisions of the trust that dispose of the trust property on or after the settlor's death other to the settlor's estate."[175]
- The formalities required are those for a will in Florida. Complying with the formalities for a will in some other state is not enough.
- Section 736.0403(2)(b), F.S. has no applicability to trusts created by non Florida domiciliaries whether or not the trust was executed in Florida.[176]

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[167] Florida cases state the standard of evidentiary proof somewhat differently from s. 736.0407, F.S. *See Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative*, 52 So.2d 670, 674 (Fla. Sup. Ct. 1951) ("clear, positive and almost conclusive"); *Bailey v. Baron*, 269 So.2d 45, 47 (Fla. 3d DCA 1972, rev'd on other grounds 275 So.2d 519 (Fla. Sup. Ct. 1973) ("clear, strong, conclusive and unequivocal"). The Committee believes the standards expressed in these cases is functionally equivalent to the "clear and convincing" standard in s. 736.0407, F.S.

[168] *See* s. 736.0403(2)(a), F.S. providing that trusts containing land must comply with s. 689.05, F.S.

[169] Section 737.111, F.S. applies to trusts created by Florida residents, and perhaps trusts created in Florida by nonresidents. Certain trusts involved with deferred compensation arrangements are explicitly excluded from the requirements of s. 737.111), F.S. *See* s. 737.111(5), F.S. An identical exclusion is included in section 736.0402(3), F.S.

[170] *See* s. 737.111(1), F.S. This section does not apply to trusts created before October 1, 1995. Section 737.111(6), F.S.

[171] A trust is revocable if it is revocable by the settlor without the consent of either the trustee or a person holding an adverse interest. Section 736.0103(15), F.S. The decision to restrict s. 736.0403(2), F.S. to revocable trust follows from the Committee's belief that compliance with testamentary formalities is justifiable as a matter of principle only for that class of trusts that operate as will substitutes. Revocable trusts serve that purpose, irrevocable trusts do not. Stated differently, irrevocable outright transfers need not comply with testamentary formalities and the Committee could find no convincing justification for treating irrevocable transfers in trust any differently.

[172] The change from "resident" in s. 737.111, F.S. to "domiciliary" in s. 736.0403(2), F.S. has no substantive effect as the two terms are defined to be synonymous in s. 731.201(11), F.S.

[173] Section 737.111, F.S. continues to apply to trust created before that date. Section 736.0402(4), F.S.

[174] Unlike s. 737.111, F.S., s. 736.0403(2), F.S. makes no mention of trust amendments. Nevertheless, it applies to trust amendments because trust amendments are included within the definition of trust instrument. *See* s. 736.0103(20), F.S.

[175] *See* s. 736.0403(2), F.S., final sentence.

[176] Compare s. 737.111(2), F.S. which seems to imply that trusts executed by nonresidents are subject to the section if the settlor executes the trust in Florida.

- Conversely, s. 736.0403(2)(b), F.S. does not contain an "out" for trusts executed in other states. The section applies to revocable trusts created by Florida domiciliaries regardless of the place of execution and regardless of the location of the property held in the trust.[177]

Trust Modification and Termination

In addition to provisions dealing with the requisites for a trust, Part IV of the Code includes important and useful provisions covering the modification, termination and reformation of trusts. The first three of these provisions discussed below, are rewrites of Florida's existing trust modification statutes. The remaining provisions are borrowed from the Uniform Code.

Incorporation of Existing Florida Statutes

Chapter 737, F.S. includes two important sections dealing with the modification and termination of irrevocable trusts. With some restructuring, these sections have been incorporated into three sections of the Code. Each is discussed individually below. First, however, consideration is given to features the three sections have in common.

Common Features

The three sections under consideration here – ss. 736.1113, 736.1115 and 736.0412, F.S. – are all in addition to and not in derogation of common law rights to modify, amend, terminate trusts.[178] Although they apply in different contexts and with different prerequisites, none is applicable while a trust is revocable and all permit the same kind of modifications. That is, when applicable, each section provides a mechanism through which a trust can be:

- Amended with respect to either administrative or distribution terms;
- Terminated in whole or in part;
- Modified to direct or permit a trustee to do unauthorized or prohibited acts; or
- Modified to preclude a trustee from doing authorized or required acts.[179]

Of course, the three sections have differences as well. By way of preview, areas of difference include:

- The role (if any) a court plays in the modification/termination decision;
- Who may request or effectuate a modification/termination; and
- The respect that is to be given to the settlor's intent.[180]

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[177] Because of the differences between s. 737.111, F.S. and new section 736.0403(2)(b), F.S., the latter applies only to trusts created on or after the effective date of the Code. Section 736.0403(4), F.S. Section 737.111, F.S. continues to apply to trusts created before that date.
[178] *See* ss. 736.04113(4), 736.04115(5) and 736.0412(6), F.S.
[179] *See* ss. 736.04113(2), 736.04115(1), and 736.0412(1), F.S.
[180] The Committee expressed the following comment concerning the settlor's intent. It may come as a surprise to some that two of the Code sections may be used to modify or terminate a trust in a manner that is inconsistent with the intent of the settlor. It is worth emphasizing, however, that this possibility is not new with the Code. It exists under the modification provisions in Chapter 737, F.S. as well. The Code's organization and restructuring of these sections just makes this possibility more apparent. Then too, it is also worth noting that, with some tradeoffs, a settlor can preclude modifications and terminations that are inconsistent with his or her intent in the governing instrument. This ability, which involves an interplay between the modification sections and the Rule against Perpetuities, is detailed more fully later.

Judicial Modification Consistent with Settlor's Intent

Section 736.04113, F.S. permits a court to modify an irrevocable trust in any of the ways described above if the trust's purposes have been fulfilled or have become illegal, impossible, wasteful or impractical. It also permits modification when, because of an unanticipated change in circumstances, compliance with the original terms would defeat or substantially impair a material purpose of the trust.[181] Section 736.04113, F.S. is identical in effect to s. 737.4031(1), F.S. The only real difference is that s. 736.04113, F.S. clarifies who may apply for modification under the section. The application may be made by a trustee or any qualified beneficiary.[182]

An important characteristic of s. 736.04113, F.S. is that as long as they remain legal, possible and consistent with public policy (e.g., not wasteful or impractical), the settlor's purposes for the trust are the guiding polestar in a court's decision to permit a modification. In that regard, in exercising its discretion, the court is directed to consider the terms and purposes of the trust, the facts and circumstances surrounding its creation and other extrinsic evidence relevant to the proposed modification.[183] Importantly, modification under s. 736.04113, F.S. is not precluded by the presence of a spendthrift provision.[184]

The court's authority to modify a trust under s. 736.04113, F.S. is included on the list of mandatory provisions.[185] Thus, while a modification that is inconsistent with a material purpose of the settlor should be rejected by a court, a provision in a trust instrument which would seek to prevent the court from exercising its discretion on the matter is ineffective.

Judicial Modification in the Best Interest of the Beneficiaries

Under Code s. 736.04115, F.S., a court may modify an irrevocable trust in any of the ways described previously when compliance with the terms of the trust is not in the best interest of the beneficiaries.[186] As with s. 736.04113, F.S. discussed above, modification under s. 736.04115, F.S. is not precluded by the presence of a spendthrift provision[187] and, in exercising its discretion, a court is directed to consider the terms and purposes of the trust, the facts and circumstances surrounding its creation, and extrinsic evidence relevant to the proposed modification.[188]

Nonjudicial Modification of Irrevocable Trusts

Section 736.0412, F.S. provides for the nonjudicial modification of a trust. Under it, a qualifying trust may be modified in any of the ways described previously upon the unanimous agreement of the trustee and all qualified beneficiaries,[189] although neither a spendthrift clause nor a provision in a trust instrument

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[181] *See* s. 736.04113(1), F.S.
[182] Section 736.04113(1), F.S.
[183] Section 736.04113(3)(a), F.S.
[184] Section 736.04113(3)(b), F.S.
[185] *See* s. 736.0105(2)(j), F.S.
[186] The Committee explained the following regarding modification. Except for a clarification of who may apply for a modification under the section – a trustee or any qualified beneficiary – this section is identical in effect to existing s. 737.4031(2), F.S.[186] Under both, it is the best interest of the beneficiaries that is the controlling criteria for modification. Consequently, it is possible that s. 736.04115, F.S. could be used to modify a trust in a manner that is inconsistent with the settlor's intent. Predictably, this possibility may be anathema to some settlors. If so, read on. By default, under Florida's statutory Rule Against Perpetuities, all trust interests must vest or terminate within 360 years of their creation. For trusts subject to this version of the Rule, section 736.04115 is mandatory. *See* s. 736.0105(2)(j), F.S. But a provision in a trust instrument that expressly prohibits judicial modification under s. 736.04115, F.S. can be effective if the trust is drafted to comply with either the common law Rule Against Perpetuities (lives in being plus 21 years) or with Florida's shorter 90 year statutory substitute. Note, however, that drafting to comply with the common law or shorter statutory Rules is not in and of itself sufficient to preclude modifications under s. 736.04115, F.S. The trust instrument must also expressly prohibit judicial modifications under the section. *See* s. 736.04112(3)(b), F.S. Accord, s.737.4031(2)(c)2, F.S.
[187] Section 736.04115(2)(c), F.S.
[188] Section 736.04115(2)(b), F.S.
[189] Section 736.0412(1), F.S.

prohibiting amendment or revocation of a trust prevents modifications under the section.[190] The objection of a nonconsenting beneficiary, however, might.

Protection of Nonconsenting Beneficiaries

Because consent to a nonjudicial modification is required only of the trustee and qualified beneficiaries, there is a possibility that a s. 736.0412, F.S. modification could be detrimental to the interests of other beneficiaries. To protect against that, Code s. 736.0410(2), F.S. allows any beneficiary to commence a judicial proceeding to have a court review a proposed nonjudicial modification.

Qualification Criteria

Section 736.0412, F.S. is substantively identical to s. 737.4032, F.S. on which it was based. Under both, a number of factors must be considered in determining whether a trust qualifies for nonjudicial modification.

- First, the trust must have been created after 2000.[191]

- Second, nonjudicial modification is not permitted for any trust for which a charitable deduction is allowed or allowable under the Internal Revenue Code until such time, if ever, that all charitable interests in the trust have terminated.[192]

- Finally, there can be no nonjudicial modification of any trust while the trust settlor is still alive.[193] This limitation, insures that a settlor's participation in a modification, either directly as a qualified beneficiary or indirectly as a representative of another qualified beneficiary, cannot cause adverse estate tax exposure at a settlor's death under the expansive reading some recent case decisions have given to IRC sections 2036 and 2038.[194]

Other Modification and Termination Provisions

The three sections discussed above have their roots in the existing modification provisions of Chapter 737, F.S. In addition, the Code includes two other modification/termination provisions that are derived from the Uniform Code.

Modification or Termination of Uneconomic Trusts

Code s. 736.0414, F.S. provides a mechanism for a trustee or court to modify or terminate an uneconomic trust. The section is not mandatory; modifications and terminations under the section 736.0414 may be precluded by an express provision in the trust instrument.[195] Assuming no such provision:

- A trustee of a trust with property worth less then $50,000 may terminate the trust on its own initiative if the trustee concludes that the value of the trust property is insufficient to justify the cost of

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[190] Section 736.0412(2), F.S.
[191] Section 736.0412(4)(a), F.S.
[192] Section 736.0412(4)(b), F.S. This restriction is intended to preserved deductibility of charitable trusts for federal tax purposes.
[193] *See* s. 736.0412(1), F.S.
[194] Assuming the above criteria are met, a final consideration involves the applicable Rule Against Perpetuities associated with the trust. Section 736.0412, F.S. involves a tradeoff with the Rule Against Perpetuities similar to that detailed above for s. 736.04113, F.S. That is, nonjudicial modification is not only permissible, its availability is mandatory for trusts having a perpetuities period in excess of the common law and 90-year statutory periods.[194] For other trusts, the availability of nonjudicial modification is within the control of the governing instrument. By default, trusts which are drafted to comply with the common law or 90 year statutory periods are automatically exempt from modification under s. 736.0412, F.S. The governing instrument, may however, provide to the contrary. *See* s. 736.0412(4)(b), F.S.
[195] Although the existence of a spendthrift clause is not itself sufficient to preclude applicability of the section. Section 736.0414(4), F.S.

administration.[196] Before proceeding, notice must be given to the qualified beneficiaries.[197] If one or more of them object, they may commence a judicial proceeding to disapprove the trustee's termination.[198]

- In addition, upon application of a trustee or any qualified beneficiary a court may modify or terminate a trust, or remove or appoint a different trustee, if the court determines that the value of the trust property is insufficient to justify the cost of administration.[199]

In either case, upon termination of a trust, the trustee is directed to distribute the trust property in a manner consistent with the purposes of the trust.[200]

Modification to Achieve Settlor's Tax Objectives

In another section derived from the Uniform Code, s. 736.0416, F.S. provides that upon application by any interested person a court may modify a trust to achieve a settlor's tax objectives. Modifications under the section must be consistent with the settlor's probable intent.[201]

Trust Reformation

The Code contains two sections permitting the reformation of a trust to better effectuate a settlor's intent. The first of these is a codification of the common law *cy pres* doctrine. The second permits reformations to cure mistakes. This latter, in particular, is an expansion of existing law.

Cy Pres

Section 736.0413, F.S. codifies the common law *cy pres* doctrine. Under the section, a court may modify or terminate a charitable trust in a manner consistent with a settlor's charitable purposes if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful.
Reformation under s. 736.0413, F.S. is discretionary with a court. In that regard, the section differs from the corresponding Uniform Code provision. Under Uniform Code s. 413, it is presumed that the settlor had a general charitable intent in creating the trust which precludes a court from reverting the trust property back to the settlor or the settlor's successors in interest.[202] This limitation is not present in s. 736.0413, F.S.

Reformation to Correct Mistakes

Under s. 736.0415, F.S., upon application of the trustee or any interested person, a court may reform the terms of a trust to conform to the settlor's intentions if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake. Reformation under the section is available for both mistakes of law and of fact, whether or not the terms of the trust are ambiguous.[203]

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[196] Section 736.0414(1), F.S.
[197] *Id.*
[198] *See* s. 736.0414(3), F.S.
[199] Section 736.0414(2), F.S.
[200] A trustee may enter into agreements and take other necessary or appropriate actions to protect the interests of the beneficiaries and to effectuate the intent and purposes of the trust. Section 736.0414(3), F.S.
[201] Code s. 736.0416, F.S. provides an important state law authority for this type of modification. It does not, and can not, however, insure that the modification will be recognized for tax purposes. In general, tax recognition requires either that the modification occur before the event giving rise to the tax or that the modification be authorized by the Internal Revenue Code or Treasury Regulations promulgated thereunder. *See* Rev. Rul. 73-142, 1973-1 C.B. 405.
[202] This aspect of the Uniform Code is discussed further in the comments to UTC s. 413.
[203] Existing Florida case law supports reformation to cure scrivener's errors. *See Robinson v. Robinson*, 720 So. 2d 540 (Fla. 4th DCA 1998). Section 736.0415, F.S. is broader, however, as it allows reformation for mistakes both in the expression and in the inducement.

Trust Division and Combination

The final section of Part IV of the Code -- s. 736.0417, F.S. -- gives trustees the power to sever or combine trusts. The section is derived from Uniform Code s. 417. It replaces provisions in Chapter 737, F.S. which also permit trust combinations and severances.[204] The Committee preferred the Uniform Code provision over existing law because the existing statutes are unnecessarily restrictive. For example, severances under existing statutes must result in trusts with identical terms and with an aggregate of interests that are reasonably equivalent to those that existed prior to the severance. Similar restrictions apply to combinations.[205]

By contrast, under s. 736.0417, F.S. a trustee may combine trusts even though their terms are not identical. And a single trust can be severed even though the resulting trusts are dissimilar. Three cautions, are in order, however.

- First, the authority of the trustee is circumscribed by a requirement that the severance or combination not impair any beneficiary's rights.
- Second, notice must be given to qualified beneficiaries and any beneficiary may commence a proceeding to disapprove a proposed severance or combination.[206]
- Lastly, the types of actions permitted under s. 736.0417, F.S. may exceed what are permissible from a tax standpoint. Trustees should exercise caution as tax law requirements for trust combinations and severances vary with the context.

CREDITORS CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS (PART V)

Part V of the Code contains the several provisions that bear on the rights of creditors vis-à-vis a beneficiary's interest in a trust. Areas covered include the ability to garnish present or future distributions; the validity, requisites, effect, and limits of spendthrift provisions; the impact on creditor's rights of discretionary distribution standards; the treatment of self-settled trusts; and the duty of trustees of revocable trusts to pay the expenses and obligations of a settlor's estate.

Third Party Trusts

The term "third party trusts" is used in this Summary as a convenience to distinguish between those trusts that a settlor creates for others and those where the settlor has either a power of revocation or an interest as beneficiary. The latter are referred to as self-settled trusts.

No Spendthrift Provision

With respect to third party trusts, s. 736.0501, F.S. provides the basic statement of creditor remedy. Under the section, as long as the trust does not contain a valid spendthrift provision, a court may "authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or by other means."[207] Importantly, the rights given to creditors under the section are limited to those cases where a beneficiary has a right to distributions. If

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[204] *See* s.737.403, F.S.
[205] *See* s. 737.403(b), F.S.
[206] Section 736.0410(2), F.S.
[207] Although Chapter 737, F.S. contains nothing similar, s. 736.0501, F.S. is consistent with existing Florida case law which permits garnishment of "disbursements that are due to be made or actually made from the trust." *Bacardi v. White*, 463 So. 2d 218 (Fla. 1985). It does not matter that the distribution is to be made to or for the benefit of the beneficiary. *See Bradshaw v. Am. Advent Christian Home and Orphanage*, 145 Fla. 270, 199 So. 329 (1941) ("Where trust income is to be applied for the use and benefit of the *cestui que* trust, a court of equity may direct application of the income to payment of his debts.")

distributions are discretionary, a beneficiary has no "attachable" trust interest. Thus, s. 736.0504(1), F.S. provides that a creditor of a beneficiary may not compel a distribution that is subject to a trustee's discretion whether or not the discretion is subject to a standard and whether or not the trustee has abused the discretion.[208] In addition, s. 736.0504(2), F.S. insures that the same rules apply even if the beneficiary is the trustee, provided the trustee's discretion to distribute for its own benefit is limited by an ascertainable standard as described in ss. 2041 and 2514 of the Internal Revenue Code.[209]

Section 736.0504, F.S. applies only with respect to the rights of creditors to compel distributions from discretionary trusts. It does not limit the right of a beneficiary to sue for an abuse of discretion or a failure to comply with a distribution standard.[210]

Spendthrift Trusts

Code s. 736.0502, F.S. gives statutory recognition to spendthrift provisions.[211] Assuming a trust has a valid spendthrift provision:

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[208] Existing Florida case law does not permit the garnishment of interests in wholly discretionary trust interests. *See Bacardi v. White*, supra note 207. Whether the same rule applies to trusts where the discretion is subject to a standard, particularly where the standard has been abused, is not clear.

[209] On the question of when a trustee's powers may be subject to an ascertainable standard even though such a standard is not provided in the trust instrument, *see* ss. 736.0814(2) and (3), F.S. under which a power of a trustee other than a settlor or a spouse of a settlor to distribute to itself is automatically restricted by an ascertainable standard as described in ss. 2041 and 2514 of the Internal Revenue Code.

Section 736.0504(2), F.S. is derived from UTC section 504(e). The purpose of the provision is explained in the following comment to the UTC section:

> The UTC, as previously drafted, did not specifically address the issue of whether a creditor of a beneficiary may reach the beneficial interest of a beneficiary who is also a trustee. However, Restatement (Third) of Trusts s.60, comment g, which was approved by the American law Institute in 1999, provides that the beneficial interest of a beneficiary/trustee may be reached by the beneficiary/trustee's creditors. Because the UTC is supplemented by the common law (see UTC Section 106), this Restatement rule might also apply in states enacting the UTC. The drafting committee has concluded that adoption of the Restatement rule would unduly disrupt standard estate planning and should be limited. Consequently, Section 504 is amended to provide that the provisions of this section, which generally prohibit a creditor of a beneficiary from reaching a beneficiary's discretionary interest, apply even if the beneficiary is also a trustee or cotrustee. The beneficiary-trustee is protected from creditor claims to the extent the beneficiary-trustee's discretion is protected by an ascertainable standard as defined in the relevant Internal Revenue Code sections. The result is that the beneficiary's trustee's interest is protected to the extent it is also exempt from federal estate tax. The amendment thereby achieves its main purpose, which is to protect the trustee-beneficiary of a bypass trust from creditor claims.

The Committee notes that there is no Florida case law in support of the position taken by the Restatement (Third) of Trusts above with respect to powers subject to ascertainable standards. In *Croom v. Ocala Plumbing & Electric Co.*, 62 Fla. 460 (1911), the supreme court did subject property to the reach of trust beneficiaries' creditors because the trust instrument gave the beneficiaries an unrestricted right to demand distribution of the trust. The court said:

> Even if a deed creating a spendthrift trust, if properly construed, is valid and effectual to exempt the property from the debts of the beneficiaries, yet where the deed provides that the trustees shall convey all or any part of the property to the *cestui que* trust or to their assigns as they may direct on the joint request in writing, this virtually gives them absolute dominion so as to vest in them or their assigns absolute title, and such deed does not exempt the property from their debts under the general rule that when one has an interest in property which he may alien or assign, that interest, whether legal or equitable, is liable for the payment of his debts.

The powers in *Croom*, however, were unrestricted. The rationale of the case would not appear to apply to powers subject to an ascertainable standard. Hence, the Committee believes that section 736.0504(2) is consistent with existing law.

[210] Section 736.0504(3), F.S.

[211] The Code clarifies that no special language is necessary to create a spendthrift trust. Thus, a trust term to the effect that beneficial interests are subject to a spendthrift trust or words of similar import is sufficient to do the trick. *See* s. 736.0502(2), F.S.

- A beneficiary may not transfer his beneficial interest in the trust; and

- With some exceptions discussed next, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before it is received by the beneficiary.[212]

Spendthrift provisions are also recognized in existing Florida case law, although there is an important difference in the treatment of them under the Code. The difference concerns the required scope of the restraint on alienability. Under Florida case law, it appears possible for a spendthrift provision to allow limited transfers among family members.[213] That is not allowable under the Code. Under s. 736.0502(1), F.S., a spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest. Because this limitation is mandatory and is a change in existing law, the requirement does not apply to any trust in existence on the effective date of the Code.[214]

Exception Creditors

When it comes to the effectiveness of spendthrift provisions, not all creditors are created equal. For public policy reasons, some creditors may proceed against a beneficiary's interest in a trust even though the trust includes a spendthrift clause. Thus, s. 736.0503(2), F.S. provides that a spendthrift clause is unenforceable against:

- A claim by a beneficiary's child, spouse, or former spouse for support or maintenance;

- A judgment creditor (such as an attorney) who has provided services for the protection of a beneficiary's interest in the trust; or

- A claim by a state or the United States, but only to the extent a separate statute so provides.

Remedies Available to Exception Creditors

The fact that spendthrift clauses are unenforceable against exception creditors means only that these creditors have remedies against a beneficiary's interest similar to those of creditors of beneficiaries with interests in a trust that does not include a spendthrift provision. That is, exception creditors may attach present or future distributions to or for the benefit of the beneficiary;[215] they cannot compel distributions from or otherwise reach beneficial interests in discretionary trusts.[216]

Key Change from Existing Law

The concept of exception creditors has been recognized in Florida's case law since the 1985 decision in *Bacardi v. White*[217] in which the Supreme Court permitted a former spouse to recover alimony and attorney's fees from her former husband's spendthrift trust. In dicta, the court indicated that the result would be the same for a claim by a child for child support. A key difference between the *Bacardi* holding and the Code treatment of these exception creditors, however, is that the court in *Bacardi* held that the spouse's remedy is a last resort remedy which is available only upon a showing that traditional remedies are not effective.[218] The Code's provisions dealing with exception creditors are not so limited. Hence the Code changes existing law in this area by eliminating the need to show that traditional remedies are ineffective.

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[212] Section 736.0502(3).
[213] Although neither court discussed the point, the spendthrift clauses upheld in *Bacardi v. White*, 463 So. 2d 218 (Fla. 1885) and *Mason v. Mason*, 789 So. 2d 895 (Fla. 3d DCA 2001) both permitted limited transfers to family members.
[214] Section 736.0502(1), F.S.
[215] *See* s. 736.0503(3), F.S. This subsection also preserves the existing procedures available under the Uniform Interstate Family Support Act. *See* Chapter 88, F.S.
[216] *See* s. 736.0504(1), F.S., discussed supra, p. 23, which applies whether or not a trust contains a spendthrift provision.
[217] 463 So. 2d 218 (Fla. 1985).
[218] Accord, *Mason v. Mason*, 789 So. 2d 895 (Fla. 3d DCA 2001).

Mandatory Distributions

Although a spendthrift provision prevents a beneficiary's creditor from attaching or garnishing the beneficiary's interest in a trust, it does not protect trust income or principal after it has been distributed to the beneficiary. For that reason, a sympathetic trustee might be tempted to delay required distributions to spendthrift beneficiaries to frustrate or delay the beneficiaries' creditors' efforts to reach the distributions. Code s. 736.0506, F.S. is intended to prevent this. Under the section, whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution that the trustee does not make within a reasonable time.[219] For this purpose, a mandatory distribution is a distribution of income or principal that the trustee is required to make under the terms of the trust, including a distribution on termination of the trust. The term does not encompass discretionary distributions of any sort.[220]

Self-settled Trusts

As mentioned previously, this Summary uses the term "self-settled trust" as a convenience. A trust is a self-settled trust if it is revocable by the settlor or if the settlor is a mandatory or permissible distributee of trust property.

Creditor Remedies

Traditionally, self-settled trusts have been treated harshly when it comes to creditors' rights. This follows from a widely accepted public policy maxim that you should not be permitted to put property in a trust for your own benefit and escape your creditors. This policy maxim informs the Code's treatment of self-settled trusts. Under Code s. 736.0505(1), F.S., whether or not a trust includes a spendthrift provision:

- While a trust is revocable, the trust property is subject to the claims of the settlor's creditors;[221] and
- In the case of an irrevocable trust, a settlor's creditor or assignee may reach the maximum that can be distributed to or for the benefit of the settlor.[222] [223] Notwithstanding this ability, the assets of the trust are not subject to the creditor's or assignee's claims merely because the trustee possesses the power to pay tax liabilities of the settlor.[224]

Withdrawal Powers

While the remedies given in the Code to creditors of settlors of self-settled trusts are not new, there is one aspect of s. 736.0505, F.S. that may be. Under s. 736.0505(2)(a), F.S., during the period it may be exercised, a holder of a withdrawal power over trust property is treated the same as a settlor of a revocable trust with respect to the property subject to the power.[225] Hence, the power holder's creditors may reach the property subject to the power.

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[219] Section 736.0506(2), F.S.
[220] It is immaterial for this purpose that the discretion is subject to a standard or that it is coupled with language of direction. Section 736.0506(1), F.S.
[221] Section 736.0505(1)(a), F.S. Accord UTC s. 505(a)(1); Restatement (Third) of Trusts s. 25 comment e (Tentative Draft No. 1, approved 1996). But see Restatement (Second) of Trusts s. 330 comment o (1959) indicating that the rule with respect to revocable trusts at common law is different.
[222] Section 736.0505(1)(b), F.S. Accord UTC s. 505(a)(2); Restatement (Third) of Trusts s. 58(2) and comment e (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts s. 156 (1959).
[223] Neither of these rules is surprising. As both are consistent with accepted general principles of law, the Committee believed that s. 736.0505(1), F.S. does not change existing Florida law. Of course, not all states follow these rules. Recent, legislation in some states gives greater creditor protection to irrevocable self-settled trusts.
[224] Section 736.0505(1)(c), F.S.
[225] Section 736.0505(2)(a), F.S.

As the term "power of withdrawal" does not include powers held by a trustee which are limited by an ascertainable standard or powers which require the consent of the trustee or an adverse person,[226] the rule in section 736.0505(2)(a), F.S. appears consistent with the Supreme Court's decision in *Croom v. Ocala Plumbing & Electric Co.*[227] which subjected trust property to the reach of creditors when the trust beneficiaries had an unrestricted right to access trust property. Under s. 736.0505(2)(b), F.S., however, upon a lapse, release, or waiver of a withdrawal power, the power holder retains the status of trust settlor with respect to the value of the property subject to the lapse, etc.[228] Accordingly, the power holder's creditors can reach the maximum amount of that property that could thereafter be distributed to the power holder. As there is no similar principal in existing Florida case law, the Committee views s. 736.0505(2)(b), F.S. to be a change in existing law.[229]

Trustee's Duty to Pay Expenses and Obligations of Settlor's Estate

Chapter 737, F.S. includes provisions which establish a workable and important mechanism by which the assets of a deceased settlor's revocable trust must be applied in payment of the expenses of administration and the obligations of a settlor's estate. The Code incorporates these provisions without change. Thus, in a mandatory provision, s. 736.05053, F.S. obligates a trustee of a trust described in s.733.707(3), F.S.[230] to pay to a deceased settlor's personal representative amounts the personal representative certifies in writing to be required to pay administration expenses and the obligations of the settlor's estate. The section is identical to s. 737.3054, F.S. In another mandatory provision, Code s. 736.05055, F.S. carries forward the requirements found in s. 737.308, F.S., including the requirement imposed on a trustee of a trust described in s. 733.707(3) , F.S. to file a notice of trust with the court of the county of the settlor's domicile and the court having jurisdiction of the settlor's estate.

Revocable Trusts (Part VI)

Part VI of the Code gathers in one place most of the provisions relating to revocable trusts, which the Code defines to be a trust that may be revoked by the settlor without the consent of either a trustee or a person having an adverse interest.[231] In an initial mandatory provision, s. 736.0601, F.S. clarifies that the capacity required to create a revocable trust is the same as that needed to execute a will.[232] Other sections specify the rules to be used to determine if and how a trust may be revoked or amended, the effect revocability has on the duties and liabilities of a trustee and the limitations period for contesting revocable trusts after the death of the settlor.[233]

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[226] *See* s. 736.0103(12), F.S.
[227] 62 Fla. 460 (1911). *Croom* is discussed further at note 209.
[228] *See* s. 736.0505(2)(b), F.S.
[229] The Code contains an important qualification to the rule discussed above dealing with the effect of lapses, releases and waivers. The rule applies if and only to the extent the value affected by the lapse, release or waiver exceeds the greater of the gift tax annual exclusion (currently $11,000) or the safe harbor for lapses under the federal gift and estate tax laws (currently the greater of $5,000 or 5 percent of the trust). *See* ss. 736.0505(b)(1) and (2), F.S. For powers drafted not to exceed these limits, the property subject to the power will be subject to the power holder's creditors before the lapse, release, etc., but not thereafter. Initially, the Committee favored a rule that would have excepted lapsing powers altogether (even while they were exercisable) provided the powers lapsed within the restrictions of the gift tax annual exclusion or transfer tax safe harbors. Such an exception, however, would invite abuse as unrestricted and unlimited withdrawal powers could be brought within the scope of the exception simply by providing that they are to lapse at some nominal rate (such as $100 per year). Ultimately, the Committee accepted the treatment described in the text which is also the treatment given to withdrawal powers under the Uniform Code. *See* UTC s. 505(b).
[230] Sections 736.05053 and 736.05055, F.S. refer to trusts described in s. 733.707(3), F.S. rather than to revocable trusts because s. 733.707(3), F.S. is a broader concept. In addition, the section contains safeguards to prevent adverse tax consequences.
[231] Section 736.0103(15), F.S.
[232] As a section dealing with the requirements for creating a trust, s. 736.0601, F.S. is made mandatory by s. 736.0105(2)(a), F.S.
[233] As for the capacity to execute a revocable trust, all of the Committee agreed that it should be the same as that required to execute a will. But some on the Committee preferred that the standard for both be raised to that required to make an irrevocable inter vivos gift.

Consequences of Revocability

Revocability is important under the Code in two respects. The first, discussed previously, is the impact revocability has on the ability of a settlor's creditors to reach trust assets in satisfaction of their claims and the liability the trust has for contribution for costs and claims at a settlor's death. The second area where revocability plays an important role concerns the duties of the trustee. While a trust is revocable, the trustee's duties are owed exclusively to the trust settlor.[234] As a consequence:

- No other person is entitled to notices, information, accountings, or reports;[235] and
- A trustee may follow a direction of the settlor that is contrary to the trust instrument.[236]

The situations where a trustee's duties are restricted by section 736.0603 are not limited to traditional revocable trusts. Under s. 736.0603(2), F.S., during the period the power may be exercised, a holder of a power of withdrawal is given the rights of a settlor of a revocable trust with respect to the property subject to the power.[237] Hence, if upon attaining a specified age, a beneficiary is given a continuing right to withdraw all trust property, the trustee has no duty to send notices, information, accountings, or reports to any other beneficiary.[238]

Trusts are Revocable by Default

In an important change from prior law, the Code provides that trusts are revocable by default. That is, unless the trust instrument states that the trust is irrevocable, the trust may be amended or revoked by the settlor.[239]

This change is prospective only. It conforms Florida law to that of California, Texas and a growing number of other states, including those that have adopted the Uniform Code. The new rule reflects the view that most well drafted trust instruments explicitly say whether they are revocable. When a trust instrument does not clarify this, the implication is that the instrument was not drafted by an experienced attorney in which case the trust was probably intended to be revocable.[240]

Revocation Methodology

In addition to stating that it is revocable, a well drafted revocable trust instrument will specify the method that is to be used to accomplish a revocation or amendment. Under the Code:

- If the instrument does this, the provision in the instrument is exclusive in the sense that the trust can be revoked or amended only by substantially complying with the method stated in the instrument.[241]

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[234] Section 736.0603(1), F.S.
[235] The corresponding provision of the Uniform Code ceases to apply if a settlor loses capacity. *See* UTC s. 603(a). This restriction is not present in s. 736.0603(1), F.S.
[236] *See* s. 736.0808(1), F.S. discussed infra at p. 41.
[237] Accord UTC s. 603(b).
[238] Section 736.0603(2), F.S. is not restricted to withdrawal powers that extend to the entire trust. It applies in the case of powers to withdraw only a portion of a trust, including lapsing powers so commonly included for tax purposes. With respect to these powers, however, the impact of s. 736.0602(2), F.S. should be minor, first because its applicability would be limited to the portion of the trust that is subject to the withdrawal power, and second because the section ceases to apply once the power lapses.
[239] Section 736.0602(1), F.S. Under the Code, if a trust is revocable, it may also be amended. *See* generally the comments to UTC s. 601 citing Restatement (Third) of Trusts s. 63 cmt. g (Tentative Draft No. 3, approved 2001); Restatement (Second of Trusts s. 331 cmt. g & h (1959) to the same effect. *See* also s. 736.0602(1), F.S.
[240] *See* generally the comments to UTC s. 602(a). Moreover, if the assumptions underlying the revocable by default rule are wrong in a particular case, it is easier to make a revocable trust irrevocable than it would be to reform an irrevocable trust into a revocable one.
[241] Section 736.0602(3)(a), F.S. The "substantial compliance" test in this section may be more lenient that existing Florida law which appears to require strict compliance. *See Euart v. Yoakley*, 456 So.2d 1327 (Fla. 4th DCA 1984).

- If the instrument does not specify a method, any clear and convincing manifestation of the settlor's intent to revoke is sufficient,[242] including a provision in the settlor's later will or codicil expressly revoking the trust or specifically devising property that would otherwise pass according to the trust terms.[243]

Both principles, however, are subject to the possible overriding application of s. 736.0403(2)(b), F.S. as well as to certain other restrictions when someone is acting on behalf of the settlor or when a trust has more than one settlor.

Interrelationship with s. 736.0403(2)(b), F.S.

Recall that under s. 736.0403(2)(b), F.S., the testamentary aspects of a revocable trust executed by a Florida domiciliary are void unless the trust instrument is executed in the manner required for wills. Under the Code, the term trust instrument includes trust amendments.[244] Hence, notwithstanding the principles set out above, *amendments* to the testamentary provisions of a revocable trust must comply with s. 736.0403(2)(b), F.S.

The question of whether trust *revocations* must also comply with s. 736.0403(2)(b), F.S. is less clear. The better position is that they do not, as the effect of a revocation is to return the property to the settlor free of trust.[245] It is an unnecessary stretch to say that such a result is a trust "amendment" to which s. 736.0403(2)(b), F.S. would apply. Nevertheless, there is sufficient uncertainty on the issue that compliance with s. 736.0403(2)(b), F.S. for all amendments and revocations would appear prudent.

Revocations on Behalf of a Settlor

In most cases, a settlor's power of revocation or amendment will be exercised personally. The Code does, however, confirm separate Florida statutes under which others have a limited authority to act on a settlor's behalf. Thus, a settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by:

- An attorney in fact, but only as authorized by s. 709.08, F.S.;[246] or
- A guardian of the property, but only as authorized in s. 744.441, F.S.[247]

Trusts with more than one Settlor

As defined in the Code, "settlor" includes anyone who transfers property to a new or existing trust.[248] Under this definition, a trust can have more than one settlor. In such cases, s. 736.0602(2), F.S. specifies default rules for how the trust may be revoked or amended. As a general principle, each settlor may unilaterally revoke or amend his or her trust portion. But an exception applies if a trust consists of community property. To that extent, either spouse may revoke the trust, but amendments require the joinder of both. In all cases, if a trust is revoked or amended by fewer than all settlors, the trustee must promptly notify the other settlors of that fact.[249]

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[242] Section 736.0602(3)(b)2, F.S. Accord *Macfarlane v. First National Bank of Miami*, 203 So. 257 (Fla. 3d DCA 1967).
[243] Section 736.0602(3)(b)1, F.S.
[244] Section 736.0103(20), F.S.
[245] Under this view, if no methodology is expressed in the trust instrument, a trust could be revoked by physical act or perhaps even by an oral statement. For a suggestion that both approached might be available under the identical provision of the Uniform Code, see the comments to UTC s. 602.
[246] Section 736.0602(5), F.S.
[247] Section 736.0602(6), F.S.
[248] Section 736.0103(16), F.S.
[249] *See* s. 736.0602(2), F.S. The restrictions placed on trusts holding community property are intended to facilitate the ability to transfer community property to a trust without destroying its community property characteristics. *See* comments to UTC s. 602.

Protection of Trustees

If a trust is revoked, the Code directs the trustee to deliver the trust property as the settlor directs.[250] Of course, nothing insures that directions from the settlor will be forthcoming and, particularly where no method is specified in the trust instrument, it is possible that a trust could be amended or revoked without the trustee's knowledge. In such cases, the Code holds the unknowing trustee harmless for distributions made and other actions taken on the assumption that the trust has not been amended or revoked.[251]

Trust Contests

Provisions relevant to trust contests appear in several places in the Code. Reference has already been made to the fact that a trust or part of a trust is void to the extent its creation is procured by fraud, duress, mistake, or undue influence.[252] Reference has also been made to the general rule prohibiting actions to contest the validity of trusts while they are revocable and the exception to the prohibition that applies to court sanctioned contests by the guardian of the property of an incompetent settlor.[253] Part VI's contribution to this area is s. 736.0604, F.S. This section sets out the period of limitations for contesting a trust that was revocable at the settlor's death. On a person by person basis, a trustee can have the advantage of a short six month limitations period by sending the person a copy of the trust instrument and a notice informing the person of the trust's existence, the trustee's name and address, and the time allowed for commencing a proceeding. As is true across the entire Code, the representation provisions of Part III are available to a trustee who wishes to comply with the requirements of s. 736.0604, F.S.[254]

Office of Trustee (Part VII)

Part VII of the Code contains the various rules relating to the office of trustee. This includes provisions detailing when and how a designated trustee accepts or declines the office; how trustees may resign or be removed; the powers and duties of a trustee who has resigned or been removed; and when vacancies in the office of trustee must be filled and how successor trustees are appointed. Also covered are the duties and powers of cotrustees, compensation of trustees, and trustees' right to reimbursement for expenses incurred in the administration of the trust.

Accepting or Declining the Office

A person designated in a trust instrument to serve as trustee may decline to do so. Prior to acceptance, a trustee who knows of his designation of trustee is deemed to decline the trusteeship if the person does not accept the designation within a reasonable time.[255] A person accepts the trusteeship by substantially complying with the method provided in the terms of the trust or by otherwise indicating acceptance, such as by accepting delivery of the trust property or by exercising powers or performing duties as trustee.[256]

Actions not Constituting Acceptance

In some cases, it is desirable for a person designated as trustee to be able to act on behalf of a trust, or in his or her own interest, without the actions being treated as an acceptance of the trusteeship. To facilitate this, the Code provides that a designated trustee may, without accepting the trusteeship:

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[250] Section 736.0602(4), F.S.
[251] Section 736.0602(7), F.S.
[252] *See* s. 736.0406, F.S.
[253] *See* s. 736.0207, F.S.
[254] This important new provision attempts to strike a balance between the need for a reasonable period to bring an action contesting the validity of a revocable trust and the sometimes competing interest the trust beneficiaries have in an expeditious resolution of their rights and a distribution of their shares.
[255] Section 736.0701(2), F.S.
[256] Section 736.0701(1)(a) and (b), F.S.

- Act to preserve trust property (provided the person sends a notice of the person's decision to decline the trusteeship to at least one qualified beneficiary within a reasonable time of taking the action); or

- Inspect or investigate trust property for any purpose including to determine potential liability under environmental or other law.[257]

Trustee's Bond

A trustee need not give bond unless required by the terms of the trust or the court finds that a bond is needed to protect the interests of the beneficiaries.[258] In the former case, the court may dispense with a bond required in an instrument. And in all cases, it may specify the amount of the bond, its liabilities, and whether sureties are necessary. The court may modify or terminate a bond or surety at any time.[259]

Resignations and Removals
Resignations

A trustee may resign with court approval.[260] In addition, the Code provides a mechanism for trustees to resign without court approval. A trustee may resign by giving at least 30 days notice to the settlor (if living), the cotrustees (if any) and all qualified beneficiaries.[261] In either case, a trustee's resignation does not discharge any liability of the resigning trustee or any sureties on the trustee's bond.[262]

The ability of a trustee to resign without court intervention was new. There was no counterpart under prior law.[263] Subsequently, new s. 737.309, F.S. was enacted to permit this. Note that under the Code, however, the trustee's right to resign is a mandatory provision. It may not be denied or curtailed in the trust instrument.[264]

Removals

Court removal of a trustee may be sought by the settlor, a cotrustee, or any beneficiary. The Code also recognizes the ability of a court to remove a trustee on its own initiative.[265] Statutory grounds for removal include a serious breach of trust, lack of cooperation among cotrustees, and unfitness, unwillingness or persistent failure to effectively administer the trust.[266] In lieu of (or in addition to) removing a trustee, the court may grant appropriate relief for any breaches of trust that have occurred.[267]

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[257] Section 736.0701(3)(a) and (b), F.S.
[258] Section 736.0702(1), F.S.
[259] Section 736.0702(2), F.S. The Committee notes that the power a court has to modify or terminate a bond under this subsection includes the power to modify any required surety.
[260] Section 736.0705(1)(b), F.S. The court may impose conditions and enter orders reasonable necessary to protect trust property. Section 736.0705(2), F.S.
[261] Section 736.0505(1)(a), F.S.
[262] Section 736.0705(3), F.S.
[263] Prior Florida law followed the general rule that a trustee who has accepted a trusteeship cannot resign except in accordance with the terms of the trust, upon consent of all beneficiaries, or with approval of a court of competent jurisdiction. *See* e.g., *Stearns v. Fraleigh*, 39 Fla. 603, 23 So. 18 (1897); *Strong v. Willis*, 3 Fla. 1244 (1850). *See* also J. Grimsley, Florida Law of Trusts, s. 4-3; Restatement (Second) of Trusts s. 106(b) (Ali 1957).
[264] *See* s. 736.0105(2)(o), F.S.
[265] Section 736.0706(1), F.S.
[266] Section 736.0706(2)(a) – (c), F.S.
[267] *See* s. 736.0706(3), F.S. On the remedies generally available for a breach of trust, see s. 736.1001(2), F.S. discussed infra at p. 45.

The Code's provision giving a settlor the right to seek removal of a trustee is probably an expansion of existing law.[268] So to is the "unfitness" criteria at least if and to the extent it permits removal in anticipation of an actual breach.[269]

The Code also permits removal of a trustee at the request of all of the qualified beneficiaries or upon a showing of a substantial change in circumstances. Removal on these grounds does not require a showing of malfeasance. It requires only that:

- The removal best serve the interests of all beneficiaries;
- It not be inconsistent with a material purpose of the trust; and
- A suitable cotrustee or successor trustee be available.[270]

Delivery of Property by Former Trustee

Subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes, a removed or resigning trustee must, within a reasonable time, deliver any trust property within the trustee's possession to the cotrustee, successor trustee, or other person entitle to it.[271] Pending that, unless a cotrustee remains in office or the court orders otherwise, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect trust property.[272]

Vacancies and Appointment of Successor Trustees

The court has plenary authority to appoint an additional trustee or special fiduciary whenever the court considers it necessary for the administration of the trust.[273] In addition, the court has residual authority to appoint a successor trustee if an otherwise unfilled vacancy in the trusteeship occurs.[274]
A vacancy in a trusteeship can occur for a number of reasons including the inability to identify a designated trustee, the fact that a designated trustee declines the office, is adjudicated to be incapacitated, resigns, is disqualified, is removed or dies.[275] In each instance, unless the terms of the trust provide otherwise, a vacancy need not be filled unless there is no remaining trustee to serve.[276]
Where a vacancy in a trusteeship is required to be filled, it must be filled first by a person designated pursuant to the terms of the trust, then by a person appointed by unanimous agreement of the qualified

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[268] *See Sanders v. Citizens Nat. Bank of Leesburg*, 585 So. 2d 1064 (Fla. 5th DCA 1991) holding that the settlor of an irrevocable trust who has retained no beneficial interest in the trust corpus cannot maintain an action to enforce the trust.
[269] Under existing law, the general rule is that removal of a trustee must be predicated on a "clear showing of abuse or wrongdoing in the actual administration of the trust" or upon a showing of disharmony and hostility between trustees. Removal may not be predicated solely on hostility between beneficiaries and a trustee or upon a potential for mismanagement or conflict of interest. *See Parr v. Cushing*, 507 So.2d 1227, 1228 (Fla. 5th DCA 1987); *Robinson v. Tootalian*, 691 So. 2d 52 (Fla. 4th DCA 1997); *State of Delaware ex rel. Gebelein v. Belin*, 456 So. 2d 1237 (Fla. 1st DCA 1984), *rev. den.* 464 So.2d 556; *Rosen v. Rosen*, 167 So. 2d 70 (Fla. 3d DCA 1964).
[270] Section 736.0706(2)(d), F.S. The necessity of getting the joinder of all qualified beneficiaries may be facilitated by the representation provisions of Part III of the Code. Moreover, it may be possible to use ss. 736.04113 or 736.04115, F.S. to remove a trustee without meeting the requirements of section 736.0706(2)(d), F.S.
[271] Section 736.0707(2), F.S. The provisions of this subsection are explicitly stated to be in addition to and not in derogation of the rights of a removed or resigning trustee under common law. The intent of this statement is to insure that the subsection is not read as overruling the holding in *Merrill Lynch Trust Co. v. Alzheimer's Lifeliners Assoc. Inc. Et. al.*, 832 So. 2d 948 (Fla. 2d DCA 2002).
[272] Section 736.0706(3), F.S.
[273] Section 736.0704(5), F.S.
[274] *See* ss. 736.0704(3)(c) and (4)(c), F.S.
[275] These reasons are detailed in s. 736.0704(1), F.S.
[276] Section 736.0704(2), F.S. If a vacancy in a cotrusteeship occurs, the remaining trustees (or a majority of the remaining trustees) may act for the trust. Section 736.0703(2), F.S. *Accord* s. 737.404(2), F.S.

beneficiaries (or in the case of charitable trusts, the charitable organizations expressly designated to receive distributions under the terms of the trust), and lastly, if necessary, by a person appointed by the court.[277]

Cotrustees
Duty to Participate

With some exceptions noted below, the Code imposes upon cotrustees a duty to participate in the administration of the trust.[278] In doing so, it is normally to be expected that the cotrustees would act by unanimous consent. However, if the cotrustees are not able to reach a unanimous decision, they may act by majority agreement.[279]

Failure to Participate

A cotrustee's participation is excused if the cotrustee is unavailable because of absence, illness, disqualification or other temporary incapacity,[280] in which cases the remaining trustee or a majority of the remaining trustees may act for the trust if prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property.[281] In addition, a cotrustee's participation in the administration of the trust is not required if the trustee has properly delegated performance of a function to another trustee.[282]

Delegation among Cotrustees

Delegation is permitted under the Code only of those functions the settlor did not reasonably expect the trustees to perform jointly.[283] In the absence of an express delegation authority in the trust instrument, this would normally be limited to ministerial duties incidental to the execution of the trust, although even in the absence of a provision in the governing instrument, the investment decisions may be delegated to a qualified trustee under other provisions of the Florida statutes.[284]

Liability of Nonjoining or Dissenting Trustees

In general, a trustee who does not join in an action by another trustee is not liable for the action.[285] However, this rule is subject to the overriding duty of each trustee to exercise reasonable care to prevent a cotrustee from committing a breach of trust and to compel a cotrustee to redress a breach that does occur.[286]

Because the Code permits a majority of trustees to act for the trust, it is possible that one or more trustees could be outvoted as to some particular course of action. A dissenting trustee who joins in an action at the

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[277] Section 736.0704(3) and (4), F.S. The ability of qualified beneficiaries (or named charities) to designate a successor trustee is an expansion of existing Florida law. *See Van Roy v. Hunter*, 96 Fla. 194, 117 So. 887 (1928) (a vacancy in a trusteeship would be filled by a court if the instrument did not provide for a successor or a method of selecting a successor).
[278] Section 736.0703(3), F.S.
[279] Section 736.0703(1), F.S.
[280] Section 736.0703(3), F.S.
[281] Section 736.0703(4), F.S.
[282] Section 736.0703(3), F.S.
[283] Section 736.0703(5), F.S. Irrevocable delegations are not permitted under this subsection. A trustee may revoke a delegation previously made. Compare UTC s. 703(e).
[284] On this, see s. 518.112, F.S.
[285] Section 736.0703(6), F.S.
[286] Section 736.0703(7)(a) and (b), F.S. The corresponding provision in the Uniform Code refers to "serious" breaches of trust. *See* UTC s. 703. The Committee removed "serious" because it did not feel the word clarified the meaning of the section. Mere technical breaches would not appear to be a problem under the subsection as they would not normally result in damages to the trust or its beneficiaries. The "seriousness" of other breaches will be reflected in the standard of reasonable care required by the subsection.

direction of a majority of trustees is not liable for actions taken by the majority provided notice of the dissent is given to any cotrustee at or before the time of the action.[287]

Compensation and Reimbursement of Trustees

A trustee is entitled to reasonable compensation,[288] including reasonable additional compensation for other services the trustee renders in connection with the administration of the trust.[289] If the trustee's compensation is specified in the terms of the trust, the trustee is entitled to be compensated as specified, subject to the court's authority to allow more or less compensation if the trustee's duties are substantially different from those originally contemplated or the specified compensation is unreasonably low or high.[290]

A trustee is also entitled to be reimbursed out of the trust property, with appropriate interest, for reasonable expenses properly incurred in the administration of the trust. A trustee has a lien against trust property to secure reimbursement for advances (plus interest) made by the trustee for the protection of the trust.[291]

Duties and Powers of Trustee (Part VIII)

As its title suggests, Part VIII of the Code covers the duties and powers of a trustee. Coverage in this section of the analysis begins with duties, moves on to powers, and ends with a few miscellaneous matters.

Duties of a Trustee

In a series of separate sections, the Code codifies all of the fundamental common law duties of a trustee as well as several other more specifically targeted duties relating to the collection, management, and distribution of trust property. Except as otherwise noted, all of the Code's provisions dealing with the duties of a trustee are consistent with existing Florida decisional and statutory law. In addition, except as otherwise noted, these provisions are default rules which apply only in the absence of a contrary provision in the trust instrument.

Compendium of Statutory Duties

A comprehensive list of the statutory duties of a trustee is presented here. Included on the list are the duty of loyalty, the duty to redress breaches, and the duty to inform and account each of which is sufficiently nuanced to merit additional discussion. That discussion appears after the list.

Duty to Administer in Good Faith

A trustee has a duty to administer the trust in good faith and in accordance with its terms and the interests of the beneficiaries.[292] This is a mandatory duty which may not be relaxed or curtailed in the trust instrument.[293]

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[287] Section 736.0703(8), F.S. Unlike the similar provision in existing law, s. 736.0703(8) does not require the notice of the dissent to be in writing. Compare s. 737.404, F.S.
[288] Section 736.0708(1), F.S. On the factors to be taken into account in determining a reasonable compensation, see *West Coast Hospital Association v. Florida Nat'l Bank of Jacksonville*, 100 So. 2d 807 (1958) citing with favor Bogert, Trusts and Trustees, s 976.
[289] Section 736.0708(3), F.S. There is not existing statute covering the compensation of multiple trustees and the Code does not address this issue either. Compare s. 733.716(5), F.S. dealing with the compensation of multiple personal representatives.
[290] Section 736.0708(2), F.S. The authority of the Court to adjust a trustee's compensation in this manner under existing law is unsettled.
[291] Section 736.0709(1) and (2), F.S. This section accords with existing law on the subject. *See* s. 737.402(2)(s), F.S. *See* also, *First Union Nat'l Bank v. Jones*, 768 So. 2d 1213 (Fla. 4th DCA 2000).
[292] Section 736.0801, F.S. This section is identical to UTC s. 801. The requirement of good faith imposed by the section is consistent with existing Florida case law. *See Mesler v. Holly*, 318 So. 2d 530 (Fla. 2nd DCA 1975); *Hoppe v. Hoppe*, 370 So. 2d 374 (Fla. 4th DCA 1978).
[293] Section 736.0105(2)(b), F.S.

Duty of Loyalty

As between the trustee and the beneficiaries, a trustee has a duty to administer the trust solely in the interests of the beneficiaries. This duty is explored in greater detail in the next section of the analysis.

Duty of Impartiality

When a trust has more than one beneficiary, a trustee must administer the trust impartially giving due regard to the respective interests of the beneficiaries.[294]

Duty to Administer Prudently

A trustee must administer the trust as a prudent person would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust and by exercising reasonable care, skill, and caution.[295]

Duty to Incur only Reasonable Expenses

A trustee must incur only expenses that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.[296]

Duty to use Special Skills

A trustee with special skills or expertise has a duty to use those special skills.[297]

Duty to Control and Protect Trust Property

A trustee must take reasonable steps to take control of and protect trust property. This includes the taking of reasonable steps to compel a former trustee or other person to deliver trust property to the trustee.[298]

Duty to Keep Accurate Records

A trustee must keep clear, distinct, and accurate records.[299]

Duty not to Commingle and to Earmark

A trustee must keep trust property separate from the trustee's own property and must, to the extent feasible, cause the interest of the trust to appear in any records maintained by third parties.[300] An exception permits a trustee to invest two or more separate trusts as a common fund if the trustee maintains records clearly indicating the respective interests.[301]

Duty to Ascertain Marketable Title

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[294] Section 736.0803, F.S.
[295] Section 736.0804, F.S. This is a more generalized statement of the duty relating to trust investments that appears in Florida's Prudent Investor Act. *See* s. 518.11(a), F.S.
[296] Section 736.0805, F.S.
[297] This duty also extends to a trustee who is named trustee on the basis of the trustee's representation that the trustee possesses special skills or expertise. S. 736.0806, F.S. This duty also appears in the Florida Prudent Investor Act. *See* s. 518.11(1)(a), F.S.
[298] *See* ss. 736.0809 and 736.0812, F.S.
[299] Section 736.0810(1), F.S.
[300] Section 736.0810(2) and (3), F.S.
[301] Section 736.0810(4), F.S.

A trustee must obtain title insurance or proof of marketable title when it is required for a specific sale or conveyance, but need not do so prior to that time.[302]

Duty to Enforce and Defend Claims

A trustee must take reasonable steps to enforce claims of and to defend claims against the trust.[303]

Duty to Redress Breaches of Former Trustees

In general, a trustee must take reasonable steps to redress a breach of trust known to the trustee to have been committed by a former trustee.[304] However, this duty is subject to important exceptions which are elaborated more fully below.

Duty to Inform and Account

A trustee must keep qualified beneficiaries reasonably informed of the trust and its administration.[305] This mandatory duty is also discussed more fully below.

Duty to Administer Pending Outcome of Contest or other Proceeding

In general, while a proceeding to determine the validity or the beneficiaries of all or a part of a trust is pending, a trustee has a duty to administer the trust as if no proceeding had been commenced. An exception applies to actions and distributions in contravention of the rights of persons who may be affected by the outcome of the proceeding. A trustee may not take such actions or make such distributions except upon court direction after notice and good cause shown.[306]

Duty to Expeditiously Distribute Trust Property on Termination

Upon termination of a trust, subject to the right to retain a reasonable reserve for the payment of debts, expenses, and taxes, a trustee has a duty to expeditiously distribute trust property to the persons entitled.[307]

More on the Duty of Loyalty

Under the Code, as between the trustee and the beneficiaries, a trustee has a duty to administer the trust solely in the interests of the beneficiaries.[308] Among other things, this means that in the absence of a contrary provision in the trust instrument, a court order, or a specific statutory exception:

- A trustee may not engage in any sale, encumbrance or transaction for its own personal account or that involves a conflict between the trustee's personal and fiduciary interests;[309]

- An investment by a trustee in an investment owned or controlled by the trustee or affiliate is not presumed to be a conflict;[310]

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[302] Section 736.08105, F.S.
[303] Section 736.0811, F.S.
[304] *See* s. 736.0812, F.S.
[305] *See* s. 732.813, F.S.
[306] *See* s. 736.08165, F.S. This section is identical to s. 737.208, F.S.
[307] Section 736.0817, F.S. The final sentence of the section stating that "the provisions of the section are in addition to and are not in derogation of the rights of a trustee under the common law with respect to final distribution of a trust" are intended to insure that this section does not override the holdings of cases such as *First Union Nat'l Bank v. Jones*, 768 So. 2d 1213 (Fla. 4th DCA 2000) and *Merrill Lynch Trust Co. v. Alzheimer's Lifeliners Ass'n, Inc.*, 832 So. 2d 948 (Fla. 2d DCA 2002).
[308] *See* generally, s. 736.0802, F.S.
[309] Section 736.0802(2) , F.S.
[310] Section 736.0802(5)(a), F.S.

- A trustee may not usurp an opportunity properly belonging to the trust;[311] and

- In voting shares of stock or in exercising powers of control over interests in other enterprises, the trustee must act in the best interest of the beneficiaries.[312] Where the trust is the sole owner of a corporation or other enterprise, this includes the duty to elect or appoint directors and managers who will manage the entity in the best interest of the beneficiaries.[313]

A trustee who is faced with a transaction that might involve a breach of the duty of loyalty may petition the court for appointment of a special fiduciary to act with respect to the transaction.[314]

The Voidable *Per Se* Rule

With some exceptions discussed later, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's personal and fiduciary interests is voidable by an affected beneficiary.[315]

The fact that an offending transaction is voidable rather than void is a change in Florida law.[316] The change is significant in the following respects:

- The right of an affected beneficiary to void a transaction is subject to the rights of persons dealing with or assisting the trustee in good faith.[317]

- A beneficiary's action can be precluded by an effective consent, ratification, or release[318] or by a failure to commence an action within the applicable limitations period.[319]

The Presumptively Voidable Rule

To be contrasted with the transactions described above are those entered into between the trustee and persons who have close business[320] or personal ties[321] to the trustee. Such transactions are only presumed to be

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[311] *See* s. 736.0802(4), F.S.
[312] Section 736.0802(6), F.S.
[313] Id. Accord UTC s. 802(g). The comments to the UTC section contain the following statement with respect to this duty: "Thus, for example, a trustee whose duty of impartiality would require the trust to make current distributions for the support of current beneficiaries may not evade that duty by holding assets in corporate form and pleading the discretion of corporate directors to determine dividend policy. Rather, the trust must vote for corporate directors who will follow a dividend policy consistent with the trustee's trust-law duty of impartiality."
[314] Section 736.0802(9), F.S.
[315] Section 736.0802(2), F.S. This is a per se rule. Hence, good faith and reasonableness are not defenses. Neither is the presence of consideration, a lack of harm, or the presence of a profit or benefit to the trust, although each of these factors may impact on a beneficiary's decision whether to act on the breach.
[316] *Compare Barnhart v. Hovde*, 490 So. 2d 1271 (Fla. 3d DCA 1986) (Where trustee failed to get court approval in advance of a transaction involving a conflict of interest, the transaction was void).
[317] *See* s. 736.0802(2), F.S., introductory clause. On the protection of persons dealing with a trustee, see s. 736.1016, discussed infra at p. 49.
[318] Section 736.0802(2)(d). On the effectiveness of consents, ratifications and releases, see s. 736.1012, F.S. *See* also the representation provisions of Part III of the Code.
[319] Section 736.0802(2)(c), F.S. On the statute of limitations on proceedings against trustees, see s. 736.1005,F.S., discussed infra at p. 48.
[320] This includes an officer, director, employee, agent, or attorney of the trustee or a corporation or other person or enterprise in which the trustee (or a person owning a significant interest in the trust) has an interest that might affect the trustee's best judgment. Section 736.0802(c) and (d), F.S.
[321] This includes the trustee's spouse and the trustee's descendants, siblings, parents or the spouse of any of them. Section 736.0802(3)(a) and (b), F.S.

affected by a conflict between the personal and fiduciary interests of the trustee.[322] Accordingly, the transactions are not voidable *per se*; they are voidable only if the presumption is not rebutted.[323]

Affiliated Services

A trustee is permitted to engage in affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company. Such a transaction is not presumed to be affected by a conflict between personal and fiduciary interests so long as the investment complies with chapters 518[324] and 660[325], and the trustee complies with the disclosure requirements.[326] The requirements of disclosure are that all qualified beneficiaries are: noticed regarding the investment; provided the identity of the investments; and the nature of the relationship of the trustee to the affiliate.[327]

Exceptions

In the interests of a fair, effective and efficient trust administration, the Code includes several exceptions to the basic duty of loyalty. Notwithstanding the potential presence of a conflict between the personal and fiduciary interests of a trustee, the trustee's duty of loyalty does not preclude any of the following:

- Payment of reasonable compensation to the trustee or an agreement between a trustee and beneficiary relating to the appointment or compensation of the trustee;[328]
- Transactions between the trust and another trust, a decedent's estate, or a guardian of the property of which the trustee is a fiduciary or in which a beneficiary has an interest;[329]
- A deposit of trust money in a regulated financial-service institution operated by the trustee;[330]
- An advance by the trustee of money for the protection of the trust;[331] or
- The employment of persons, including attorneys, accountants, investment advisers, or agents, even if they are the trustee or are associated with the trustee, to advise or assist the trustee in the performance of its administrative duties[332] or the employment of agents to perform any act of administration, whether or not discretionary.[333]

Duty to Redress Breaches of Former Trustees

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[322] Section 736.0802(3), F.S.
[323] According to the comments to UTC section 802 from which s. 736.0802, F.S. is partially derived, factors relevant to this determination include the fairness of any consideration involved and whether the other terms of the transaction are similar to those that would be found in a transaction involving an independent party.
[324] *See* in particular s. 518.11, F.S., Florida's Prudent Investor rule, which provides that a fiduciary has the responsibility to invest assets as a prudent investor would considering the purposes of the trust. In seeking to satisfy this standard, the trustee must exercise reasonable care and caution.
[325] Chapter 660, F.S. governs trust business and in part precludes self dealing, s. 660.40, F.S.
[326] Section 736.0802(5)(a), F.S.
[327] The requirements of s. 736.0802(5), F.S. do not apply to qualified investment instruments or to a trust for which a right of revocation exists, s. 736.0802(5)(e)(1), F.S. However, the requirements of s. 736.0802(5), F.S. do apply to irrevocable trusts created on or after July 1, 2007, the assets of which are valued in excess of five million dollars on the date the trust was created, s. 736.0802(5)(e)(2), F.S.
[328] Section 736.0802(7)(a) and (b), F.S.
[329] Section 736.0802(7)(c), F.S.
[330] Section 736.0802(7)(d), F.S.
[331] Section 736.0802(7)(e), F.S.
[332] Section 736.0802(8), F.S. The trustee may act without independent investigation on their recommendations.
[333] *Id.*

As mentioned previously, as a general rule a trustee must take reasonable steps to redress a breach of trust known to the trustee to have been committed by a former trustee.[334] This duty is qualified, however, by s. 736.08125, F.S. which details several instances where a successor trustee has no personal liability for actions[335] of a prior trustee.[336]

Under Code s. 736.08125, F.S., there is no personal liability, nor is there any *duty* to institute proceedings against a prior trustee:[337]

- When the successor trustee succeeds a settlor serving as trustee of a revocable trust;
- As to any beneficiary who has waived a required accounting, but only as to the periods included in the waiver;
- As to any beneficiary who has effectively released the successor trustee of its duty to institute a proceeding or file a claim; or
- As to any person who is not a qualified beneficiary.[338]

In addition, there is no personal liability with respect to a qualified beneficiary:

- For any action or claim that the qualified beneficiary is barred from bring against the prior trustee;[339]
- If the qualified beneficiary fails to act within 6 months after the date the successor trustee accepts the trusteeship and delivers a written notice to the beneficiary;[340] or
- If a super majority of the eligible beneficiaries have released the successor trustee.[341]

Duty to Inform and Account

Under s. 736.0813, F.S., a trustee must keep the qualified beneficiaries of an irrevocable[342] trust reasonably informed of the trust and its administration.[343] The extent of this duty, which is limited to the qualified beneficiaries, is described in detail in the five paragraphs of s. 736.0813(1), F.S., each of which is included

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[334] Section 736.0812, F.S.
[335] The term actions includes a failure to act. Section 736.0103(1), F.S.
[336] Section 736.08125, F.S. is substantively similar to s. 737.306(3) - (6), F.S. As under existing law, the section speaks only to the personal liability of successor trustees. Nothing in the section affects the liability of a prior trustee or the right of a successor trustee or any beneficiary to proceed against the prior trustee. Section 736.08125(7), F.S.
[337] Or the estate of a prior trustee.
[338] Section 736.08125(1) – (4), F.S.
[339] Section 736.08125(5)(c), F.S.
[340] In addition informing the qualified beneficiary of the trustee's acceptance of the trusteeship in accordance with section 736.0813(1)(a), F.S. (see infra p. 39), the written notice must advise the beneficiary that the right to proceed against the successor trust will be barred unless the beneficiary delivers a written request to the trustee within 6 months after the date of the trustee's acceptance. Section 736.08125(5)(b), F.S.
[341] Section 736.08125(5)(a), F.S. For purpose of this final exception, eligible beneficiaries is defined to be a subset of the qualified beneficiaries. The intermediate qualified beneficiaries described in s. 736.0103(14)(b), F.S. are excluded from the subset unless, at the time the determination is being made, there are no qualified beneficiaries described in section 736.0103(14)(c), F.S. *See* s. 736.08125(6)(a), F.S. A super majority of eligible beneficiaries means at least two-thirds in interest of the eligible beneficiaries if their interests are reasonably ascertainable; otherwise, it means at least two-thirds in number of the eligible beneficiaries. Section 736.08125(6)(b), F.S.
[342] While a trust is revocable, a trustee's duty to inform and account is owed only to the settlor. Section 736.0603(1), F.S.; 736.0813(4), F.S.
[343] The representation provisions of Part III of the Code apply with respect to the rights of a qualified beneficiary under s. 736.0813, F.S.. Section 736.0813(3), F.S.

on the list of mandatory provisions.[344] According to these paragraphs, a trustee's duty to inform and account includes, but is not limited to, a duty with respect to the qualified beneficiaries to:

- Notify them of the trustee's acceptance of the trust and the full name and address of the trustee within 60 days after the trustee's acceptance;[345]
- Notify them of the existence of the trust, the identity of the settlor, the right to request a copy of the trust instrument, and the right to accountings within 60 days of when the trustee acquires knowledge of the creation of an irrevocable trust or that a formerly revocable trust has become irrevocable;[346]
- Upon reasonable request, furnish them with a complete copy of the trust instrument;[347]
- Once a trust becomes irrevocable, furnish a trust accounting to them annually as well as on termination of the trust or on a change of trustee;[348] and
- Upon reasonable request, provide them with relevant information about the trust's assets and liabilities and the particulars of the trust administration.[349]

Trustee Powers

The powers of a trustee are detailed in several sections of the Code. These provisions apply only in the absence of a contrary limitation or restriction in the trust instrument.

General Powers

In addition to powers granted in the trust instrument and those provided in other sections of the Code, s. 736.0815, F.S. states generally that a trustee's powers include any powers that are appropriate to achieve the proper investment, management and distribution of the trust property as well as all powers that an unmarried competent owner has over individually owned property. These powers may be exercised without authorization of the court.

Specific Powers

In a more informative provision, s. 736.0816, F.S. contains a detailed listing of powers that a trustee automatically has in the absence, of course, of a contrary provision in the trust instrument. While space does not permit an exhaustive listing of these powers, it is worth noting that this section serves the same function as s. 737.402, F.S. Although the wording and ordering of the powers included in the two provisions differs, it is the Committee's view that all powers included in s. 737.402, F.S. are also covered by section 736.0816. In addition, under s. 736.0816, F.S., a trustee has authority to:

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[344] *See* s. 736.0105(2)(q) – (s), F.S. Section 736.0813, F.S. applies only with respect to accountings rendered for periods beginning on or after January 1, 2008.
[345] Section 736.0813(1)(a), F.S.
[346] Section 736.0813(1)(b), F.S.
[347] Section 736.0813(1)(c), F.S.
[348] Section 736.0813(1)(d), F.S.
[349] A little more about these duties. The initial two duties above do not apply to irrevocable trusts created (or revocable ones that became irrevocable) before the effective date of the Code. In addition, the first provision does not apply to a trustee who accepts a trust (whether revocable or irrevocable) before that date. *See* the language following s. 736.0813(1)(e), F.S. The contents of the required accounting are detailed in s. 736.08135, F.S. This section is effective for all trust accountings rendered for any accounting period beginning on or after January 1, 2003. Section 736.08135(3), F.S. This section is identical with s. 737.3035, F.S. with the addition of a requirement that a trustee's final accounting include a plan of distribution for any undistributed assets shown on the accounting. Section 736.08135(2)(f), F.S. And a qualified beneficiary may waive (or withdraw a prior waiver of) the right to one or more accountings, including a final accounting. Section 736.0813(2), F.S., and a withdrawal of a prior waiver is effective only for accounting for future periods.

- Exercise federal, state and local tax elections;[350]

- Select payment options, exercise rights, and take other appropriate actions with respect to retirement plans, annuities and insurance contracts payable to the trust;[351]

- Make loans, including to a beneficiary, with terms and conditions that are fair and reasonable under the circumstances;[352] and

- On termination of a trust, exercise powers appropriate to the winding up of the trust and the distribution of the trust property, subject to a right to retain a reasonable reserve for the payment of debts, expenses, and taxes.[353]

Environmental Powers

Code s. 736.08163, F.S. incorporates almost verbatim[354] the provisions of current s. 737.4025, F.S. dealing with a trustee's rights and powers (and the concomitant protection from personal liability) when a trust includes or might include environmentally contaminated property.

Power to Delegate to Agents

Under s. 736.0807, F.S., a trustee may delegate duties and powers that a prudent trustee of comparable skill could properly delegate under the circumstances. The trustee must exercise reasonable care, skill and caution in selecting the agent, in defining the scope and terms of the delegation, and in supervising the agent.[355] In accepting a delegation, an agent submits to the jurisdiction of Florida courts[356] and thereafter owes a duty to exercise reasonable care to comply with the terms of the delegation.[357] A trustee who properly delegates duties and powers under the structures of s. 736.0807, F.S. is not liable for the acts of the agent.[358]

Powers to Direct

For various reasons, it is sometimes desirable that someone have the power to direct the trustee's actions and decisions with respect to the trust. Code s. 736.0808, F.S. deals with this topic. As there is no statutory equivalent under existing law, this section provides useful clarification.

By Settlor of Revocable Trust

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[350] Section 736.0816(17), F.S.
[351] Section 736.0816(18), F.S.
[352] Section 736.0816(19), F.S. The trustee has a lien on future distributions for repayment of any loans.
[353] Section 736.0816(25), F.S.
[354] Apart from a simplification of the section title, the only difference between the two sections is that the definition of "environmental law" was removed from section 736.08163 in favor of the more generally applicable definition found in s. 736.0103(5), F.S.
[355] *See* s. 736.0807(1), F.S.
[356] Section 736.0807(4), F.S.
[357] Section 736.0807(2), F.S.
[358] Current law permits delegations of: investment functions (including special provisions relating to life insurance trusts) under s. 518.112, F.S., and somewhat more indirectly, functions relating to trust administration under the general authority to employ agents under s. 737.402(2)(y), F.S. The former remain available under the Code. The provisions of s. 737.402(2)(y), F.S. are replaced with the Code's more comprehensive s. 736.0807, F.S. under which any duty or power may be delegated provided the delegation would be proper for a trustee of comparable skill. Apart from its increased scope, Code s. 736.0807, F.S. makes one other important change. Section 737.402(2)(y), F.S. states that trustees may act without independent investigation of an agent's recommendations. A similar statement is found in Code s. 736.0816(20), F.S. The apparent conflict between this provision and the duties imposed in s. 736.0807(1)(c), F.S. is a matter of uncertainty. Section 736.0807, however, contemplates a continuing duty to review and monitor an agent's actions and performance. *See* s. 736.0807(1)(c), F.S.

While a trust is revocable, the settlor has the power to direct the trustee whether or not it is explicitly stated in the terms of the trust. Thus, with two important caveats, the trustee of a revocable trust may follow a direction of the settlor even when the direction is contrary to the terms of the trust.[359]
The two caveats relate to the formalities required for a settlor's direction to be effective. To the extent the direction relates to an act that is either expressly prohibited or is not authorized in the terms of the trust, as opposed to one relating to an exercise of discretion the trustee already possesses, the direction is, in effect, a trust amendment.[360] As such, the direction must be manifested in a manner that substantially complies with any provisions in the trust instrument pertaining to trust amendments.[361] Moreover, if the direction relates to a "testamentary aspect" of the trust, the direction must comply with the requirements of s. 736.0403(2)(b), F.S.[362] That is, it must be made in a written instrument executed with testamentary formalities.[363]

Other Directions

With respect to a power to direct given to others (or to settlors of irrevocable trusts), the power must be expressly granted in the terms of the trust. It may be given to a beneficiary or to some other person in which case the other person is presumptively a fiduciary. As such, the person:

- Is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries; and
- Is liable for any loss resulting from a breach of that duty.[364]

A power given to someone other than the settlor of a revocable trust may include the power to direct modification or termination of the trust,[365] or the power to direct the actions of the trustee in which latter case the trustee may act in accordance with a direction unless the direction is either manifestly contrary to the terms of the trust or the trustee knows that the direction would constitute a serious breach of the power holder's fiduciary duty described above.[366]

Tax Savings

The Code contains two provisions targeted generally at the protection of trusts from inadvertent and adverse tax consequences. Both have an antecedent in Chapter 737, F.S.

Duty to Distribute Income of Marital Trust

Absent a contrary provision in the trust instrument, Code s. 736.08147, F.S. directs that income from a trust which gives the settlor's spouse a right to income must be distributed no less frequently than annually. This provision is intended to insure the qualification of marital trusts for the gift and estate tax marital deductions. It is identical in effect to current s. 737.3053, F.S., although a slight change in wording was made to restrict application of the section to the lifetime of the surviving spouse.

Limitations on a Trustee's Power to Distribute to Itself

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[359] Section 736.0808(1), F.S.
[360] On the equivalency of a settlor's direction to a trust amendment, see the comments to UTC s. 808.
[361] Section 736.0701(1)(a), F.S., discussed supra p. 28.
[362] Section 736.0403(2)(b), F.S. is discussed supra p. 29.
[363] As a matter of best practice, because of the concerns discussed in the preceding paragraph, whenever possible, trustees of revocable trusts should insist that settlor's directions be made in a written instrument executed with testamentary formalities and that they substantially comply in other respects with the terms of the trust.
[364] Section 736.0808(4), F.S.
[365] A power to direct trust modification or termination may also be given to a trustee. *See* s. 736.0808(3), F.S.
[366] Section 736.0808(2), F.S.

Code ss. 736.0814(2)-(5), F.S. are intended to protect trustees who are also beneficiaries of the trust from having adverse estate tax consequences because of their distribution and administration powers with respect to the trust. The section is based on and serves an identical purpose to current s. 737.402(4) , F.S. Under s. 736.0814(2), F.S., in the absence of an express provision in the terms of a trust indicating that one or more of the following rules are not to apply, a trustee may not directly or indirectly:[367]

- Make distributions of income or principal to or for its own benefit other than distributions except to provide for that trustee's health, education, maintenance, or support as described in ss. 2041 and 2514 of the Internal Revenue Code;[368]
- Make distributions of income or principal to satisfy the trustee's support obligations;[369] or
- Make discretionary allocations of receipts or expenses to directly enlarge or shift beneficial interests in the trust.[370]

Alternative Exercise

A power whose exercise is limited or prohibited under the above rules may be exercised by any remaining trustees, or in the absence of a remaining trustee, by a person appointed by the Court on application of any qualified beneficiary.[371]

Exceptions

Notwithstanding the prohibitions listed above, exceptions are provided for:

- Trustees (whether the settlor or other person) of revocable or amendable trusts;[372]
- A power held by the trust settlor;[373] and
- Trusts where application of the restrictions could jeopardize an intended tax benefit, such as a marital deduction trust where the settlor's spouse serves as trustee;[374] or a trust qualifying for the annual exclusion under s. 2503(c) of the Internal Revenue Code.[375]

Trust Investments (Part IX)

As was mentioned previously, Part IX of the Code consists of a single section that incorporates the provisions of Chapter 518, F.S; Florida's Prudent Investor rule. This rule provides that a fiduciary has the responsibility to invest assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust.[376] In seeking to satisfy this standard, the trustee must exercise reasonable care and caution.[377]

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[367] *E.g.*, through an exercise of a power to remove or to replace a trustee in a manner that causes some other person to do an act the trustee is prohibited under the section from doing directly. *See* s. 736.0814(2)(d), F.S. *See* also the statement in s. 736.0814(5), F.S. that a person who has the right to remove or to replace a trustee does not, by virtue of that authority, possess the powers of the trustee who may be removed or replaced. The effectiveness of this statement for tax purposes is unclear.
[368] Section 736.0814(2)(a), F.S.
[369] Section 736.0814(2)(c), F.S.
[370] Section 736.0814(2)(b), F.S.
[371] Section 736.0814(4), F.S.
[372] Section 736.0814(3)(c), F.S.
[373] Section 736.0814(3)(a), F.S.
[374] Section 736.0814(3)(b), F.S.
[375] Section 736.0814(3)(d), F.S.
[376] Section 518.11(1)(a), F.S.
[377] *Id.*

Liability of Trustees and Rights of Persons Dealing with Trustee (Part X)

Part X is one of the longer parts of the Code. In the order discussed below, it deals with the remedies and damages for breach of trust; liability of trustees to nonbeneficiaries, the entitlement, assessment and recovery of costs and fees; limitations on actions against a trustee; and the protection of persons dealing with the trustee including those relying on a certification of trust furnished by the trustee.

Liability of Trustees for Breach of Trust

A trustee is not an insurer. Thus, absent a breach of trust, a trustee is not liable for a loss or depreciation in trust value or for not making a profit.[378] On the other hand, except as discussed below, a trustee *is* liable for a breach of trust, a concept that includes among others, a violation (intentional or not) of any of the duties discussed previously that the trustee owes to a beneficiary.[379]

Protection of Trustees from Liability
When Trustee Acts in Reasonable Reliance on Trust Instrument

Although a breach of trust has occurred, new Code s. 736.1006, F.S. insulates a trustee from liability if the breach resulted from the trustee's reasonable reliance on the terms of the trust as expressed in the trust instrument.[380]

For Losses Resulting from Certain Unknown External Events

In some cases, the terms of a trust or the duties and powers of a trustee may depend on the status of certain external events such as the marriage, divorce, educational status or death of beneficiaries or other persons. At common law, a trustee is strictly liable for misdelivery regardless of the trustee's level of care. Code s. 736.1007, F.S., which is based on Uniform Code s. 1007, changes this rule. It protects; a trustee who has exercised reasonable care to ascertain the happening of the event from liability for losses resulting from the trustee's lack of knowledge of the event. The comments to the Uniform Code section clarify that the events listed in the section are not exclusive.

Effect of Beneficiary's Consent, Release, or Ratification

Code s. 736.1012, F.S. deals with the impact of a beneficiary's consent, release or ratification of a trustee's actions. As a general principle, a trustee is not liable to a beneficiary who has consented to the conduct that constitutes a breach or who has released the trustee from liability or ratified the offending transaction. This principle does not apply, however, to consents, releases or ratifications that were:

- Induced by the trustee's improper conduct; or
- Made by a beneficiary who did not know of its rights and the material facts relating to the breach.

Effect of Term Exculpating Trustee from Liability

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[378] Section 736.1003, F.S. Accord *Boalt v. Hanson*, 412 So. 2d 880 (Fla. 3d DCA 1982); *Wohl v. Lewy*, 505 So. 2d 525 (Fla. 3d DCA 1987).
[379] *See* s. 736.1002(1), F.S.
[380] This provision is derived from Uniform Code s. 1006. It is intended to protect trustees from liability arising from subsequent inconsistent reformations of a trust instrument to remedy a mistake of fact or law or from the fact that the terms of a trust may not always be manifested comprehensively in the trust instrument.

Code s. 736.1008, F.S. restricts the enforceability of a term in a trust that attempts to relieve a trustee of liability for a breach of trust. The restrictions are mandatory; they may not be relaxed in the trust instrument.[381]

Under the section, an exculpatory term may not relieve a trustee of liability for breaches committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.[382] In addition, an exculpatory term is unenforceable if it was inserted as a result of an abuse of a fiduciary or confidential relationship between the trustee and settlor.[383] This latter restriction applies to terms that were drafted or caused to be drafted by the trustee unless the trustee proves that the term is fair and its existence and contents were adequately communicated *directly* to the settlor.[384] [385]

Remedies and Damages for Breach of Trust

Section 736.1001(2), F.S. contains a nonexclusive list of actions a court may take with respect to a breach of trust.[386] According to the section, a court may:

- Suspend or remove the trustee;
- Enjoin, void, or compel actions by the trustee including the performance of the trustee's duties and the issuance of accountings;
- Reduce or deny the trustee's compensation;
- Compel the trustee to pay money or to restore trust property; and
- Impose a lien or a constructive trust on trust property and recover wrongfully disposed of trust property or its proceeds.

Damages

In those cases where the court finds that it is appropriate for a trustee to respond in damages for a breach of trust, s. 736.1002, F.S. states that the trustee's liability is the greater of any profit the trustee made from the breach and the amount required to restore the trust to what it would have been but for the breach, including lost income, capital gain, or appreciation that would have resulted from a property administration.[387]

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[381] Section 736.0105(2)(u), F.S.
[382] Section 736.1011(1)(a), F.S.
[383] Section 736.1011(1)(b), F.S.
[384] Section 736.1011(2), F.S.
[385] Section 736.1011, F.S. is derived from Uniform Code s. 1008. The Committee added the requirement that a term drafted by or at the direction of the trustee be *directly* communicated to the settlor to indicate the Committee's disapproval of a statement in the comments to UTC s. 1008 that disclosure to the settlor's attorney would suffice for this purpose.
[386] In the absence of extenuating circumstances such as bad faith, gross negligence or recurring breaches, the Committee believed that a court's focus in fashioning a remedy for a breach of trust normally should be the redress of the damage caused by the breach and not the punishment of the trustee. Accordingly, s. 736.1001(3), F.S. suggests that the appropriate remedy for a breach involving a failure to distribute trust property is an order requiring the trustee to make distributions in an amount necessary to restore the trust beneficiaries to their appropriate position. Where the breach involves an improper distribution, the trust may be made whole by compelling the recipient of the distribution to return the distribution. In this regard, Code s. 736.1018, F.S. provides that persons receiving improper distributions must return the assets or funds together with any income or interest, or, if the person does not have the property, its value on the date of disposition together with any income or gain received by the person. Section 736.1018, F.S. is identical to s. 737.209, F.S. When this remedy is unavailable or insufficient, s. 736.1001(3), F.S. suggests that that the appropriate remedy for a breach that has resulted in an improper distribution is an order directing the trustee to withhold future distributions. Note however, that the remedies suggested in s. 736.1001(3), F.S. are aspirational. Courts are not bound by them. In appropriate situations, courts may adopt a remedy from the more comprehensive list found in s. 736.1001(2), F.S. or may order any other relief they find appropriate.
[387] *See* s. 736.1002(1), F.S.

Contribution

Depending on the circumstances, more than one person can be liable for a single breach of trust. This can occur, for example, when there are cotrustees or when a sole trustee acts improperly with the knowing participation of an agent. In both cases, the Code provides new and important clarification on the rights of one liable person to contribution from others.[388] The rules discussed below apply both to cases filed after the effective date of the Code and to causes of action for breach of trust pending on that date.[389]

Section 736.1002(2), F.S. sets out the basic principle that, if more than one person is liable to the beneficiaries for a breach of trust, each liable person is entitled to pro rata contribution from the others. There are exceptions. No contribution is available for breaches committed in bad faith or to the extent a liable person benefits from the breach.[390]

Section 736.1002(3), F.S. specifies how the pro rata contribution is to be determined. In addition to stating that general principles of equity apply,[391] s. 736.1002(3), F.S. clarifies that pro rata in this context means in proportion to the relative degrees of fault.[392] Importantly, this determination anticipates more than a mere counting of the number of liable persons. Some evaluation of their relative fault is required. In making this evaluation, a court may treat the collective liability of a group as a single share.[393]

Finally, in sequential order, subsections (4) through (6) of s. 736.1002, F.S.,

- Set out detailed rules specifying how the right to contribution can be enforced;
- Provide that an unsatisfied judgment against one liable person does not discharge the liability of others and that satisfaction of the judgment does not impair any right to contribution under the section; and
- Make a court's judgment determining the liability of the persons to the beneficiary binding among the persons for purpose of determining their right to contribution.

Costs and Fees

The Code contains several sections covering the burden of fees and costs. With the usual caveat relating to minor revisions and restructuring, these provisions track corresponding provisions in Chapter 737, F.S. The provisions of the Code dealing with fees and costs include:

- **Section 736.1004, F.S.:** This section is derived from a combination of s. 737.188, F.S. and s. 737.4033, F.S. It applies to costs (including attorney's and guardian ad litem's fees) incurred in actions for breach of a fiduciary duty or challenging an exercise or nonexercise of a trustee's power and in proceedings to modify a trust under ss. 736.04133 - 736.0412, F.S.[394] The section directs the court to award taxable costs and fees as in chancery actions[395] and authorizes the court to direct payment from the party's interest, from other property, or from both. Section 736.1004, F.S. makes no change in Florida law.

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[388] Much of s. 736.1002, F.S. is based on s. 768.31(4), F.S. dealing with contribution among joint tortfeasors. By its terms, that section does not apply to breaches of trust or other fiduciary obligations. Section 768.31(2)(g), F.S.
[389] Section 736.1002(7), F.S.
[390] Section 736.1002 (2), F.S.
[391] Section 736.1002 (3)(c), F.S.
[392] Section 736.1002 (a), F.S.
[393] Section 736.1002 (3)(b), F.S.
[394] Judicial proceedings arising with respect to s. 736.0412, F.S. actually arise under s. 736.0410(2), F.S.
[395] This means that costs may be awarded to the prevailing party, unless equity and fairness dictate otherwise. *See In re Estate of Simon*, 549 So. 2d 210 (Fla. 3d DCA 1989).

- **Section 736.1005, F.S.:** This section is substantively identical to that portion of s. 737.2035, F.S. relating to attorney's fees. Under it, an attorney who has rendered services to a trust may apply to the court for an award of reasonable compensation for those services. The section is directed primarily at the compensation of attorneys of beneficiaries and others who render services that benefit the trust. The section authorizes the court to direct from which part of the trust the fees are to be paid. The section also continues the requirement of written notice to nonadverse trustees and the authority of the court to adjust the attorney's compensation for services rendered prior to the notice.

- **Section 736.1006, F.S.:** This section is substantively identical to that portion of s. 737.2035, F.S. that relates to costs other than attorney's fees. Section 736.1006, F.S. provides that a court may award costs as in chancery proceedings in all trust proceedings. The court may also direct the part of the trust from which the costs are to be paid.

- **Section 736.1007, F.S.:** This section is substantively identical to s. 737.2041, F.S. It contains rules relating to the compensation of attorneys for ordinary and extraordinary services rendered in conjunction with the administration of a revocable trust after the settlor's death; the impact of a fee agreement between the attorney and the trustee or settlor; and the authority of the court to determine reasonable compensation and to award costs and fees in proceedings involved in determining that compensation.

Liability of Trustees to Third Parties

Codes ss. 736.1013 and 736.1015, F.S. address a trustee's liability to third parties. The latter is a new provision addressing a trustee's liability as a general partner of a partnership entered into or acquired by a trust. The former deals with liability for contracts entered into and torts committed by a trustee during the administration of the trust. Except as noted in the comment below, s. 736.1013, F.S. is substantively identical to current ss. 737.306(1) and (2), F.S.

General Rules for Contracts and Torts

With respect to contracts, a trustee is not personally liable on contracts entered into as a fiduciary in the course of administration of a trust unless the contract so provides or the trustee failed to reveal its fiduciary capacity.[396] [397]

With respect to torts, a trustee is personally liable for torts committed in the course of administration of a trust or for obligations arising from the ownership or control of trust property only if the trustee is personally at fault.[398]

Whether or not a trustee is personally liable under the above rules, a claim based on a contract or tort may be asserted against the trustee in the trustee's representative capacity.[399] As is true under existing law, subsequent (or earlier) issues of liability between the trust estate and trustee individually may be determined in a proceeding for accounting, surcharge, indemnification or other appropriate proceeding.[400]

Trustee's Liability as General Partner

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[396] Section 736.1013(1), F.S.
[397] Unlike existing law, the Code contains no exception for contracts for attorney's fees.
[398] Section 736.1013(2), F.S. *Accord* s. 737.306(1)(b), F.S.
[399] Section 736.1013(3), F.S. *Accord* s. 737.306(1)(c), F.S.
[400] Section 736.1013(4), F.S. *Accord* s. 737.306(2), F.S.

Code s. 736.1015, F.S. is new to Florida law.[401] It provides trustees with protection against personal liability for contracts and torts entered into by a partnership when the trustee holds an interest as general partner. In this context:

- A trustee is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the partnership interest as long as the trustee was not personally at fault;[402] and.

- Absent a contrary provision in the contract, a trustee has no personal liability on contracts entered into by the partnership if the trustee's fiduciary capacity was disclosed either in the contract or in a previously filed statement pursuant to the Uniform Partnership (or Limited Partnership) Acts.[403]

Limitations on Actions Against Trustees

Code s. 736.1008, F.S. specifies limitations periods for claims by a beneficiary against a trustee for breach of trust.[404] The section is a reorganized and slightly expanded version of s. 737.307, F.S. under which the applicable limitations period for a particular action can depend on a variety of factors including whether the trustee has filed an interim or final accounting and, if so, whether the matter is disclosed on the accounting.

Matters Adequately Disclosed on a Trust Accounting

With respect to matters adequately disclosed on a trust accounting, the applicable limitations period depends on whether the trustee has sent the beneficiary a limitation notice that relates to that accounting.

When Trustee has Issued a Written Limitation Notice

The shortest limitations period provided in s. 736.1008, F.S. is six months. This period applies to actions on matters the trustee has adequately disclosed on a trust accounting or other trust disclosure document when the trustee has provided the beneficiary with a related limitation notice.[405] A limitation notice is a written statement informing the beneficiary that an action against the trustee for actions based on any matter adequately disclosed in the accounting may be barred unless the action is commenced within six months of receipt of the accounting or limitation notice, whichever is later.[406]

More comprehensive definitions of "trust disclosure document" and "limitation notice," as well the detailed rules controlling when a limitation notice is related to a particular disclosure document are specified in ss. 736.1008(4)(a) and (4)(c), F.S.. In all respects, however, these provisions are identical to the corresponding provisions in s. 737.307, F.S.

When There is no Limitation Notice

A significantly longer limitations period applies to claims involving matters adequately disclosed on a trust accounting when no related limitation notice is sent to the beneficiary. Here, s. 736.1008(1)(a), F.S. provides that the claims are barred as provided in Chapter 95, F.S. Normally, this will result in a four year limitations with the period beginning on the date of receipt of the adequate disclosure.[407] An exception

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[401] The section is derived from UTC. Section 736.1015, F.S. protects only trustees; it does not protect settlors. To the contrary, the section specifically provides that when a trustee of a revocable trust holds a general partnership interest, the settlor is personally liable for contracts and other partnership obligations as if the settlor were a general partner. Section 736.1015 (3), F.S.
[402] Section 736.1015(2), F.S.
[403] Section 736.1015(1), F.S.
[404] For the limitations period applicable to actions contesting the validity of a revocable trust after the settlor's death, see s. 736.0604, F.S. discussed supra at p. 30.
[405] *See* s. 736.1008(2), F.S.
[406] *See* s. 736.1008(4)(c), F.S.
[407] *See* s. 95.11(3), F.S. *See* also s. 736.1008(1)(a), F.S.

applies to matters involving actual or constructive fraud by the trustee. In those cases, the discovery rule of s. 95.031(2)(a), F.S. applies. Subject to an overall requirement that the action be commenced within twelve years, the discovery rule provides that the limitations period does not begin until the later of the time the facts giving rise to the action are discovered or the time the facts should have been discovered by an exercise of due diligence.[408]

Matters NOT adequately disclosed on a trust accounting
When Trustee has Issued Final Accounting and Given Written Notice to Beneficiary

The provisions of Chapter 95, F.S. discussed above also apply to claims involving matters that have not been adequately disclosed on a trust accounting or other trust disclosure document, but only if:

- The trustee has issued its final accounting for the trust; and
- The trustee has given written notice to the beneficiary of the availability of trust records for examination and that claims based on matters not adequately disclosed in that accounting may be barred unless the action is commenced within the applicable limitations period provided in Chapter 95, F.S.[409]

In this context, in the absence of fraud which would bring the discovery rule into play, the normal limitations period will be four years with the period beginning on the date of receipt of the final trust accounting and required written notice.[410]

When Trustee has NOT Issued Final Accounting or has NOT Given Written Notice to Beneficiary

A careful reading of the portions of s. 736.1008, F.S. discussed so far will reveal that they do not cover the entire universe of factual situations. Specifically, no limitations rules have yet been discussed for matters that have not been disclosed on a trust accounting where either the trustee has not issued a final accounting or, having done so, the trustee has not given the required notice described above.

As to both situations, s. 736.1008(3), F.S. provides that the applicable limitations period is determined under Chapter 95, F.S. That is, the normal limitations period will the four year period described in s. 95.11(3), F.S. In what may be an important change in existing law, however, the section provides that the cause of action does not accrue (and correspondingly, the limitations period does not commence) until the trust beneficiary has actual knowledge of the trustee's repudiation of the trust or adverse possession of trust assets.[411]

Protection of Persons other than Beneficiaries Dealing with the Trustee

The Code contains two sections of interest to persons other than beneficiaries who deal with trustees. Code s. 736.1016, F.S., which is based on Uniform Code s. 1012, provides protection against liability for persons who deal with a trustee in good faith. The section is similar to, but slightly more expansive than, current s. 737.405, F.S. Code s. 736.1017, F.S. which is derived from Uniform Code s. 1013 and for which there is no counterpart in Chapter 737, F.S. provides protection for persons who rely on a certificate of trust furnished by the trustee.

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[408] Here again, Code s. 736.1008, F.S. is identical to s. 737.307, F.S.
[409] *See* s. 736.1008(1)(b), F.S.
[410] Section 736.1008(1)(b), F.S.
[411] The situations described here are unaddressed in s. 737.307, F.S. As a consequence, they would be subject to the general provisions of Chapter 95, F.S. under which, in the absence of fraud, the four year period would begin at the occurrence of the last element constituting the cause of action. Section 95.031(2)(a), F.S. Under this test, unless a failure to account is itself a constructive fraud, a breaching trustee who failed to account could be protected by a silent running of the limitations period behind an unsuspecting beneficiary's back. The Committee believed this to be an inappropriate result because it undermines the incentive trustees should have to fully and adequately account.

Persons Dealing with Trustee in Good Faith

Section 736.1016, F.S. provides protection to persons (other than beneficiaries) who assist or deal for value with a trustee in good faith and without knowledge that:

- The trustee is exceeding its powers or
- The trustee is actually a former trustee whose trusteeship has terminated.

In addition, the section:

- Relieves a person acting in good faith (other than a beneficiary) from any duty to inquire into the extent of the trustee's powers or the propriety of their exercise; and
- Relieves *any* person acting in good faith from any duty to ensure the proper application of any assets the person delivers to a trustee.

Section 736.1016, F.S. is included on the list of mandatory provisions; the protections it provides may not be altered in a trust instrument.[412] The section is similar to current s. 737.405, F.S. Two noteworthy areas of difference include:

- Section 737.405, F.S. does not include a provision protecting persons who in good faith deal with or assist a former trustee whose trusteeship has terminated; and
- By its terms, Code s. 736.1016, F.S. is subservient to other laws (such as the Uniform Commercial Code) relating to commercial transactions and the transfer of securities by fiduciaries.

Persons Acting in Reliance on a Certification of Trust

Except when it is required by law or a judicial proceeding concerning the trust, instead of furnishing a complete copy of a trust instrument to a person (other than a beneficiary) who requests it, Code s. 736.1017, F.S. provides that the trustee may furnish a certification of trust.[413] The section sets out certain required information that must be included in the certification[414] among which is a statement that the trust has not been revoked, modified, or amended in any manner that would cause the representations in the certificate to be incorrect.[415]

A person to whom a certificate of trust is furnished may:

- Require copies of excerpts from the trust instrument that designate and empower the trust to act in a particular pending transaction.[416]
- Assume without inquiry the existence of any facts contained in the certification;
- Act without liability to any person in good faith reliance on the certification; and
- Enforce against trust property a transaction entered into in good faith reliance on the certification as if the representations contained therein were correct.[417] [418]

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[412] *See* s. 736.0105(2)(v), F.S.
[413] Section 736.1017(1) and (8), F.S..
[414] *See* s. 736.1017 (1), F.S. for a list of the required contents. A certification of trust need not include the dispositive terms of the trust. Section 736.1017 (4), F.S.
[415] Section 736.1017 (3), F.S.
[416] Section 736.1017 (5), F.S.

Rules of Construction (Part XI)

Part XI contains a series of default rules of construction. As an initial matter, it is worth repeating the admonitions found in the initial section of the Part that, except for the provisions included on the mandatory list in s. 736.0105(2), F.S. (of which there is only one — s. 736.1108 dealing with penalty clauses for contesting trusts), the intent of the settlor as expressed in the terms of the trust controls the legal effect of the trust dispositions. In ascertaining that intent, however, in the absence of a contrary indication in the terms of a trust, the rules of construction set out in Part XI of the Code apply.[419]

All of the statutory rules of construction found in Part XI have a counterpart in existing Chapter 737, F.S. One of these – s. 736.1106, F.S. dealing with antilapse and the descendibility of beneficial interests in trust – changes existing law. The others are substantively identical to their Chapter 737, F.S. cousins. New s. 736.1106, F.S. is discussed last.

Carryover Provisions from Existing Law
Construction of Generic Terms

Code s. 736.1102, F.S. is identical to s. 737.623, F.S. It provides that in construing a trust, adopted persons and persons born out of wedlock are included in class gift terminology and other terms of relationship in accordance with the rules for determining relationships for purposes of intestate succession.

Multi-Generational Class Gifts

Code s. 736.1103, F.S. provides that gifts to multi-generational classes (such as descendants, heirs, etc.) are *per stirpes*. This provision is identical in intent to s. 737.624, F.S., although the wording of the section was revised to eliminate a potential conflict between this section and new s. 736.1106, F.S. discussed below.

Unlawful and Intentional Killings

Code s. 736.1104, F.S. is identical to s. 737.625, F.S. Under both, a beneficiary who unlawfully and intentionally kills or participates in procuring the death of the settlor or another person on whose death such beneficiary's interest depends is precluded from taking that interest. Instead, the interest devolves as if the slayer predeceased the victim. This rule is triggered by a civil evidentiary standard (the greater weight of the evidence) although a final judgment of murder in any degree is conclusive.

Effect of Dissolution of Marriage on Revocable Trust

Absent a contrary provision in the trust instrument or in a judgment for dissolution of marriage or divorce, s. 736.1105, F.S. provides that provisions in a revocable trust in favor of a spouse become void upon a subsequent divorce, annulment or dissolution of the marriage. The trust is administered and construed as if the spouse were dead. Apart from a title change, this section is identical to s. 737.106, F.S.

Change in Securities; Accessions; Nonademption

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[417] *See* s. 736. 1017(6) and (7), F.S.

[418] The right of a certification recipient to act in good faith reliance on the certification applies only when the recipient does not have knowledge that the representations contained in the certification are incorrect. Without more, knowledge of a trust's terms may not be inferred solely because the recipient is in possession of a copy of the trust instrument. *See* s. 736.1017(6), F.S., final sentence.

[419] *See* s. 736.1016, F.S..

Code s. 736.1107, F.S. addresses some commonly occurring constructional issues that arise when a trust beneficiary is entitled to a distribution of specific securities (as opposed to their equivalent value).[420] The section gives the beneficiary:

- A right to whatever securities remain in the trust at the time the distribution is to occur;
- A right to additional securities of the same issuer held by the trust as a result of a traditional stock split or stock dividend; and
- A right to securities of another issuer held by the trust as a result of merger, consolidation, reorganization, or other similar action initiated by the issuer.

Trust Contest Penalty Clauses

Code s. 736.1108, F.S. is a mandatory provision the initial subsection of which is identical to s. 737.207, F.S. The subsection provides that trust *in terrorem* clauses[421] are unenforceable. The second subsection of s. 736.1108, F.S. is new. It is an effective date provision that incorporates the effective date of the legislation originally creating current s. 737.207, F.S. Trusts created before October 1, 1993 are not subject to either provision.[422]

Antilapse and the Descendibility of Beneficial Interests in Trusts

Code s. 736.1106, F.S. is new.[423] Like current s. 737.6035, F.S. which it will replace, s. 736.1106, F.S. is concerned with antilapse and the descendibility of beneficial interests in trusts. The new section is applicable to all trusts except those which are irrevocable on the effective date of the Code.[424]

Historical Background

Prior to 2003, Florida's only section dealing with antilapse was s. 732.603(1), F.S. of the Probate Code. This section applied only when certain related devisees under a will predeceased the testator. Because the term "devisee" is defined in the Probate Code to exclude the beneficiaries of trusts,[425] the prevailing wisdom at the time was that the section did not apply to beneficial interests in testamentary trusts. The impact of the limitation can be illustrated in a brief example.

> **Example 3 — Lapse of Interest in Testamentary Trust.** D executes a will that devises $100,000 outright to his child C and the residue of his estate in trust "income to Wife for life; remainder in corpus C." D's child, C, predeceases D survived by a daughter GC. Subsequently, D dies, survived by Wife and by GC.

As it existed in 2001, s. 732.603(1), F.S. would preserve the outright devise to C for the benefit of GC. But the gift of the remainder interest to C in the trust would lapse. That particular oddity was remedied in 2001 when s. 732.603(1), F.S. was amended to apply both to certain related predeceasing devisees and to "a beneficiary of a trust created by a will." In addition, the section was extended to apply when C survived D

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[420] Section 736.1107, F.S. is the trust law counterpart to s. 732.605, F.S. in the Probate Code and is identical in all respect to current s. 737.622, F.S.
[421] *I.e.,* a provisions purporting to penalize any interested person for contesting the trust instrument or instituting other proceedings relating to the trust estate or trust assets. *See* s. 736.1108(1), F.S.
[422] For this purpose, a revocable trust is treated as if it was created when the right of revocation terminates. Section 736.1108(2), F.S.
[423] Section 736.1106, F.S. is the trust law equivalent of s. 732.603, F.S. (the Probate Code antilapse statute). As is explained more fully below, adoption of s. 736.1106, F.S. requires that conforming amendments be made to s. 732.603, F.S. as well. As these two provisions are related, discussion of the conforming changes that are being made to s. 732.603, F.S. appear below instead of later in the Summary where other conforming changes are considered.
[424] Section 736.1106(5), F.S.
[425] *See* s. 731.201(9), F.S.

but not life tenant W.[426] Then, in 2003, s. 737.6035, F.S. was created to apply similar rules in the case of interests created in living trusts.[427]

Concerns Regarding Current Statutes

The changes made to s. 732.603, F.S. in 2001 and the creation of s. 737.6035, F.S. in 2003 have led to several concerns expressed by commentators:

- The failure to address how these sections apply to powers of appointment, if at all;
- The inadvertent and inappropriate application of s. 737.6035, F.S. to some present interests in trust; and
- The failure of s. 732.603, F.S. to address the situation of a related beneficiary dying without surviving descendants after the testator but before the expiration of the life tenant's interest.
- The failure of s. 737.6035, F.S. to clarify how beneficial interests in *inter vivos* trusts are to be handled when they are not saved for some other beneficiary under the section.[428]

Of necessity, the formulation of the new Florida Trust Code required a reexamination of s. 737.6035, F.S. In turn, a Committee decision to remedy the problems it found in that section required changes in s. 732.603, F.S. as well. Together, these two provisions constitute a new coordinated and more comprehensive default regime covering antilapse and descendibility issues in both testamentary and nontestamentary contexts. Discussion begins with the changes made to s. 732.603, F.S.[429]

Revisions to s. 732.603, F.S.

As detailed above, under existing law, lapse and descendibility rules for testamentary trusts appear in s. 732.603, F.S. of the Probate Code while the companion rules for living trusts appear in s. 737.6035, F.S. The division of labor under the new regime is different. Because Code s. 736.1106, F.S. applies to both testamentary and to living trusts, s. 732.603, F.S. is restored to its pre-2002 state. That is, the new version applies only to outright testamentary dispositions.[430] In addition, new s. 732.603, F.S. is revised as follows.

- In addition to devises, it now covers interests created by the exercise of testamentary powers of appointment; and
- It incorporates existing Florida case law on the impact of survivorship language in a devise or appointment.

Powers of Appointment

Current s. 732.603, F.S. is not clear on whether and how it applies to outright interests created by the exercise of testamentary powers of appointment. In contrast, new s. 732.603, F.S. explicitly applies to these interests.[431]

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[426] The 2001 changes became effective January 1, 2002.
[427] Section 737.6035, F.S. became effective on June 12, 2003.
[428] For more on these and other problems with s. 732.603, F.S. and s. 737.6035, F.S., see David Powell, *Lapse, Antilapse, an Descendible Beneficial Interests in Trusts, in* ADMINISTRATION OF TRUSTS IN FLORIDA ch 7 (4th Ed. The Florida Bar 2005).
[429] In the interest of clarity, the analysis uses the adjective "new" when referencing the newly formulated version of section 732.603.
[430] New s. 732.603(4), F.S.
[431] *See* new s. 732.603(2), F.S.

Example 4 — Outright Exercise of Testamentary Power. At his death, D is the life beneficiary of a trust created by his uncle F. Under the terms of the trust, D has a testamentary power to appoint property among D's descendants. D's will purports to appoint $100,000 to his child C. But C predeceased D, survived by GC who survived D.

In the absence of a contrary intent, new s. 732.603, F.S. provides that GC becomes entitled to the $100,000 D tried to appoint to C. Note, however, the following additional observations about this example:

- It is immaterial to the result whether F created D's power in an *inter vivos* or a testamentary instrument.
- Application of new s. 732.603, F.S. assumes that there is no contrary intent indicated in either D's will or in the instrument in which F created D's power.
- GC takes in C's place under new s. 732.603, F.S. only if the relationship test specified in the section is met with respect to F and C. Thus, if F is unrelated to C, the section does not apply whether or not C is related to D.
- In general, it is immaterial to the application of new s. 732.603, F.S. whether D's power is a general one or a special one. With the latter, however, there exists the possibility that the person in whose favor the section operates is outside the class of permissible objects of the power.[432] The section explicitly permits this unless the language creating the power expressly excludes the substitution of descendants for an object of the power.[433]

Words of Survivorship and other Indications of Contrary Intent

Like its predecessor, new s. 732.603, F.S. yields to an indication of a contrary intent. This would include a direction in the testator's will that lapsed gifts are to be added to the residue or that they are to pass instead to an alternate beneficiary. In this regard, the new section also codifies existing Florida case law which holds that mere words of survivorship associated with a testamentary disposition are a sufficient indication of contrary intent.[434] Thus the section would not apply in either Example 3 or Example 4 if D's devise (or appointment) had been "to C *if he survives me*." Likewise, the section would not apply to Example 4 if in creating D's power, F had provided that he could appoint "among his *surviving* descendants."[435]

Beneficial Interests in Trust
General Effect of s. 736.1106, F.S.

With some exceptions discussed below, Code s. 736.1106, F.S. applies when a beneficiary of a future interest in either a testamentary or an *inter vivos* trust dies before the point at which the beneficiary's interest becomes possessory.[436] In such situations, s. 736.1106, F.S. does two things:

- First, it provides that the deceased beneficiary's future interest in the trust is contingent on the beneficiary surviving the point at which the interest takes in possession.
- Second, unless a contrary intent appears in the trust instrument, s. 736.1106, F.S. creates a *per stirptual* alternate gift in such of the deceased beneficiary's descendants as are living at that time.[437]

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[432] To illustrate, if D's power in the above example had been to appoint among his children instead of his descendants, the operation of new s. 732.603, F.S. will be to preserve the gift for a person (GC) who is not an object of D's power.
[433] *See* new s. 732.603(2), F.S., final sentence.
[434] *See Williams v. Williams,* 152 Fla. 255, 9 So. 2d 798 (Fla. 1942) (dealing with former s. 731.20, F.S.); *In re Estate of Wagner*, 423 So. 2d 400 (Fla. 2d DCA 1982).
[435] *See* new s. 732.603(3)(a), F.S.
[436] The section refers to this as the "distribution date." *See* s. 736.1106(1)(b), F.S.

The effect of the section may be illustrated with the following example.

> **Example 5 — Beneficial Future Interest in Trust.** D dies with a will in which he devises property to a testamentary trust to pay "income to W for life; remainder in corpus to C." C dies after D survived by W and by two children GC-1 and GC-2. Some time later, W dies survived by C's two kids.

On the facts of this example, and again assuming no contrary intent appears in the trust instrument, s. 736.1106, F.S. creates a *per stirptual* alternate gift of C's interest in favor of GC-1 and GC-2.[438]

Situations where s. 736.1106, F.S. Applies

Section 736.1106, F.S. applies to a broad array of situations where the beneficiary of a future interest[439] in a trust dies before the time the interest becomes possessory. The only two exceptions are situations where a contrary intent appears in the instrument and where the beneficial interest involved is one created in a trust that became irrevocable before the effective date of the Code. Thus, in the illustrative context of Example 5, the section would apply:

- Whether the trust in which C held his interest was created by standard transfer or by an exercise of a power of appointment, and in the latter case, whether the power was general or special.
- Whether the transfer (or appointment) by which the trust was created was an *inter vivos* or testamentary one.
- With respect to an *inter vivos* trust, whether the trust is revocable or irrevocable.
- With respect to a testamentary trust, whether C survived the testator or not.
- Whether, the predeceasing beneficiary is an individual or a member of a class.[440]
- Whether or not the trust settlor and predeceasing beneficiary are related. That is, unlike s. 732.603, F.S. of the Probate Code, there is no relationship test under s. 736.1106, F.S.

The absence of a relationship test in s. 736.1106, F.S. rests on a subtle but important distinction between the underlying rationales for that section compared with the Probate Code antilapse provision. The latter is first, foremost, and exclusively a rule based on presumed intent. The relationship test assumes that that intent differs depending on whether the beneficiary of a testamentary gift is a relative or not. The rationale behind s. 736.1106, F.S. is different. It is found in large part on matters of economy and administrative convenience. To illustrate, consider the impact of s. 736.1106, F.S. to Example 5. Because of the section, C's interest in the example is not descendible. That is, it does not pass at C's death to his successors by will or inheritance. For that reason:

- It is not subject to estate taxation at C's death;

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[437] Section 736.1106(2), F.S.

[438] Astute readers will readily see that the effect of s. 736.1106, F.S. is to turn C's vested interest into a contingent one with alternate gift in his descendants. Note that the alternate gift is in the descendants of D who survive W. If GC-1 predeceased W survived by a child GGC, the remainder will pass half to GGC and half to GC-2 at W's death. It is immaterial whether GGC was born before or after C's death. The result of the situation described in the comment is the same whether GC-1 predeceased W in fact or in law. *See* s. 736.1106(1)(e), F.S.

[439] Section 736.1106, F.S. applies only to future interests. *See* s. 736.1106(1)(a), F.S.

[440] *See* s. 736.1106(1)(a) and (c), F.S.

- It may not it be reached by C's creditors (including the elective share right of C's surviving spouse); and

- It will not be necessary to reopen administration of C's estate at W's subsequent death in order to determine who is entitled to C's interest.

To the above may be added the secondary advantage that in many cases, application of s. 736.1106, F.S. *will* accord with D's probable intent. But the advantages listed above exist regardless of any relationship between D and C. If D's contrary intent in a particular case outweighs the listed advantages, D is free to negate application of s. 736.1106, F.S. in the trust instrument. Unless he does so, however, the better default rule is for the section to apply regardless of any relationship test.

Language Indicating a Contrary Intent

It was mentioned previously, that application of s. 736.1106, F.S. means two things. The first is that vested remainders are now contingent on the taker surviving to the time of possession. The second is that an alternate gift arises in the descendants of a beneficiary who fails to meet the survivorship contingency. As a default rule of construction, both of these principles will yield to a contrary intent in the trust instrument. As a practical matter, however, an instrument would rarely negate application of the first principle because to do so is to invite the problems the section was designed to avoid. It is for this reason that vested remainder interests are seldom found in well drafted trust instruments.
The second principle is certain to be less universally acceptable. It is to be expected that many settlors would prefer a different taker for the alternate gift. If so, application of the second principle can be avoided by:

- Expressing a different alternate taker in the instrument;

- Stating the intent that the designated beneficiary's descendants not share in the gift; or

- Attaching words of survivorship to the remainder beneficiary' interest.[441]

By contrast, the mere presence of a residuary clause in a settlor's will is not a sufficient indication of a contrary intent to the application of the second principle and this is true even if the will specifically provides that lapsed or failed gifts are to pass under the residuary clause.[442]

Disposition of Remainder Interests when there is no Alternate Taker

In some cases, there will be no eligible alternate taker for the contingent interest arising from an application of the first principle of s. 736.1106, F.S. This can occur if the predeceasing beneficiary left no descendants. It can also occur when the instrument contains language negating the application of the second principle but not language identifying an alternative taker for the interest. In either case, disposition of the interest will depend on whether the interest was created by traditional transfer or by the exercise of a power of appointment.

Interests Created by Traditional Transfer

If the interest was created in a nonresiduary devise in the *transferor's* will, the interest will pass as part of the transferor's residuary estate.[443] Otherwise it passes to the *transferor's* heirs with the heirs being determined as if the transferor had died intestate at the time the interest takes in possession.[444]

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[441] On the effectiveness of using words of survivorship for this purpose, *see* s. 736.1106(3)(a), F.S.
[442] *See* s. 736.1106(3)(b), F.S.
[443] Section 736.1106(4)(b), F.S.
[444] Section 736.1106(4)(c), F.S.

Example 6 — Residuary devise to testamentary trust – no alternate taker. D dies with a will in which he devises the residue of his estate to a testamentary trust to pay "income to W for life; remainder in corpus to his child C." D's only other relatives are a brother B and a sister S. C dies after D. He is survived by W, B, and S, but not by any descendants. Thereafter, W dies survived by B and S. At W's death, the property passes to D's surviving heirs, B and S.[445]

Interests Created by Appointment

In general, the rules discussed above for interests created by traditional transfers also apply to interests created by the exercise of a power of appointment. In the case of powers, however, the basic rules are subject to two special wrinkles:

- First, prior to application of the above rules, preference is given to the power donor's gift-in-default clause, if any.[446]

- Second, in the application of the above rules, the *transferor* of an interest created by the exercise of a general power is specified to be the donee of the power while the *transferor* for interests created by the exercise of a special power is specified to be the donor of the power.[447]

Charitable Trusts (Part XII)

Part XII of the Code incorporates most of the sections currently found in Part V of chapter 737, F.S. dealing with charitable trusts. Two current sections (s. 737.510, F.S. and s. 737.512, F.S.) were omitted, the latter because it is obsolete and the former because charitable organizations expressly designated in a trust instrument are given the rights of a qualified beneficiary under Code s. 736.0110(1), F.S. Accordingly, the duties imposed on trustees in s. 737.510, F.S. are unnecessary under the Code.

The remaining sections, and the changes, if any, made to them are listed below.

- **Section 736.1201, F.S.**: This section is derived from s. 737.501, F.S. The order of the definitions for "charitable organization" and "Internal Revenue Code" were switched and changes were made to the definitions of Internal Revenue Code and State attorney. The definition of the former was updated to the 1986 Code and the definition of the latter was tied to the state attorney for the judicial circuit of the principal place of administration of the trust under s. 736.0108, F.S.

- **Section 736.1202, F.S.**: This section is identical to s. 737.502, F.S.

- **Section 736.1203, F.S.**: This section is derived from s. 737.503, F.S. A cross reference to s. 737.505, F.S. was updated to Code s. 736.1203, F.S.

- **Section 736.1204, F.S.**: Section 736.1204, F.S. is derived from s. 737.504, F.S. Gender specific references were replaced with gender neutral ones, cross references to s. 737.505, F.S. were updated

[445] Some additional observations about the above example: if D's brother B had died before W, the property would pass exclusively to sister S because the class of D's heirs is determined as if D had died intestate at W's death when the remainder interest takes in present possession; the result in the Example (original or as modified above) is the same if D had created the trust by *inter vivos* transfer instead of by will; in the case of an *inter vivos* trust, the result is also the same whether the trust is revocable or irrevocable and whether D predeceases W or not, and since there is no relationship test under s. 736.1106, F.S., all of the above remains true even if D and C are unrelated to each other.
[446] *See* s. 736.1106(4)(a), F.S.
[447] *See* s. 736.1106(4), F.S., final paragraph.

to Code s. 736.1205, F.S., and some section references were clarified as referring to the Internal Revenue Code.

- **Section 736.1205, F.S.**: This section is derived from s 737.505, F.S. Cross references to s. 737.504, F.S. were updated to Code s. 736.1204, F.S.

- **Section 736.1206, F.S.**: This section is derived form s. 737.506, F.S. References to s. 737.504(2), F.S. were updated to Code s. 736.1204(2), F.S.

- **Section 736.1207, F.S.**: This section is identical to s. 737.507, F.S.

- **Section 736.1208, F.S.**: This section is identical to s. 737.508, F.S.

- **Section 736.1209, F.S.**: This section is derived from s. 737.509, F.S. A reference to s. 737.510, F.S. was deleted and references to s. 737.508(5), F.S. were updated to Code s. 736.1208(5), F.S.

- **Section 736.1210, F.S.**: This section is identical to s. 737.511, F.S.

Miscellaneous (Part XIII)

Part XIII of the Code contains miscellaneous sections. One deals with electronic records and signatures, two with investments by fiduciaries, another with severability, and two with effective date issues.

Electronic Records and Signatures

Section 736.1301, F.S. is a prophylactic provision with no real current effect. It provides that any provisions of the Code relating to the legal effect, validity, or enforceability of electronic records or signatures supersede those found in the Electronic Signatures in Global National Commerce Act. This section appears in all recent Uniform Acts. As the Florida Code contains no such provisions relating to the legal effect, validity, or enforceability of electronic records or signatures, the main impact of the section is that it will insure the primacy of any provisions that may be added in the future.

Investment of Fiduciary Funds Permitted

Section 518.117, F.S. is created to permit a fiduciary that is authorized to engage in trust business to invest fiduciary funds in accordance with s. 660.417, F.S.

Severability

Section 736.1302, F.S. is a standard severability clause that is intended to insure that the invalidity of one or more provisions of the Code will not affect the validity of other provisions.

Investment of Fiduciary Funds

Section 660.417, F.S. is amended to permit affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company and receiving additional compensation for that investment. If a trustee engages in such activity the basis for the calculation of the compensation must be disclosed.

Effective date

The final miscellaneous provisions are found in s. 736.1303, F.S. Section 736.1303, F.S. specifies that the Code takes effect on July 1, 2007, and specifies rules relating to the application of the Code to existing trusts and legal proceedings. These include the following:

- The Code does not affect any act done prior to its effective date.[448]
- The Code does not affect the running of any limitations period that began before the effective date of the Code, even if the statute specifying the period is repealed or superseded by the Code.[449]
- The Code applies to all judicial proceedings concerning trusts commenced on or after its effective date.[450]
- The Code also applies to judicial proceedings commenced before that date unless the court finds its application would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of the parties.[451]
- Finally, except as otherwise provided in a particular section of the Code, the Code applies to all trusts whether created before, on, or after its effective date.[452]

The significance of the final point above is worth emphasizing. Except as might be provided above or in a particular section, the Code applies retroactively to all trusts, whenever created. Although this has the advantage of avoiding the maintenance of two systems of trust law for extended periods of time, in some instances retroactive application can be constitutionally impermissible (e.g., where it impairs vested rights) or unfair. For this reason, a number of Code sections include effective date sections that limit the default retroactivity rule of s. 736.1303, F.S. This table lists most of these:

Specific Effective Dates of Code Provisions to Limit Retroactivity

Section	Title or topic	Effective date:
736.0403	Trusts created in other jurisdictions; formalities required for revocable trusts	Trusts created after the effective date of the Code.
736.04115	Judicial modification of irrevocable trust when modification is in best interest of beneficiaries	Inapplicable to trusts created before January 1, 2001. Revocable trusts are deemed created at the time they become irrevocable.
736.0412	Nonjudicial modification of irrevocable trust	Inapplicable to trusts created before January 1, 2001. Revocable trusts are deemed created at the time they become irrevocable.
736.0813	Duty to inform and account	In general, applies only to trust accountings rendered for accounting periods beginning on or after January 1, 2008. Paragraphs (1)(a) and (b) do not apply to trustees who accept a trusteeship before the effective date of the Code or to trusts that are irrevocable before that date.

[448] Section 736.1303(1)(e), F.S.
[449] Section 736.1303(2), F.S.
[450] Section 736.1303(1)(b), F.S.
[451] Section 736.1303(1)(d), F.S.
[452] Section 736.1303(1)(a), F.S.

Specific Effective Dates of Code Provisions to Limit Retroactivity		
Section	**Title or topic**	**Effective date:**
736.08135	Trust accountings	Applies only to trust accountings rendered for accounting periods beginning on or after January 1, 2003.
736.08163	Powers of trustees relating to environmental or human health laws or to trust property contaminated with hazardous or toxic substances; liability	Does not apply to trusts created before July 1, 1995, unless the trust is amended to incorporate the provisions of the section.
736.1008	Limitations on proceedings against trustees	Applies to trust accountings for accounting periods beginning on or after January 1, 2008, and to written reports, other than trust accountings, received by a beneficiary on or after January 1, 2008.
736.1108	Penalty clause for contest	Applies to trusts created on or after October 1, 1993. Revocable trusts are treated as created when the right of revocation terminates.

Conforming Changes

In addition to the Code itself, the bill includes a number of conforming and other changes to various sections of the Probate Code and other portions of the Florida statutes. Many of these are just updates to statutory cross references and will not be discussed here. Those with substantive impact are list below.

- **Section 518.117, F.S.:** *New.* This section authorizes investment of fiduciary funds pursuant to s. 660. 417, F.S.

- **Section 660.25, F.S.:** *Revised.* This section provides a definition for "investment instrument."

- **Section 660.417, F.S.:** *Revised.* This section authorizes trustees to engage in affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company.

- **Section 689.075(4), F.S.:** *Revised.* The second sentence of this subsection was deleted as obsolete.
- **Section 689.175, F.S.:** *New.* This section abolishes the Doctrine of Worthier title as both a rule of law and a rule of construction. The purposes originally served by that doctrine are no longer relevant and its application can create adverse tax consequences and can impair the validity of special needs trusts.

- **Section 731.103, F.S.:** *Revised.* The section is made applicable to new Chapter 736; the provision specifying the applicability of the rules of evidence in civil actions is moved to new s. 731.1035, F.S. (below); subsection (4) permitting proof of death by direct or circumstantial evidence before expiration of 5-year time period is added to conform this section to s. 737.626(4), F.S.

- **Section 731.1035, F.S.:** *New.* This new section is separated out from s. 731.103, F.S. (see above). It specifies that the rules of evidence in civil action apply to proceedings under Probate Code.

- **Section 731.201(2) and (9), F.S.:** *Revised.* In both of these subsections, a reference to beneficiaries described in s. 737.303(4)(b), F.S. is changed to qualified beneficiary as defined in the new Code.

- **Section 731.201(27), F.S.:** *New.* This section adds a new definition of "power of appointment."

- **Section 731.303, F.S.:** *Revised.* This section is amended to limit it to proceedings involving estates and not those involving trusts. In addition, the portions of the section dealing with representation by holders of powers of appointment are subjected to the same restrictions that appear in Code s. 736.0302, F.S. That is, representation does not apply to matters involving a trustee's fraud or bad faith, a power of a trustee to distribute property or to a power held by a person who is the sole trustee.

- **Section 732.513, F.S.:** *Revised.* Subsection (c) of the section is deleted to remove the implication that a pour over to a revocable trust that is not executed in the manner required for wills is effective.

- **Section 732.603, F.S.:** *Rewritten.* The revisions to this section have been discussed in detail previously.[453]

- **Section 732.604, F.S.:** *Clarified.* Subsection (2) of this section is revised to clarify the meaning it was intended to have all along.

- **Section 732.611, F.S.:** *Clarified.* The wording of this section was changed to better reflect its intended purpose.

- **Section 732.212, F.S.:** *Revised.* A reference in this section to beneficiaries described in s. 737.303(4)(b), F.S. is changed to qualified beneficiary as defined in the new Code.

- **Section 738.104, F.S.:** *Revised.* This section is amended in several places to change references to the previously defined term "beneficiaries" to a newly defined term "eligible beneficiaries." Under the new version, it is the eligible beneficiaries of a trust who have standing to object to the use of a trustee's power to adjust with respect to trusts in existence on January 1, 2003. The new term excludes from the class of beneficiaries with standing the middle tier qualified beneficiaries described in Code s. 736.0103(14)(b), F.S. unless there is no third tier qualified beneficiary described in s. 736.0103(14)(c), F.S. The practical effect of the revisions are two fold. First, for most trusts the term eligible beneficiaries will have a meaning very similar to the term "beneficiaries" under the current version of the section. For those trusts where the term differs, the revisions are intended to insure that there will always be two categories of qualified beneficiaries with standing to object to an exercise of the trustee's adjustment power.

- **Section 744.331(6)(b) and (f), F.S.:** *Revised.* These are companion revisions to the change made in Code s. 736.0207, F.S. permitting court approved contests of a revocable trust by a settlor's guardian prior to the settlor's death. Paragraph (b) requires that a court determine whether a sufficient alternative to guardianship exists for a person the court finds to be incapable of exercising delegable rights. If so, the court is precluded from appointing a guardian. If not, the court is required to appoint a guardian for the incapacitated person. Paragraph (f) provides that an incapacitated person's trust, trust amendment, or durable power of attorney is not to be considered a sufficient alternative to guardianship if an interested person files a verified statement that he or she has a reasonable factual basis for believing in good faith that the trust, trust amendment or durable power is invalid.

- **Section 744.441(11), F.S.:** *Revised.* The new language added to this subsection is also a related to new Code s. 736.0207, F.S. Subsection (11) directs that before authorizing a guardian to bring an action under s. 736.0207, F.S., the court must find that the action appears to be in the ward's best interest during the ward's probable lifetime.

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[453] *See* "Revisions to s. 732.603, F.S.", supra p. 53.

- **Section 744.462, F.S.:** *New*. This new section provides for the reporting of a court's finding as to the validity of a ward's trust, trust amendment, and power of attorney and for the continued review by the court of the sufficiency of guardianship alternatives, the continued need for a guardian, and the extent of the need for delegation of the ward's rights.

C. SECTION DIRECTORY:

Section 1. Creating Part I of chapter 736, F.S., consisting of sections 736.0101, 736.0102, 736.0103, 736.0104, 736.0105, 736.0106, 736.0107, 736.0108, 736.0109, 736.0110, 736.0111, and 736.0112. This section provides a short title, scope, and definitions for the Florida Trust Code (FTC).

Section 2. Creating Part II of chapter 736, F.S., consisting of sections 736.0201, 736.0202, 736.0203, 736.0204, 736.0205, 736.0206, and 736.0207. This section provides for the role of courts in trust proceedings, including, but not limited to, jurisdiction, venue, and trust contests.

Section 3. Creating Part III of chapter 736, F.S., consisting of sections 736.0301, 736.0302, 736.0303, 736.0304, 736.0305, and 736.0306. This section outlines the effect of representation throughout the trust process.

Section 4. Creating Part IV of chapter 736, F.S., consisting of sections 736.0401, 736.0402, 736.0403, 736.0404, 736.0405, 736.0406, 736.0407, 736.0408, 736.0409, 736.0410, 736.04113, 736.04115, 736.0412, 736.0413, 736.0414, 736.0415, 736.0416, and 736.0417. This section encompasses the methods and requirements for the creation of a trust, trust validity, trust modification, and trust termination.

Section 5. Creating Part V of chapter 736, F.S., consisting of sections 736.0501, 736.0502, 736.0503, 736.0504, 736.0505, 736.05053, 736.05055, 736.0506, and 736.0507. This section details creditors' claims, and what effect, if any, spendthrift provision may have upon the trust. Furthermore, this section outlines responsibilities of a trustee, and claims against a settlor.

Section 6. Creating Part VI of chapter 736, F.S., consisting of sections 736.0601, 736.0602, 736.0603, and 736.0404. This section gathers in one place most of the provisions relating to revocable trusts. Section 736.601 clarifies that the capacity required to create a revocable trust is the same as that needed to execute a will. Other sections specify the rules to be used to determine if and how a trust may be revoked or amended, the effect revocability has on the duties and liabilities of a trustee and the limitations period for contesting revocable trusts after the death of the settlor.

Section 7. Creating Part VII of chapter 736, F.S., consisting of sections 736.0701, 736.0702, 736.0703, 736.0704, 736.0705, 736.0706, 736.0707, 736.0708, and 736.0709. Part VII of the Code contains the various rules relating to the office of trustee. This includes provisions detailing when and how a designated trustee accepts or declines the office; how trustees may resign or be removed; the powers and duties of a trustee who has resigned or been removed; and when vacancies in the office of trustee must be filled and how successor trustees are appointed. Also covered are the duties and powers of cotrustees, compensation of trustees, and trustees' right to reimbursement for expenses incurred in the administration of the trust.

Section 8. Creating Part VIII of chapter 736, F.S., consisting of sections 736.0801, 736.0802, 736.0803, 736.0804, 736.0805, 736.0806, 736.0807, 736.0808, 736.0809, 736.0810, 736.08105, 736.0811, 736.0812, 736.08125, 736.0813, 736.08135, 736.0814, 736.08147, 736.0815, 736.0816, 736.08163, 736.08165, and 736.0817. This section covers the duties of a trustee, the powers of a trustee, and a few miscellaneous matters.

Section 9. Creating Part IX of chapter 736, F.S., consisting of section 736.0901 which directs that a trustee shall invest trust property in accordance with chapter 518, F.S.

Section 10. Creating Part X of chapter 736, F.S., consisting of sections 736.1001, 736.1002, 736.1003, 736.1004, 736.1005, 736.1006, 736.1007, 736.1008, 736.1009, 736.1010, 736.1011, 736.1012, 736.1013, 736.1014, 736.1015, 736.1016, 736.1017, and 736.1018. This section deals with the remedies and damages for breach of trust; liability of trustees to nonbeneficiaries, the entitlement, assessment and recovery of costs and fees; limitations on actions against a trustee; and the protection of persons dealing with the trustee including those relying on a certification of trust furnished by the trustee.

Section 11. Creating Part XI of chapter 736, F.S., consisting of sections 736.1101, 736.1102, 736.1103, 736.1104, 736.1105, 736.1106, 736.1107, and 736.1108. This section contains a series of default rules of construction.

Section 12. Creating Part XII of chapter 736, F.S., consisting of sections 736.1201, 736.1202, 736.1203, 736.1204, 736.1205, 736.1206, 736.1207, 736.1208, 736.1209, and 736.1210. This section incorporates most of the sections currently found in Part V of Chapter 737, F.S. dealing with charitable trusts.

Section 13. Creating Part XIII of chapter 736, F.S., consisting of sections 736.1301, 736.1302, and 736.1303. This section addresses four miscellaneous sections. One deals with electronic records and signatures, another with severability, and two with effective date issues.

Section 14. This section amends paragraph (a) of subsection (5) of s. 497.458, F.S., relating to the disposition of proceeds received on contracts.

Section 15. This section creates s. 518.117, F.S., relating to what investments of fiduciary funds are permissible.

Section 16. This section amends subsection (2) of s. 607.0802, F.S., relating to qualifications of directors.

Section 17. This section amends subsection (2) of s. 617.0802, F.S., relating to qualifications of directors.

Section 18. This section amends subsections (6) and (7) of s. 660.25, F.S., defining "investment instrument," and correcting references from Chapter 737, F.S. to s. 736.

Section 19. This section amends s. 660.417, F.S., to permit a trustee to engage in affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company

Section 20. This section amends paragraphs (a), (d), and (e) of subsection (1) and subsections (2), (3), (9), and (10) of s. 660.46, F.S., relating to the substitution of fiduciaries.

Section 21. This section amends s. 660.418, F.S., to correctly reference s. 736 and not Chapter 737, F.S.

Section 22. This section amends subsection (5) of s. 689.071, F.S., to correctly reference s. 736 and not Chapter 737, F.S.

Section 23. This section amends subsections (1) and (4) of s. 689.075, F.S., relating to *inter vivos* trusts; powers retained by settlor.

Section 24. This section creates s. 689.175, F.S., abolishing the Worthier title doctrine.

Section 25. This section amends subsection (8) of s. 709.08, F.S., to correctly reference s. 736 and not Chapter 737, F.S.

Section 26. This section amends paragraph (c) of subsection (2) of s. 721.08, F.S., to correctly reference sections of s. 736 and not Chapter 737, F.S.

Section 27. This section amends paragraph (e) of subsection (1) of s. 721.53, F.S., to correctly reference sections of s. 736 and not Chapter 737, F.S.

Section 28. This section amends s. 731.103, F.S., regarding evidence as to death or status.

Section 29. This section creates s. 731.1035, F.S., providing in proceedings under the code, the rules of evidence in civil actions are applicable unless specifically changed by the code.

Section 30. This section amends s. 731.201, F.S., regarding general definitions.

Section 31. This section amends paragraph (a) of subsection (1) and subsection (5) of s. 731.303, F.S., regarding representation.

Section 32. This section amends subsection (5) of s. 732.2075, F.S., to correctly reference a section of s. 736 and not Chapter 737, F.S.

Section 33. This section amends subsection (2) of s. 732.513, F.S., relating to devises to trustee.

Section 34. This section amends s. 732.603, F.S., substantially rewording s. 732.603, F.S., relating to antilapse; deceased devisee; class gifts.

Section 35. This section amends s. 732.604, F.S., concerning a failure of testamentary provision.

Section 36. This section amends s. 732.611, F.S., regarding devises to multigenerational classes to be *per stirpes*.

Section 37. This section amends subsection (1) of s. 733.212, F.S., regarding a notice of administration.

Section 38. This section amends subsection (1) of s. 733.602, F.S., to correctly reference a Chapter 736 and not Chapter 737, F.S.

Section 39. This section amends subsection (4) of s. 733.805, F.S., to correctly reference a section of s. 736 and not Chapter 737, F.S.

Section 40. This section amends paragraph (j) of subsection (1) of s. 733.817, F.S., correcting a reference to s. 731.201, F.S.

Section 41. This section amends paragraphs (a) and (f) of subsection (8) and paragraphs (a) and (d) of subsection (9) of s. 738.104, F.S., regarding a trustee's power to adjust.

Section 42. This section amends subsection (4) of s. 738.1041, F.S., to correctly reference a section of s. 736 and not Chapter 737, F.S.

Section 43. This section amends subsection (5) of s. 738.202, F.S., to correctly reference a section of s. 736 and not Chapter 737, F.S.

Section 44. This section amends paragraph (a) of subsection (12) of s. 739.102, F.S., to correctly reference a section of s. 736 and not Chapter 737, F.S.

Section 45. This section amends paragraphs (b) and (f) of subsection (6) of s. 744.331, F.S., relating to orders determining incapacity.

Section 46. This section amends paragraph (a) of subsection (6) of s. 744.361, F.S., correcting a reference to Chapter 518, F.S.

Section 47. This section amends subsections (11) and (18) of s. 744.441, F.S., relating to powers of a guardian upon court approval.

Section 48. This section creates s. 744.462, F.S., concerning determinations regarding alternatives to guardianship.

Section 49. This section repeals ss. 737.101, 737.105, 737.106, 737.111, 737.115, 737.116, 737.201, 737.202, 737.203, 737.2035, 737.204, 737.2041, 737.205, 737.206, 737.2065, 737.207, 737.208, 737.209, 737.301, 737.302, 737.303, 737.3035, 737.304, 737.305, 737.3053, 737.3054, 737.3055, 737.306, 737.3061, 737.307, 737.308, 737.309, 737.401, 737.402, 737.4025, 737.403, 737.4031, 737.4032, 737.4033, 737.404, 737.405, 737.406, 737.501, 737.502, 737.503, 737.504, 737.505, 737.506, 737.507, 737.508, 737.509, 737.510, 737.511, 737.512, 737.6035, 737.621, 737.622, 737.623, 737.624, 737.625, 737.626, and 737.627, F.S.

Section 50. This section provides and effective date of July 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

   None.

D. FISCAL COMMENTS:

By providing settlors and trustees with the ability to take advantage of more flexible trust provisions, this bill may perhaps result in more equitable trust distributions and better tax outcomes for trust beneficiaries.

Traditionally, self-settled trusts have been treated harshly when it comes to creditors' rights. Under Code s. 736.0505(1), F.S., whether or not a trust includes a spendthrift provision: while a trust is revocable, the trust property is subject to the claims of the settlor's creditors, and in the case of an irrevocable trust, a settlor's creditor or assignee may reach the maximum that can be distributed to or for the benefit of the settlor. Therefore, this bill provides creditors with greater protection. Notwithstanding this ability, the assets of the

trust are not subject to the creditor's or assignee's claims merely because the trustee possesses the power to pay tax liabilities of the settlor.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This 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:

Personal Jurisdiction:

Section 736.0202, F.S. pertains to personal jurisdiction by Florida courts over the trustee, beneficiaries, and recipients of trust distributions. Specifically, s. 736.0202(2), F.S. provides:

> With respect to their interest in the trust, the beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the courts of this state regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this state regarding any matter involving the distribution.

The Committee's Scrivener's Summary provides that "F.S. chapter 737 has no provision corresponding to section 736.0602[454]. Jurisdiction under existing law is obtained under the general long arm statutes found in F.S. chapter 48. The Committee believes that the inclusion of a long arm statute tailored specifically to trust matters is a beneficial addition to Florida law."[455]

Even assuming, for the sake of argument, that the provisions of the Florida Long Arm Statute have been satisfied,[456] federal due process requirements cannot be minimized. The U.S. Supreme Court has "noted

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[454] The report points to s. 736.602, F.S., however s. 736.0602, F.S. pertains to revocation or amendment of revocable trusts, therefore it would seem that the reference to s. 736.602, F.S. is merely a scrivener's error and it will be considered as such.
[455] Committee's Scrivener's Summary, page 12.
[456] Section 48.193, F.S. provides:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:
(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.
(b) Committing a tortious act within this state.
(c) Owning, using, possessing, or holding a mortgage or other lien on any real property within this state.
(d) Contracting to insure any person, property, or risk located within this state at the time of contracting.
(e) With respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintaining a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.
(f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:
1. The defendant was engaged in solicitation or service activities within this state; or
2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.
(g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this

several reasons why a forum legitimately may exercise personal jurisdiction over a nonresident who 'purposefully directs' his activities toward forum residents. A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors."[457]

Nevertheless, the U.S. Supreme Court maintains that the "constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum."[458] The Court will look to the individuals "conduct and connection with the forum State" to determine if that person "should reasonably anticipate being haled into court there."[459] In seeking to make this determination, the court will attempt to determine if an individual has purposefully availed himself or herself of the "privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[460]

"This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person. Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State."[461]

Furthermore, in determining whether due process requirements are met, the Florida Supreme Court has set forth a "twofold constitutional inquiry: (1) whether the acts or the nonresident defendant give rise to sufficient 'minimum contacts' with the forum such that (2) maintaining a suit there 'does not offend traditional notions of fair play and substantial justice.'"[462] Factors to consider in whether minimum contacts have been established include "whether sufficient minimum contacts exist including the foreseeability that the defendant's conduct will result in suit in the forum state and the defendant's purposeful availment of the forum's privileges and protections."[463] In other words, even though an individual may appear to fall within the reach of the long arm statute, personal jurisdiction over that nonresident may run afoul of the due process requirements of the U.S. Constitution unless minimum contacts with Florida can be established.

Section 736.0202, F.S., which authorizes personal jurisdiction over an out of state resident solely upon the receipt of a distribution from a trust located in Florida, may perhaps be challenged by a nonresident whose only contact with Florida was cashing a check received in the mail.

Formalities for Creation of a Trust:

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state.
(h) With respect to a proceeding for paternity, engaging in the act of sexual intercourse within this state with respect to which a child may have been conceived.
(2) A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.
(3) Service of process upon any person who is subject to the jurisdiction of the courts of this state as provided in this section may be made by personally serving the process upon the defendant outside this state, as provided in s. 48.194. The service shall have the same effect as if it had been personally served within this state.
(4) If a defendant in his or her pleadings demands affirmative relief on causes of action unrelated to the transaction forming the basis of the plaintiff's claim, the defendant shall thereafter in that action be subject to the jurisdiction of the court for any cause of action, regardless of its basis, which the plaintiff may by amendment assert against the defendant.
(5) Nothing contained in this section limits or affects the right to serve any process in any other manner now or hereinafter provided by law.

[457] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985)(citations omitted).
[458] *Rudzewicz*, 471 U.S. 474-75 (citations omitted).
[459] *Id.*
[460] *Id.*
[461] *Rudzewicz*, 471 U.S. at 475-76. (emphasis in original)(citations omitted).
[462] *Georgia Insurers Insolvency Pool v. Brewer*, 602 So. 2d 1264, 1268 (Fla. 1992)(citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).
[463] *Id.* (citing *Rudzewicz*, 471 U.S. 462 (1985).

Section 736.0403(2)(b) provides: "The testamentary aspects of a revocable trust, executed by a settlor who is a domiciliary of this state at the time of execution, are invalid unless the trust instrument is executed by the settlor with the formalities required for the execution of a will in this state. For the purpose of this subsection, the term 'testamentary aspects' means those provisions of the trust instrument that dispose of the trust property on or after the death of the settlor other than to the settlor's estate."

The Committee's Scrivener's Report provides the following analysis of this section:[464]

> A failure to comply with the requirements of section 736.0403(2)(b) does not result in the initial invalidity of a revocable trust. Rather, only the testamentary aspects of the trust are void. As under existing law, testamentary aspects means "those provisions of the trust that dispose of the trust property on or after the settlor's death other to the settlor's estate."
>
> The formalities required are those for a will in Florida. Complying with the formalities for a will in some other state is not enough.
>
> Section 736.0403(2)(b) has no applicability to trusts created by non Florida domiciliaries whether or not the trust was executed in Florida.
>
> Conversely, section 736.0403(2)(b) does not contain an "out" for trusts executed in other states. The section applies to revocable trusts created by Florida domiciliaries regardless of the place of execution and regardless of the location of the property held in the trust.

Section 736.0403(2)(b), F.S. may invalidate testamentary aspects of a trust created by a Florida domiciliary in another state regardless of whether the corpus of the trust is outside of Florida. By way of example the above language would seem to preclude a Floridian from executing a trust in New York with testamentary aspects which seeks to solely dispose of property located in New York unless New York has identical to formalities to Florida required for the execution of a will. Such a result may create a potential conflict of laws problem.

B. RULEMAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The Florida Bankers Association supports the bill and advises[465] that it contains provisions that

> would allow professional trustees more investment options for their customers by removing strict prohibitions on sophisticated investment products offered by or through the trustee or an affiliate. Professional trustees already enjoy this freedom on mutual funds, common trust funds and money market funds. This legislation would expand the authority to investments that are customarily seen only in large trusts.... We believe that the bill may also reduce customer fees.... Currently, Delaware, Ohio and Illinois have such provisions in their laws... The [CS] would help keep Florida competitive in the trust industry.

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[464] Committee Report, pages 19-20.

[465] Correspondence from C. Scott Jenkins, Vice President of Governmental Affairs, dated February 8, 2006, on file with the Committee on Elder & Long-Term Care.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 11, 2005, the Civil Justice Committee adopted an amendment removing everything after the enacting clause. The amendment modified the bill in the following manner:

- Changed the presumption on an unproductive trust to that of current law ($50,000);
- Removed the definition of "person" from the bill;
- Modified the governing law provisions of s. 736.0107, F.S. to provide that in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction where the settlor resides at the time the trust is created controls. Moreover, a designation in the terms of the trust is not controlling as to any matter for which the designation would be contrary to a strong public policy of Florida;
- Removed "the interest of the beneficiaries" from consideration of a trustees' duty where to administer the trust;
- Authorized a trustee to invest in investment instruments that are controlled by the trustee or its affiliate or from which the trustee or affiliate receives compensation, provides for notice of this to beneficiaries, and establishes a method by which a beneficiary may file an objection with the trustee;
- Created s. 518.117, F.S., authorizing a fiduciary to invest fiduciary funds pursuant to s. 660.417, F.S.; so long as the investment complies with among other things Florida's Prudent Investor Rule. This rule provides that a fiduciary has the responsibility to invest assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust.[466] In seeking to satisfy this standard, the trustee must exercise reasonable care and caution;
- Amended s. 660.417, F.S., regarding investments by fiduciaries, to add that a bank or trust company is not precluded from investing in investment instruments offered by that bank or trust company; and

The bill was then reported favorably with a Committee Substitute.

This analysis is drawn to the Committee Substitute.

On March 9, 2006, the Economic Development, Trade and Banking Committee adopted 6 technical amendments and 4 substantive amendments that provide as follows:

- Corrects a duplicate reference to "custodian";
- Corrects a typographical error ("of" to "or");
- Corrects a drafting error in s. 736.0403(3), F.S., as the subsection relates only to subparagraph (b) and not to the entire section. This conforms to existing law;
- Corrects a drafting error in s. 736.0403(4), F.S., as the subsection relates only to subparagraph (b) and not to the entire section. This conforms to existing law;
- Corrects a statutory cross reference;
- Amends the provisions of the bill to be more consistent with current Florida law found in s. 737.402(4), F.S.;
- Provides that the discretionary power of a trustee to pay the tax liabilities of the settlor that are generated by the trust assets does not subject the trust to claims of the creditors of the settlor. This change addresses the tax glitch created by an IRS ruling dealing with grantor retained annuity trusts;
- Requires the trustee to disclose to the beneficiaries, in addition to compensation, the nature of any services performed for an investment fund by an affiliate of the trustee if the trustee or its affiliate earns any compensation from the fund;

[466] Section 518.11(1)(a), F.S.

- Extends the opt out to those beneficiaries in which the grantor has not made a specific decision in the trust document about whether investments in proprietary products is permissible; and
- Provides that if a trustee chooses not to initiate the affiliated investment opt out procedure and elects not to invest trust funds in affiliated investments as provided in the subsection, the law protects the trustee from liability for making that decision.

CHAMBER ACTION

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1 The Economic Development, Trade & Banking Committee recommends
2 the following:
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4 **Council/Committee Substitute**
5 Remove the entire bill and insert:
6 A bill to be entitled
7 An act relating to the Florida Trust Code; creating parts
8 I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, and XIII
9 of chapter 736, F.S.; providing a short title; providing
10 general provisions and definitions; providing for judicial
11 proceedings; providing for representations; providing for
12 creation, validity, modification, and termination of
13 trusts; providing for creditors' claims; providing for
14 spendthrift, discretionary, and revocable trusts;
15 providing for the office of trustee; providing for powers
16 and duties of the trustee; providing for trust
17 investments; providing for liability of trustee and rights
18 of persons dealing with trustee; providing for rules of
19 construction; providing for charitable trusts; providing
20 miscellaneous provisions; creating s. 518.117, F.S.;
21 authorizing investment of certain fiduciary funds by
22 certain fiduciaries; amending s. 660.25, F.S.; providing a
23 definition of the term "investment instrument"; amending

24 s. 660.417, F.S.; revising provisions relating to
25 investment of fiduciary funds in investment instruments by
26 certain banks or trust companies; creating s. 689.175,
27 F.S.; abolishing the worthier title doctrine; providing
28 construction of certain instrument language; amending s.
29 731.103, F.S.; correcting a cross-reference; providing
30 construction relating to establishment of death by certain
31 evidence under certain circumstances; creating s.
32 731.1035, F.S.; providing for application of rules of
33 evidence in civil actions to certain proceedings; amending
34 s. 731.201, F.S.; revising definitions; conforming terms
35 and correcting cross-references; amending s. 731.303,
36 F.S.; specifying nonapplication of certain orders relating
37 to powers of revocation and powers of appointment;
38 revising provisions relating to representation by a holder
39 of a power of appointment; amending s. 732.513, F.S.;
40 deleting a ground protecting a devise's validity; amending
41 s. 732.603, F.S.; revising provisions relating to
42 antilapse, deceased devisees, and class gifts; amending s.
43 744.331, F.S.; revising provisions relating to orders
44 determining incapacity; amending s. 744.441, F.S.;
45 revising authority of certain guardians to prosecute or
46 defend claims or proceedings for certain purposes;
47 specifying duties of a court; creating s. 744.462, F.S.;
48 providing requirements for judicial determinations
49 relating to alternatives to guardianship; providing duties
50 of a court; amending ss. 497.458, 607.0802, 617.0802,
51 660.46, 660.418, 689.071, 689.075, 709.08, 721.08, 721.53,

52 732.2075, 732.604, 732.611, 733.212, 733.602, 733.805,
53 733.817, 738.104, 738.1041, 738.202, 739.102, and 744.361,
54 F.S., to conform terms and correct cross-references;
55 repealing ss. 737.101, 737.105, 737.106, 737.111, 737.115,
56 and 737.116, constituting part I of ch. 737, F.S.,
57 relating to trust registration; repealing ss. 737.201,
58 737.202, 737.203, 737.2035, 737.204, 737.2041, 737.205,
59 737.206, 737.2065, 737.207, 737.208, and 737.209,
60 constituting part II of ch. 737, F.S., relating to
61 jurisdiction of courts; repealing ss. 737.301, 737.302,
62 737.303, 737.3035, 737.304, 737.305, 737.3053, 737.3054,
63 737.3055, 737.306, 737.3061, 737.307, 737.308, and
64 737.309, constituting part III of ch. 737, F.S., relating
65 to duties and liabilities of trustees; repealing ss.
66 737.401, 737.402, 737.4025, 737.403, 737.4031, 737.4032,
67 737.4033, 737.404, 737.405, and 737.406, constituting part
68 IV of ch. 737, F.S., relating to powers of trustees;
69 repealing ss. 737.501, 737.502, 737.503, 737.504, 737.505,
70 737.506, 737.507, 737.508, 737.509, 737.510, 737.511, and
71 737.512, constituting part V of ch. 737, F.S., relating to
72 charitable trusts; repealing ss. 737.6035, 737.621,
73 737.622, 737.623, 737.624, 737.625, 737.626, and 737.627,
74 consisting of part VI of ch. 737, F.S., relating to rules
75 of construction of trust administration; providing an
76 effective date.
77
78 Be It Enacted by the Legislature of the State of Florida:
79

80 Section 1. Part I of chapter 736, Florida Statutes,
81 consisting of sections 736.0101, 736.0102, 736.0103, 736.0104,
82 736.0105, 736.0106, 736.0107, 736.0108, 736.0109, 736.0110,
83 736.0111, and 736.0112, is created to read:
84
85 PART I
86 GENERAL PROVISIONS AND DEFINITIONS
87
88 736.0101 Short title.--This chapter may be cited as the
89 "Florida Trust Code" and for purposes of this chapter is
90 referred to as the "code."
91 736.0102 Scope.--This code applies to express trusts,
92 charitable or noncharitable, and trusts created pursuant to a
93 law, judgment, or decree that requires the trust to be
94 administered in the manner of an express trust. This code does
95 not apply to constructive or resulting trusts; conservatorships;
96 custodial arrangements pursuant to the Florida Uniform Transfers
97 to Minors Act; business trusts providing for certificates to be
98 issued to beneficiaries; common trust funds; land trusts under
99 s. 689.05; trusts created by the form of the account or by the
100 deposit agreement at a financial institution; voting trusts;
101 security arrangements; liquidation trusts; trusts for the
102 primary purpose of paying debts, dividends, interest, salaries,
103 wages, profits, pensions, or employee benefits of any kind; and
104 any arrangement under which a person is nominee or escrowee for
105 another.
106 736.0103 Definitions.--Unless the context otherwise
107 requires, in this code:

108 (1) "Action," with respect to an act of a trustee,
109 includes a failure to act.
110 (2) "Affiliate" means any person or entity that directly
111 or indirectly through one or more intermediaries owns or
112 controls, is owned or controlled by, or is under common control
113 or ownership with, the fiduciary. An affiliate may include, but
114 is not limited to, an investment adviser, administrator, broker,
115 custodian, transfer agent, placement agent, servicing agent,
116 registrar, underwriter, sponsor, distributor, or manager.
117 (3) "Ascertainable standard" means a standard relating to
118 an individual's health, education, support, or maintenance
119 within the meaning of s. 2041(b)(1)(A) or s. 2514(c)(1) of the
120 Internal Revenue Code of 1986, as amended.
121 (4) "Beneficiary" means a person who:
122 (a) Has a present or future beneficial interest in a
123 trust, vested or contingent; or
124 (b) Holds a power of appointment over trust property in a
125 capacity other than that of trustee.
126 (5) "Charitable trust" means a trust, or portion of a
127 trust, created for a charitable purpose as described in s.
128 736.0405(1).
129 (6) "Environmental law" means a federal, state, or local
130 law, rule, regulation, or ordinance that relates to protection
131 of the environment or human health.
132 (7) "General power of appointment" means a power of
133 appointment exercisable in favor of the holder of the power, the
134 power holder's creditors, the power holder's estate, or the
135 creditors of the power holder's estate.

136 (8) "Guardian of the person" means a person appointed by
137 the court to make decisions regarding the support, care,
138 education, health, and welfare of a minor or an incapacitated
139 adult. The term does not include a guardian ad litem.
140 (9) "Guardian of the property" means a person appointed by
141 the court to administer the estate of a minor or incapacitated
142 adult.
143 (10) "Interests of the beneficiaries" means the beneficial
144 interests provided in the terms of the trust.
145 (11) "Jurisdiction" with respect to a geographic area,
146 includes a state or country.
147 (12) "Power of withdrawal" means a presently exercisable
148 general power of appointment other than a power:
149 (a) Exercisable by a trustee and limited by an
150 ascertainable standard; or
151 (b) Exercisable by another person only upon consent of the
152 trustee or a person holding an adverse interest.
153 (13) "Property" means anything that may be the subject of
154 ownership, real or personal, legal or equitable, or any interest
155 therein.
156 (14) "Qualified beneficiary" means a living beneficiary
157 who, on the date the beneficiary's qualification is determined:
158 (a) Is a distributee or permissible distributee of trust
159 income or principal;
160 (b) Would be a distributee or permissible distributee of
161 trust income or principal if the interests of the distributees
162 described in paragraph (a) terminated on that date without
163 causing the trust to terminate; or

164 (c) Would be a distributee or permissible distributee of
165 trust income or principal if the trust terminated in accordance
166 with its terms on that date.
167 (15) "Revocable," as applied to a trust, means revocable
168 by the settlor without the consent of the trustee or a person
169 holding an adverse interest.
170 (16) "Settlor" means a person, including a testator, who
171 creates or contributes property to a trust. If more than one
172 person creates or contributes property to a trust, each person
173 is a settlor of the portion of the trust property attributable
174 to that person's contribution except to the extent another
175 person has the power to revoke or withdraw that portion.
176 (17) "Spendthrift provision" means a term of a trust that
177 restrains both voluntary and involuntary transfer of a
178 beneficiary's interest.
179 (18) "State" means any state of the United States and
180 includes the District of Columbia, the Commonwealth of Puerto
181 Rico, and any territory or possession subject to the legislative
182 authority of the United States.
183 (19) "Terms of a trust" means the manifestation of the
184 settlor's intent regarding a trust's provisions as expressed in
185 the trust instrument or as may be established by other evidence
186 that would be admissible in a judicial proceeding.
187 (20) "Trust instrument" means an instrument executed by a
188 settlor that contains terms of the trust, including any
189 amendments to the trust.
190 (21) "Trustee" means the original trustee and includes any
191 additional trustee, any successor trustee, and any cotrustee.

192 736.0104 Knowledge.--
193 (1) Subject to subsection (2), a person has knowledge of a
194 fact if the person:
195 (a) Has actual knowledge of the fact;
196 (b) Has received a notice or notification of the fact; or
197 (c) Has reason to know the fact from all the other facts
198 and circumstances known to the person at the time in question.
199 (2) An organization that conducts activities through
200 employees has notice or knowledge of a fact involving a trust
201 only from the time the information was received by an employee
202 having responsibility to act on matters involving the trust, or
203 would have been brought to the employee's attention if the
204 organization had exercised reasonable diligence. An organization
205 exercises reasonable diligence if the organization maintains
206 reasonable routines for communicating significant information to
207 the employee having responsibility to act on matters involving
208 the trust and there is reasonable compliance with the routines.
209 Reasonable diligence does not require an employee of the
210 organization to communicate information unless the communication
211 is part of the individual's regular duties or the individual
212 knows a matter involving the trust would be materially affected
213 by the information.
214 736.0105 Default and mandatory rules.--
215 (1) Except as otherwise provided in the terms of the
216 trust, this code governs the duties and powers of a trustee,
217 relations among trustees, and the rights and interests of a
218 beneficiary.

219 (2) The terms of a trust prevail over any provision of
220 this code except:
221 (a) The requirements for creating a trust.
222 (b) The duty of the trustee to act in good faith and in
223 accordance with the terms and purposes of the trust and the
224 interests of the beneficiaries.
225 (c) The requirement that a trust and its terms be for the
226 benefit of the trust's beneficiaries, and that the trust have a
227 purpose that is lawful, not contrary to public policy, and
228 possible to achieve.
229 (d) The periods of limitation for commencing a judicial
230 proceeding.
231 (e) The power of the court to take such action and
232 exercise such jurisdiction as may be necessary in the interests
233 of justice.
234 (f) The requirements under s. 736.0108(1) for the
235 designation of a principal place of administration of the trust.
236 (g) The jurisdiction and venue provisions in ss. 736.0202,
237 736.0203, and 736.0204.
238 (h) The restrictions on the designation of representative
239 under s. 736.0306.
240 (i) The formalities required under s. 736.0403(2) for the
241 execution of a trust.
242 (j) The power of the court to modify or terminate a trust
243 under ss. 736.0410-736.04115, except as provided in s.
244 736.04115(3)(b), and under ss. 736.0413, 736.0415, and 736.0416.
245 (k) The ability to modify a trust under s. 736.0412,
246 except as provided in s. 736.0412(4)(b).

247 (l) The effect of a spendthrift provision and the rights
248 of certain creditors and assignees to reach a trust as provided
249 in part V.
250 (m) The trustee's duty under s. 736.05053 to pay expenses
251 and obligations of the settlor's estate.
252 (n) The trustee's duty under s. 736.05055 to file a notice
253 of trust at the settlor's death.
254 (o) The right of a trustee under s. 736.0701 to decline a
255 trusteeship and the right of a trustee under s. 736.0705 to
256 resign a trusteeship.
257 (p) The power of the court under s. 736.0702 to require,
258 dispense with, modify, or terminate a bond.
259 (q) The power of the court under s. 736.0708(2) to adjust
260 a trustee's compensation specified in the terms of the trust
261 that is unreasonably low or high.
262 (r) The duty under s. 736.0813(1)(a) and (b) to notify
263 qualified beneficiaries of an irrevocable trust of the existence
264 of the trust, of the identity of the trustee, and of their
265 rights to trust accountings.
266 (s) The duty under s. 736.0813(1)(c) and (d) to provide a
267 complete copy of the trust instrument and to account to
268 qualified beneficiaries.
269 (t) The duty under s. 736.0813(1)(e) to respond to the
270 request of a qualified beneficiary of an irrevocable trust for
271 relevant information about the assets and liabilities of the
272 trust and the particulars relating to trust administration.
273 (u) The effect of an exculpatory term under s. 736.1011.

274 (v) The rights under ss. 736.1013-736.1017 of a person
275 other than a trustee or beneficiary.
276 (w) The effect of a penalty clause for contesting a trust
277 under s. 736.1108.
278 736.0106 Common law of trusts; principles of equity.--The
279 common law of trusts and principles of equity supplement this
280 code, except to the extent modified by this code or another law
281 of this state.
282 736.0107 Governing law.--The meaning and effect of the
283 terms of a trust are determined by:
284 (1) The law of the jurisdiction designated in the terms of
285 the trust, provided there is a sufficient nexus to the
286 designated jurisdiction at the time of the creation of the trust
287 or during the trust administration, including, but not limited
288 to, the location of real property held by the trust or the
289 residence or location of an office of the settlor, trustee, or
290 any beneficiary; or
291 (2) In the absence of a controlling designation in the
292 terms of the trust, the law of the jurisdiction where the
293 settlor resides at the time the trust is first created.
294
295 Notwithstanding subsection (1) or subsection (2), a designation
296 in the terms of a trust is not controlling as to any matter for
297 which the designation would be contrary to a strong public
298 policy of this state.
299 736.0108 Principal place of administration.--
300 (1) Terms of a trust designating the principal place of
301 administration of the trust are valid only if there is a

302 sufficient connection with the designated jurisdiction. Without
303 precluding other means for establishing a sufficient connection,
304 terms of a trust designating the principal place of
305 administration are valid and controlling if:
306 (a) A trustee's principal place of business is located in
307 or a trustee is a resident of the designated jurisdiction; or
308 (b) All or part of the administration occurs in the
309 designated jurisdiction.
310 (2) Unless otherwise validly designated in the trust
311 instrument, the principal place of administration of a trust is
312 the trustee's usual place of business where the records
313 pertaining to the trust are kept or, if the trustee has no place
314 of business, the trustee's residence. In the case of cotrustees,
315 the principal place of administration is:
316 (a) The usual place of business of the corporate trustee,
317 if there is only one corporate cotrustee;
318 (b) The usual place of business or residence of the
319 individual trustee who is a professional fiduciary, if there is
320 only one such person and no corporate cotrustee; or otherwise
321 (c) The usual place of business or residence of any of the
322 cotrustees as agreed on by the cotrustees.
323 (3) Notwithstanding any other provision of this section,
324 the principal place of administration of a trust, for which a
325 bank, association, or trust company organized under the laws of
326 this state or bank or savings association organized under the
327 laws of the United States with its main office in this state has
328 been appointed trustee, shall not be moved or otherwise affected
329 solely because the trustee engaged in an interstate merger

330 transaction with an out-of-state bank pursuant to s. 658.2953 in
331 which the out-of-state bank is the resulting bank.
332 (4) A trustee is under a continuing duty to administer the
333 trust at a place appropriate to its purposes and its
334 administration.
335 (5) Without precluding the right of the court to order,
336 approve, or disapprove a transfer, the trustee, in furtherance
337 of the duty prescribed by subsection (4), may transfer the
338 trust's principal place of administration to another state or to
339 a jurisdiction outside of the United States.
340 (6) The trustee shall notify the qualified beneficiaries
341 of a proposed transfer of a trust's principal place of
342 administration not less than 60 days before initiating the
343 transfer. The notice of proposed transfer must include:
344 (a) The name of the jurisdiction to which the principal
345 place of administration is to be transferred.
346 (b) The address and telephone number at the new location
347 at which the trustee can be contacted.
348 (c) An explanation of the reasons for the proposed
349 transfer.
350 (d) The date on which the proposed transfer is anticipated
351 to occur.
352 (e) The date, not less than 60 days after the notice is
353 provided, by which the qualified beneficiary must notify the
354 trustee of an objection to the proposed transfer.
355 (7) The authority of a trustee to act under this section
356 without court approval to transfer a trust's principal place of
357 administration is suspended if a qualified beneficiary files a

358 lawsuit objecting to the proposed transfer on or before the date
359 specified in the notice. The suspension is effective until the
360 lawsuit is dismissed or withdrawn.
361 (8) In connection with a transfer of the trust's principal
362 place of administration, the trustee may transfer any of the
363 trust property to a successor trustee designated in the terms of
364 the trust or appointed pursuant to s. 736.0704.
365 736.0109 Methods and waiver of notice.--
366 (1) Notice to a person under this code or the sending of a
367 document to a person under this code must be accomplished in a
368 manner reasonably suitable under the circumstances and likely to
369 result in receipt of the notice or document. Permissible methods
370 of notice or for sending a document include first-class mail,
371 personal delivery, delivery to the person's last known place of
372 residence or place of business, or a properly directed facsimile
373 or other electronic message.
374 (2) Notice otherwise required under this code or a
375 document otherwise required to be sent under this code need not
376 be provided to a person whose identity or location is unknown to
377 and not reasonably ascertainable by the trustee.
378 (3) Notice under this code or the sending of a document
379 under this code may be waived by the person to be notified or to
380 whom the document is to be sent.
381 (4) Notice of a judicial proceeding must be given as
382 provided in the Florida Rules of Civil Procedure.
383 736.0110 Others treated as qualified beneficiaries.--
384 (1) A charitable organization expressly designated to
385 receive distributions under the terms of a charitable trust has

386 the rights of a qualified beneficiary under this code if the
387 charitable organization, on the date the charitable
388 organization's qualification is being determined:
389 (a) Is a distributee or permissible distributee of trust
390 income or principal;
391 (b) Would be a distributee or permissible distributee of
392 trust income or principal on termination of the interests of
393 other distributees or permissible distributees then receiving or
394 eligible to receive distributions; or
395 (c) Would be a distributee or permissible distributee of
396 trust income or principal if the trust terminated on that date.
397 (2) A person appointed to enforce a trust created for the
398 care of an animal or another noncharitable purpose as provided
399 in s. 736.0408 or s. 736.0409 has the rights of a qualified
400 beneficiary under this code.
401 (3) The Attorney General may assert the rights of a
402 qualified beneficiary with respect to a charitable trust having
403 its principal place of administration in this state.
404 736.0111 Nonjudicial settlement agreements.--
405 (1) For purposes of this section, the term "interested
406 persons" means persons whose interest would be affected by a
407 settlement agreement.
408 (2) Except as otherwise provided in subsection (3),
409 interested persons may enter into a binding nonjudicial
410 settlement agreement with respect to any matter involving a
411 trust.
412 (3) A nonjudicial settlement agreement among the trustee
413 and trust beneficiaries is valid only to the extent the terms

414 and conditions could be properly approved by the court. A
415 nonjudicial settlement may not be used to produce a result not
416 authorized by other provisions of this code, including, but not
417 limited to, terminating or modifying a trust in an impermissible
418 manner.
419 (4) Matters that may be resolved by a nonjudicial
420 settlement agreement include:
421 (a) The interpretation or construction of the terms of the
422 trust.
423 (b) The approval of a trustee's report or accounting.
424 (c) The direction to a trustee to refrain from performing
425 a particular act or the grant to a trustee of any necessary or
426 desirable power.
427 (d) The resignation or appointment of a trustee and the
428 determination of a trustee's compensation.
429 (e) The transfer of a trust's principal place of
430 administration.
431 (f) The liability of a trustee for an action relating to
432 the trust.
433 (5) Any interested person may request the court to approve
434 or disapprove a nonjudicial settlement agreement.
435 736.0112 Qualification of foreign trustee.--Unless
436 otherwise doing business in this state, local qualification by a
437 foreign trustee is not required for the trustee to receive
438 distribution from a local estate. Nothing in this chapter shall
439 affect the provisions of s. 660.41.

440 Section 2. Part II of chapter 736, Florida Statutes,
441 consisting of sections 736.0201, 736.0202, 736.0203, 736.0204,
442 736.0205, 736.0206, and 736.0207, is created to read:
443
444 PART II
445 JUDICIAL PROCEEDINGS
446
447 736.0201 Role of court in trust proceedings.--
448 (1) Except as provided in subsection (5) and s. 736.0206,
449 proceedings concerning trusts shall be commenced by filing a
450 complaint and shall be governed by the Florida Rules of Civil
451 Procedure.
452 (2) The court may intervene in the administration of a
453 trust to the extent the court's jurisdiction is invoked by an
454 interested person or as provided by law.
455 (3) A trust is not subject to continuing judicial
456 supervision unless ordered by the court.
457 (4) A judicial proceeding involving a trust may relate to
458 the validity, administration, or distribution of a trust,
459 including proceedings to:
460 (a) Determine the validity of all or part of a trust;
461 (b) Appoint or remove a trustee;
462 (c) Review trustees' fees;
463 (d) Review and settle interim or final accounts;
464 (e) Ascertain beneficiaries; determine any question
465 arising in the administration or distribution of any trust,
466 including questions of construction of trust instruments;

467 instruct trustees; and determine the existence or nonexistence
468 of any immunity, power, privilege, duty, or right;
469 (f) Obtain a declaration of rights; or
470 (g) Determine any other matters involving trustees and
471 beneficiaries.
472 (5) A proceeding for the construction of a testamentary
473 trust may be filed in the probate proceeding for the testator's
474 estate. The proceeding shall be governed by the Florida Probate
475 Rules.
476 736.0202 Jurisdiction over trustee and beneficiary.--
477 (1) By accepting the trusteeship of a trust having its
478 principal place of administration in this state or by moving the
479 principal place of administration to this state, the trustee
480 submits personally to the jurisdiction of the courts of this
481 state regarding any matter involving the trust.
482 (2) With respect to their interests in the trust, the
483 beneficiaries of a trust having its principal place of
484 administration in this state are subject to the jurisdiction of
485 the courts of this state regarding any matter involving the
486 trust. By accepting a distribution from such a trust, the
487 recipient submits personally to the jurisdiction of the courts
488 of this state regarding any matter involving the distribution.
489 (3) This section does not preclude other methods of
490 obtaining jurisdiction over a trustee, beneficiary, or other
491 person receiving property from the trust.
492 736.0203 Subject-matter jurisdiction.--The circuit court
493 has original jurisdiction in this state of all proceedings
494 arising under this code.

495 736.0204 Venue.--Venue for actions and proceedings
496 concerning trusts, including those under s. 736.0201, may be
497 laid in:
498 (1) Any county where the venue is proper under chapter 47;
499 (2) Any county where the beneficiary suing or being sued
500 resides or has its principal place of business; or
501 (3) The county where the trust has its principal place of
502 administration.
503 736.0205 Trust proceedings; dismissal of matters relating
504 to foreign trusts.--Over the objection of a party, the court
505 shall not entertain proceedings under s. 736.0201 for a trust
506 registered, or having its principal place of administration, in
507 another state unless all interested parties could not be bound
508 by litigation in the courts of the state where the trust is
509 registered or has its principal place of administration. The
510 court may condition a stay or dismissal of a proceeding under
511 this section on the consent of any party to jurisdiction of the
512 state where the trust is registered or has its principal place
513 of business, or the court may grant a continuance or enter any
514 other appropriate order.
515 736.0206 Proceedings for review of employment of agents
516 and review of compensation of trustee and employees of trust.--
517 (1) After notice to all interested persons, the court may
518 review the propriety of the employment by a trustee of any
519 person, including any attorney, auditor, investment adviser, or
520 other specialized agent or assistant, and the reasonableness of
521 any compensation paid to that person or to the trustee.

522 (2) If the settlor's estate is being probated, and the
523 settlor's trust or the trustee of the settlor's trust is a
524 beneficiary under the settlor's will, the trustee, any person
525 employed by the trustee, or any interested person may have the
526 propriety of employment and the reasonableness of the
527 compensation of the trustee or any person employed by the
528 trustee determined in the probate proceeding.
529 (3) The burden of proof of the propriety of the employment
530 and the reasonableness of the compensation shall be on the
531 trustee and the person employed by the trustee. Any person who
532 is determined to have received excessive compensation from a
533 trust for services rendered may be ordered to make appropriate
534 refunds.
535 (4) Court proceedings to determine reasonable compensation
536 of a trustee or any person employed by a trustee, if required,
537 are a part of the trust administration process. The costs,
538 including attorney's fees, of the person assuming the burden of
539 proof of propriety of the employment and reasonableness of the
540 compensation shall be determined by the court and paid from the
541 assets of the trust unless the court finds the compensation paid
542 or requested to be substantially unreasonable. The court shall
543 direct from which part of the trust assets the compensation
544 shall be paid.
545 (5) The court may determine reasonable compensation for a
546 trustee or any person employed by a trustee without receiving
547 expert testimony. Any party may offer expert testimony after
548 notice to interested persons. If expert testimony is offered, a
549 reasonable expert witness fee shall be awarded by the court and

550 paid from the assets of the trust. The court shall direct from
551 which part of the trust assets the fee shall be paid.
552 (6) Persons given notice as provided in this section shall
553 be bound by all orders entered on the complaint.
554 (7) In a proceeding pursuant to subsection (2), the
555 petitioner may serve formal notice as provided in the Florida
556 Probate Rules, and such notice shall be sufficient for the court
557 to acquire jurisdiction over the person receiving the notice to
558 the extent of the person's interest in the trust.
559 736.0207 Trust contests.--An action to contest the
560 validity of all or part of a trust may not be commenced until
561 the trust becomes irrevocable, except this section does not
562 prohibit such action by the guardian of the property of an
563 incapacitated settlor.
564 Section 3. Part III of chapter 736, Florida Statutes,
565 consisting of sections 736.0301, 736.0302, 736.0303, 736.0304,
566 736.0305, and 736.0306, is created to read:
567
568 PART III
569 REPRESENTATION
570
571 736.0301 Representation; basic effect.--
572 (1) Notice, information, accountings, or reports given to
573 a person who may represent and bind another person under this
574 part may serve as a substitute for and have the same effect as
575 notice, information, accountings, or reports given directly to
576 the other person.

577 (2) Actions taken by a person who represents the interests
578 of another person under this part are binding on the person
579 whose interests are represented to the same extent as if the
580 actions had been taken by the person whose interests are
581 represented.
582 (3) Except as otherwise provided in s. 736.0602, a person
583 under this part who represents a settlor lacking capacity may
584 receive notice and give a binding consent on the settlor's
585 behalf.
586 (4) A trustee is not liable for giving notice,
587 information, accountings, or reports to a beneficiary who is
588 represented by another person under this part and nothing in
589 this part prohibits the trustee from giving notice, information,
590 accountings, or reports to the person represented.
591 736.0302 Representation by holder of power of
592 appointment.--
593 (1) The holder of a power of appointment may represent and
594 bind persons whose interests, as permissible appointees, takers
595 in default, or otherwise, are subject to the power.
596 (2) Subsection (1) does not apply to:
597 (a) Any matter determined by the court to involve fraud or
598 bad faith by the trustee;
599 (b) A power of a trustee to distribute trust property; or
600 (c) A power of appointment held by a person while the
601 person is the sole trustee.
602 736.0303 Representation by fiduciaries and parents.--To
603 the extent there is no conflict of interest between the

604 representative and the person represented or among those being
605 represented with respect to a particular question or dispute:
606 (1) A guardian of the property may represent and bind the
607 estate that the guardian of the property controls.
608 (2) An agent having authority to act with respect to the
609 particular question or dispute may represent and bind the
610 principal.
611 (3) A trustee may represent and bind the beneficiaries of
612 the trust.
613 (4) A personal representative of a decedent's estate may
614 represent and bind persons interested in the estate.
615 (5) A parent may represent and bind the parent's unborn
616 child, or the parent's minor child if a guardian of the property
617 for the minor child has not been appointed.
618 736.0304 Representation by person having substantially
619 identical interest.--Unless otherwise represented, a minor,
620 incapacitated, or unborn individual, or a person whose identity
621 or location is unknown and not reasonably ascertainable, may be
622 represented by and bound by another person having a
623 substantially identical interest with respect to the particular
624 question or dispute, but only to the extent there is no conflict
625 of interest between the representative and the person
626 represented.
627 736.0305 Appointment of representative.--
628 (1) If the court determines that an interest is not
629 represented under this part, or that the otherwise available
630 representation might be inadequate, the court may appoint a
631 representative to receive notice, give consent, and otherwise

632 represent, bind, and act on behalf of a minor, incapacitated, or
633 unborn individual, or a person whose identity or location is
634 unknown. If not precluded by a conflict of interest, a
635 representative may be appointed to represent several persons or
636 interests.
637 (2) A representative may act on behalf of the individual
638 represented with respect to any matter arising under this code,
639 whether or not a judicial proceeding concerning the trust is
640 pending.
641 (3) In making decisions, a representative may consider
642 general benefits accruing to the living members of the
643 represented individual's family.
644 736.0306 Designated representative.--
645 (1) If authorized in the trust instrument, one or more
646 persons may be designated to represent and bind a beneficiary
647 and receive any notice, information, accounting, or report.
648 (2) Except as otherwise provided in this code, a person
649 designated, as provided in subsection (1) may not represent and
650 bind a beneficiary while that person is serving as trustee.
651 (3) Except as otherwise provided in this code, a person
652 designated, as provided in subsection (1) may not represent and
653 bind another beneficiary if the person designated also is a
654 beneficiary, unless:
655 (a) That person was named by the settlor; or
656 (b) That person is the beneficiary's spouse or a
657 grandparent or descendant of a grandparent of the beneficiary or
658 the beneficiary's spouse.

659 (4) No person designated, as provided in subsection (1) is
660 liable to the beneficiary whose interests are represented, or to
661 anyone claiming through that beneficiary, for any actions or
662 omissions to act made in good faith.
663 Section 4. Part IV of chapter 736, Florida Statutes,
664 consisting of sections 736.0401, 736.0402, 736.0403, 736.0404,
665 736.0405, 736.0406, 736.0407, 736.0408, 736.0409, 736.0410,
666 736.04113, 736.04115, 736.0412, 736.0413, 736.0414, 736.0415,
667 736.0416, and 736.0417, is created to read:
668
669 PART IV
670 CREATION, VALIDITY, MODIFICATION, AND TERMINATION
671
672 736.0401 Methods of creating trust.--A trust may be
673 created by:
674 (1) Transfer of property to another person as trustee
675 during the settlor's lifetime or by will or other disposition
676 taking effect on the settlor's death;
677 (2) Declaration by the owner of property that the owner
678 holds identifiable property as trustee; or
679 (3) Exercise of a power of appointment in favor of a
680 trustee.
681 736.0402 Requirements for creation.--
682 (1) A trust is created only if:
683 (a) The settlor has capacity to create a trust.
684 (b) The settlor indicates an intent to create the trust.
685 (c) The trust has a definite beneficiary or is:
686 1. A charitable trust;

687 2. A trust for the care of an animal, as provided in s.
688 736.0408; or
689 3. A trust for a noncharitable purpose, as provided in s.
690 736.0409.
691 (d) The trustee has duties to perform.
692 (e) The same person is not the sole trustee and sole
693 beneficiary.
694 (2) A beneficiary is definite if the beneficiary can be
695 ascertained now or in the future, subject to any applicable rule
696 against perpetuities.
697 (3) A power of a trustee to select a beneficiary from an
698 indefinite class is valid. If the power is not exercised within
699 a reasonable time, the power fails and the property subject to
700 the power passes to the persons who would have taken the
701 property had the power not been conferred.
702 736.0403 Trusts created in other jurisdictions;
703 formalities required for revocable trusts.--
704 (1) A trust not created by will is validly created if the
705 creation of the trust complies with the law of the jurisdiction
706 in which the trust instrument was executed or the law of the
707 jurisdiction in which, at the time of creation, the settlor was
708 domiciled.
709 (2) Notwithstanding subsection (1):
710 (a) No trust or confidence of or in any messuages, lands,
711 tenements, or hereditaments shall arise or result unless the
712 trust complies with the provisions of s. 689.05.
713 (b)1. The testamentary aspects of a revocable trust,
714 executed by a settlor who is a domiciliary of this state at the

715 time of execution, are invalid unless the trust instrument is
716 executed by the settlor with the formalities required for the
717 execution of a will in this state. For purposes of this
718 subsection, the term "testamentary aspects" means those
719 provisions of the trust instrument that dispose of the trust
720 property on or after the death of the settlor other than to the
721 settlor's estate.
722 2. This paragraph does not apply to trusts established as
723 part of an employee annuity described in s. 403 of the Internal
724 Revenue Code of 1986, as amended, an individual retirement
725 account as described in s. 408 of the Internal Revenue Code of
726 1986, as amended, a Keogh (HR-10) Plan, or a retirement or other
727 plan that is qualified under s. 401 of the Internal Revenue Code
728 of 1986, as amended.
729 3. This paragraph applies to trusts created on or after
730 the effective date of this code. Section 737.111, as in effect
731 prior to the effective date of this code, continues to apply to
732 trusts created before the effective date of this code.
733 736.0404 Trust purposes.--A trust may be created only to
734 the extent the purposes of the trust are lawful, not contrary to
735 public policy, and possible to achieve. A trust and its terms
736 must be for the benefit of its beneficiaries.
737 736.0405 Charitable purposes; enforcement.--
738 (1) A trust may be created for charitable purposes.
739 Charitable purposes include, but are not limited to, the relief
740 of poverty; the advancement of arts, sciences, education, or
741 religion; and the promotion of health, governmental, or
742 municipal purposes.

743 (2) If the terms of a charitable trust do not indicate a
744 particular charitable purpose or beneficiary, the court may
745 select one or more charitable purposes or beneficiaries. The
746 selection must be consistent with the settlor's intent to the
747 extent such intent can be ascertained.
748 (3) The settlor of a charitable trust, among others, has
749 standing to enforce the trust.
750 736.0406 Effect of fraud, duress, mistake, or undue
751 influence.--A trust is void if the creation of the trust is
752 procured by fraud, duress, mistake, or undue influence. Any part
753 of the trust is void if procured by such means, but the
754 remainder of the trust not procured by such means is valid if
755 the remainder is not invalid for other reasons.
756 736.0407 Evidence of oral trust.--Except as required by s.
757 736.0403 or a law other than this code, a trust need not be
758 evidenced by a trust instrument but the creation of an oral
759 trust and its terms may be established only by clear and
760 convincing evidence.
761 736.0408 Trust for care of an animal.--
762 (1) A trust may be created to provide for the care of an
763 animal alive during the settlor's lifetime. The trust terminates
764 on the death of the animal or, if the trust was created to
765 provide for the care of more than one animal alive during the
766 settlor's lifetime, on the death of the last surviving animal.
767 (2) A trust authorized by this section may be enforced by
768 a person appointed in the terms of the trust or, if no person is
769 appointed, by a person appointed by the court. A person having
770 an interest in the welfare of the animal may request the court

771 to appoint a person to enforce the trust or to remove a person
772 appointed.
773 (3) Property of a trust authorized by this section may be
774 applied only to the intended use of the property, except to the
775 extent the court determines that the value of the trust property
776 exceeds the amount required for the intended use. Except as
777 otherwise provided in the terms of the trust, property not
778 required for the intended use must be distributed to the
779 settlor, if then living, otherwise as part of the settlor's
780 estate.
781 736.0409 Noncharitable trust without ascertainable
782 beneficiary.--Except as otherwise provided in s. 736.0408 or by
783 another provision of law, the following rules apply:
784 (1) A trust may be created for a noncharitable purpose
785 without a definite or definitely ascertainable beneficiary or
786 for a noncharitable but otherwise valid purpose to be selected
787 by the trustee. The trust may not be enforced for more than 21
788 years.
789 (2) A trust authorized by this section may be enforced by
790 a person appointed in the terms of the trust or, if no person is
791 appointed, by a person appointed by the court.
792 (3) Property of a trust authorized by this section may be
793 applied only to the intended use of the property, except to the
794 extent the court determines that the value of the trust property
795 exceeds the amount required for the intended use. Except as
796 otherwise provided in the terms of the trust, property not
797 required for the intended use must be distributed to the

798 settlor, if then living, otherwise as part of the settlor's
799 estate.
800 736.0410 Modification or termination of trust; proceedings
801 for disapproval of nonjudicial acts.--
802 (1) In addition to the methods of termination prescribed
803 by ss. 736.04113-736.0414, a trust terminates to the extent the
804 trust expires or is revoked or is properly distributed pursuant
805 to the terms of the trust.
806 (2) A proceeding to disapprove a proposed modification or
807 termination under s. 736.0412 or a trust combination or division
808 under s. 736.0417 may be commenced by any beneficiary.
809 (3) A proceeding to disapprove a proposed termination
810 under s. 736.0414(1) may be commenced by any qualified
811 beneficiary.
812 736.04113 Judicial modification of irrevocable trust when
813 modification is not inconsistent with settlor's purpose.--
814 (1) Upon the application of a trustee of the trust or any
815 qualified beneficiary, a court at any time may modify the terms
816 of a trust that is not then revocable in the manner provided in
817 subsection (2), if:
818 (a) The purposes of the trust have been fulfilled or have
819 become illegal, impossible, wasteful, or impracticable to
820 fulfill;
821 (b) Because of circumstances not anticipated by the
822 settlor, compliance with the terms of the trust would defeat or
823 substantially impair the accomplishment of a material purpose of
824 the trust; or
825 (c) A material purpose of the trust no longer exists.

826 (2) In modifying a trust under this section, a court may:
827 (a) Amend or change the terms of the trust, including
828 terms governing distribution of the trust income or principal or
829 terms governing administration of the trust;
830 (b) Terminate the trust in whole or in part;
831 (c) Direct or permit the trustee to do acts that are not
832 authorized or that are prohibited by the terms of the trust; or
833 (d) Prohibit the trustee from performing acts that are
834 permitted or required by the terms of the trust.
835 (3) In exercising discretion to modify a trust under this
836 section:
837 (a) The court shall consider the terms and purposes of the
838 trust, the facts and circumstances surrounding the creation of
839 the trust, and extrinsic evidence relevant to the proposed
840 modification.
841 (b) The court shall consider spendthrift provisions as a
842 factor in making a decision but the court is not precluded from
843 modifying a trust because the trust contains spendthrift
844 provisions.
845 (4) The provisions of this section are in addition to, and
846 not in derogation of, rights under the common law to modify,
847 amend, terminate, or revoke trusts.
848 736.04115 Judicial modification of irrevocable trust when
849 modification is in best interest of beneficiaries.--
850 (1) Without regard to the reasons for modification
851 provided in s. 736.04113, if compliance with the terms of a
852 trust is not in the best interests of the beneficiaries, upon
853 the application of a trustee or any qualified beneficiary, a

854 court may at any time modify a trust that is not then revocable
855 as provided in s. 736.04113(2).
856 (2) In exercising discretion to modify a trust under this
857 section:
858 (a) The court shall exercise discretion in a manner that
859 conforms to the extent possible with the intent of the settlor,
860 taking into account the current circumstances and best interests
861 of the beneficiaries.
862 (b) The court shall consider the terms and purposes of the
863 trust, the facts and circumstances surrounding the creation of
864 the trust, and extrinsic evidence relevant to the proposed
865 modification.
866 (c) The court shall consider spendthrift provisions as a
867 factor in making a decision but the court is not precluded from
868 modifying a trust because the trust contains spendthrift
869 provisions.
870 (3) This section shall not apply to:
871 (a) Any trust created prior to January 1, 2001.
872 (b) Any trust created after December 31, 2000, if:
873 1. Under the terms of the trust, all beneficial interests
874 in the trust must vest or terminate within the period prescribed
875 by the rule against perpetuities in s. 689.225(2),
876 notwithstanding s. 689.225(2)(f).
877 2. The terms of the trust expressly prohibit judicial
878 modification.
879 (4) For purposes of subsection (3), a revocable trust
880 shall be treated as created when the right of revocation
881 terminates.

882 (5) The provisions of this section are in addition to, and
883 not in derogation of, rights under the common law to modify,
884 amend, terminate, or revoke trusts.
885 736.0412 Nonjudicial modification of irrevocable trust.--
886 (1) After the settlor's death, a trust may be modified at
887 any time as provided in s. 736.04113(2) upon the unanimous
888 agreement of the trustee and all qualified beneficiaries.
889 (2) Modification of a trust as authorized in this section
890 is not prohibited by a spendthrift clause or by a provision in
891 the trust instrument that prohibits amendment or revocation of
892 the trust.
893 (3) An agreement to modify a trust under this section is
894 binding on a beneficiary whose interest is represented by
895 another person under part III of this code.
896 (4) This section shall not apply to:
897 (a) Any trust created prior to January 1, 2001.
898 (b) Any trust created after December 31, 2000, if, under
899 the terms of the trust, all beneficial interests in the trust
900 must vest or terminate within the period prescribed by the rule
901 against perpetuities in s. 689.225(2), notwithstanding s.
902 689.225(2)(f), unless the terms of the trust expressly authorize
903 nonjudicial modification.
904 (c) Any trust for which a charitable deduction is allowed
905 or allowable under the Internal Revenue Code until the
906 termination of all charitable interests in the trust.
907 (5) For purposes of subsection (4), a revocable trust
908 shall be treated as created when the right of revocation
909 terminates.

910 (6) The provisions of this section are in addition to, and
911 not in derogation of, rights under the common law to modify,
912 amend, terminate, or revoke trusts.
913 736.0413 Cy pres.--
914 (1) If a particular charitable purpose becomes unlawful,
915 impracticable, impossible to achieve, or wasteful, the court may
916 apply the doctrine of cy pres to modify or terminate the trust
917 by directing that the trust property be applied or distributed,
918 in whole or in part, in a manner consistent with the settlor's
919 charitable purposes.
920 (2) A proceeding to modify or terminate a trust under this
921 section may be commenced by a settlor, a trustee, or any
922 qualified beneficiary.
923 736.0414 Modification or termination of uneconomic
924 trust.--
925 (1) After notice to the qualified beneficiaries, the
926 trustee of a trust consisting of trust property having a total
927 value less than $50,000 may terminate the trust if the trustee
928 concludes that the value of the trust property is insufficient
929 to justify the cost of administration.
930 (2) Upon application of a trustee or any qualified
931 beneficiary, the court may modify or terminate a trust or remove
932 the trustee and appoint a different trustee if the court
933 determines that the value of the trust property is insufficient
934 to justify the cost of administration.
935 (3) Upon termination of a trust under this section, the
936 trustee shall distribute the trust property in a manner
937 consistent with the purposes of the trust. The trustee may enter

938 into agreements or make such other provisions that the trustee
939 deems necessary or appropriate to protect the interests of the
940 beneficiaries and the trustee and to carry out the intent and
941 purposes of the trust.
942 (4) The existence of a spendthrift provision in the trust
943 does not make this section inapplicable unless the trust
944 instrument expressly provides that the trustee may not terminate
945 the trust pursuant to this section.
946 (5) This section does not apply to an easement for
947 conservation or preservation.
948 736.0415 Reformation to correct mistakes.--Upon
949 application of a settlor or any interested person, the court may
950 reform the terms of a trust, even if unambiguous, to conform the
951 terms to the settlor's intent if it is proved by clear and
952 convincing evidence that both the accomplishment of the
953 settlor's intent and the terms of the trust were affected by a
954 mistake of fact or law, whether in expression or inducement. In
955 determining the settlor's original intent, the court may
956 consider evidence relevant to the settlor's intent even though
957 the evidence contradicts an apparent plain meaning of the trust
958 instrument.
959 736.0416 Modification to achieve settlor's tax
960 objectives.--Upon application of any interested person, to
961 achieve the settlor's tax objectives the court may modify the
962 terms of a trust in a manner that is not contrary to the
963 settlor's probable intent. The court may provide that the
964 modification has retroactive effect.
965 736.0417 Combination and division of trusts.--

966 (1) After notice to the qualified beneficiaries, a trustee
967 may combine two or more trusts into a single trust or divide a
968 trust into two or more separate trusts, if the result does not
969 impair rights of any beneficiary or adversely affect achievement
970 of the purposes of the trusts or trust, respectively.
971 (2) Subject to the terms of the trust, the trustee may
972 take into consideration differences in federal tax attributes
973 and other pertinent factors in administering the trust property
974 of any separate account or trust, in making applicable tax
975 elections, and in making distributions. A separate trust created
976 by severance must be treated as a separate trust for all
977 purposes from the date on which the severance is effective. The
978 effective date of the severance may be retroactive to a date
979 before the date on which the trustee exercises such power.
980 Section 5. Part V of chapter 736, Florida Statutes,
981 consisting of sections 736.0501, 736.0502, 736.0503, 736.0504,
982 736.0505, 736.05053, 736.05055, 736.0506, and 736.0507, is
983 created to read:
984
985 PART V
986 CREDITORS' CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS
987
988 736.0501 Rights of beneficiary's creditor or assignee.--To
989 the extent a beneficiary's interest is not subject to a
990 spendthrift provision, the court may authorize a creditor or
991 assignee of the beneficiary to reach the beneficiary's interest
992 by attachment of present or future distributions to or for the
993 benefit of the beneficiary or by other means. The court may

994 limit the award to such relief as is appropriate under the
995 circumstances.
996 736.0502 Spendthrift provision.--
997 (1) A spendthrift provision is valid only if the provision
998 restrains both voluntary and involuntary transfer of a
999 beneficiary's interest. This subsection does not apply to any
1000 trust in existence on the effective date of this code.
1001 (2) A term of a trust providing that the interest of a
1002 beneficiary is held subject to a spendthrift trust, or words of
1003 similar import, is sufficient to restrain both voluntary and
1004 involuntary transfer of the beneficiary's interest.
1005 (3) A beneficiary may not transfer an interest in a trust
1006 in violation of a valid spendthrift provision and, except as
1007 otherwise provided in this part, a creditor or assignee of the
1008 beneficiary may not reach the interest or a distribution by the
1009 trustee before receipt of the interest or distribution by the
1010 beneficiary.
1011 (4) A valid spendthrift provision does not prevent the
1012 appointment of interests through the exercise of a power of
1013 appointment.
1014 736.0503 Exceptions to spendthrift provision.--
1015 (1) As used in this section, the term "child" includes any
1016 person for whom an order or judgment for child support has been
1017 entered in this or any other state.
1018 (2) To the extent provided in subsection (3), a
1019 spendthrift provision is unenforceable against:

1020 (a) A beneficiary's child, spouse, or former spouse who
1021 has a judgment or court order against the beneficiary for
1022 support or maintenance.
1023 (b) A judgment creditor who has provided services for the
1024 protection of a beneficiary's interest in the trust.
1025 (c) A claim of this state or the United States to the
1026 extent a law of this state or a federal law so provides.
1027 (3) Except as otherwise provided in this subsection, a
1028 claimant against which a spendthrift provision may not be
1029 enforced may obtain from a court, or pursuant to the Uniform
1030 Interstate Family Support Act, an order attaching present or
1031 future distributions to or for the benefit of the beneficiary.
1032 The court may limit the award to such relief as is appropriate
1033 under the circumstances. Notwithstanding this subsection, the
1034 remedies provided in this subsection apply to a claim by a
1035 beneficiary's child, spouse, former spouse, or a judgment
1036 creditor described in paragraph (2)(a) or paragraph (2)(b) only
1037 as a last resort upon an initial showing that traditional
1038 methods of enforcing the claim are insufficient.
1039 736.0504 Discretionary trusts; effect of standard.--
1040 (1) Whether or not a trust contains a spendthrift
1041 provision, a creditor of a beneficiary may not compel a
1042 distribution that is subject to the trustee's discretion, even
1043 if:
1044 (a) The discretion is expressed in the form of a standard
1045 of distribution; or
1046 (b) The trustee has abused the discretion.

1047 (2) If the trustee's discretion to make distributions for
1048 the trustee's own benefit is limited by an ascertainable
1049 standard, a creditor may not reach or compel distribution of the
1050 beneficial interest except to the extent the interest would be
1051 subject to the creditor's claim were the beneficiary not acting
1052 as trustee.
1053 (3) This section does not limit the right of a beneficiary
1054 to maintain a judicial proceeding against a trustee for an abuse
1055 of discretion or failure to comply with a standard for
1056 distribution.
1057 736.0505 Creditors' claims against settlor.--
1058 (1) Whether or not the terms of a trust contain a
1059 spendthrift provision, the following rules apply:
1060 (a) The property of a revocable trust is subject to the
1061 claims of the settlor's creditors during the settlor's lifetime
1062 to the extent the property would not otherwise be exempt by law
1063 if owned directly by the settlor.
1064 (b) With respect to an irrevocable trust, a creditor or
1065 assignee of the settlor may reach the maximum amount that can be
1066 distributed to or for the settlor's benefit. If a trust has more
1067 than one settlor, the amount the creditor or assignee of a
1068 particular settlor may reach may not exceed the settlor's
1069 interest in the portion of the trust attributable to that
1070 settlor's contribution.
1071 (c) Notwithstanding paragraph (b), the assets of an
1072 irrevocable trust shall not be subject to the claims of an
1073 existing or subsequent creditor or assignee of the settlor, in
1074 whole or in part, solely because of the existence of a

1075 discretionary power granted to the trustee by the terms of the
1076 trust or any other provision of law to pay directly to the
1077 taxing authorities or to reimburse the settlor for any tax on
1078 trust income or principal that is payable by the settlor under
1079 the law imposing such tax.
1080 (2) For purposes of this section:
1081 (a) During the period the power may be exercised, the
1082 holder of a power of withdrawal is treated in the same manner as
1083 the settlor of a revocable trust to the extent of the property
1084 subject to the power.
1085 (b) Upon the lapse, release, or waiver of the power, the
1086 holder is treated as the settlor of the trust only to the extent
1087 the value of the property affected by the lapse, release, or
1088 waiver exceeds the greater of the amount specified in:
1089 1. Section 2041(b)(2) or s. 2514(e); or
1090 2. Section 2503(b),
1091
1092 of the Internal Revenue Code of 1986, as amended.
1093 736.05053 Trustee's duty to pay expenses and obligations
1094 of settlor's estate.--
1095 (1) A trustee of a trust described in s. 733.707(3) shall
1096 pay to the personal representative of a settlor's estate any
1097 amounts that the personal representative certifies in writing to
1098 the trustee are required to pay the expenses of the
1099 administration and obligations of the settlor's estate. Payments
1100 made by a trustee, unless otherwise provided in the trust
1101 instrument, must be charged as expenses of the trust without a
1102 contribution from anyone. The interests of all beneficiaries of

1103 such a trust are subject to the provisions of this subsection;
1104 however, the payments must be made from assets, property, or the
1105 proceeds of the assets or property, other than assets proscribed
1106 in s. 733.707(3), that are included in the settlor's gross
1107 estate for federal estate tax purposes.
1108 (2) Unless a settlor provides by will, or designates in a
1109 trust described in s. 733.707(3) funds or property passing under
1110 the trust to be used as designated, the expenses of the
1111 administration and obligations of the settlor's estate must be
1112 paid from the trust in the following order:
1113 (a) Property of the residue of the trust remaining after
1114 all distributions that are to be satisfied by reference to a
1115 specific property or type of property, fund, or sum.
1116 (b) Property that is not to be distributed from specified
1117 or identified property or a specified or identified item of
1118 property.
1119 (c) Property that is to be distributed from specified or
1120 identified property or a specified or identified item of
1121 property.
1122 (3) Trust distributions that are to be satisfied from
1123 specified or identified property must be classed as
1124 distributions to be satisfied from the general assets of the
1125 trust and not otherwise disposed of in the trust instrument on
1126 the failure or insufficiency of funds or property from which
1127 payment should be made, to the extent of the insufficiency.
1128 Trust distributions given for valuable consideration abate with
1129 other distributions of the same class only to the extent of the
1130 excess over the value of the consideration until all others of

1131 the same class are exhausted. Except as provided in this
1132 section, trust distributions abate equally and ratably and
1133 without preference or priority between real and personal
1134 property. When a specified or identified item of property that
1135 has been designated for distribution in the trust instrument or
1136 that is charged with a distribution is sold or taken by the
1137 trustee, other beneficiaries shall contribute according to their
1138 respective interests to the beneficiary whose property has been
1139 sold or taken. Before distribution, the trustee shall determine
1140 the amounts of the respective contributions and such amounts
1141 must be paid or withheld before distribution is made.
1142 (4) The trustee shall pay the expenses of trust
1143 administration, including compensation of trustees and attorneys
1144 of the trustees, before and in preference to the expenses of the
1145 administration and obligations of the settlor's estate.
1146 736.05055 Notice of trust.--
1147 (1) Upon the death of a settlor of a trust described in s.
1148 733.707(3), the trustee must file a notice of trust with the
1149 court of the county of the settlor's domicile and the court
1150 having jurisdiction of the settlor's estate.
1151 (2) The notice of trust must contain the name of the
1152 settlor, the settlor's date of death, the title of the trust, if
1153 any, the date of the trust, and the name and address of the
1154 trustee.
1155 (3) If the settlor's probate proceeding has been
1156 commenced, the clerk shall notify the trustee in writing of the
1157 date of the commencement of the probate proceeding and the file
1158 number.

1159 (4) The clerk shall file and index the notice of trust in
1160 the same manner as a caveat unless there exists a probate
1161 proceeding for the settlor's estate, in which case the notice of
1162 trust must be filed in the probate proceeding and the clerk
1163 shall send a copy to the personal representative.
1164 (5) The clerk shall send a copy of any caveat filed
1165 regarding the settlor to the trustee, and the notice of trust to
1166 any caveator, unless there is a probate proceeding pending and
1167 the personal representative and the trustee are the same.
1168 (6) Any proceeding affecting the expenses of the
1169 administration or obligations of the settlor's estate prior to
1170 the trustee filing a notice of trust are binding on the trustee.
1171 (7) The trustee's failure to file the notice of trust does
1172 not affect the trustee's obligation to pay expenses of
1173 administration and obligations of the settlor's estate as
1174 provided in s. 733.607(2).
1175 736.0506 Overdue distribution.--
1176 (1) As used in this section, the term "mandatory
1177 distribution" means a distribution of income or principal the
1178 trustee is required to make to a beneficiary under the terms of
1179 the trust, including a distribution on termination of the trust.
1180 The term does not include a distribution subject to the exercise
1181 of the trustee's discretion even if:
1182 (a) The discretion is expressed in the form of a standard
1183 of distribution; or
1184 (b) The terms of the trust authorizing a distribution
1185 couple language of discretion with language of direction.

1186 (2) A creditor or assignee of a beneficiary may reach a
1187 mandatory distribution of income or principal, including a
1188 distribution upon termination of the trust, if the trustee has
1189 not made the distribution to the beneficiary within a reasonable
1190 time after the designated distribution date, whether or not a
1191 trust contains a spendthrift provision.
1192 736.0507 Personal obligations of trustee.--Except to the
1193 extent of the trustee's interest in the trust other than as a
1194 trustee, trust property is not subject to personal obligations
1195 of the trustee, even if the trustee becomes insolvent or
1196 bankrupt.
1197 Section 6. Part VI of chapter 736, Florida Statutes,
1198 consisting of sections 736.0601, 736.0602, 736.0603, and
1199 736.0604, is created to read:
1200
1201 PART VI
1202 REVOCABLE TRUSTS
1203
1204 736.0601 Capacity of settlor of revocable trust.--The
1205 capacity required to create, amend, revoke, or add property to a
1206 revocable trust, or to direct the actions of the trustee of a
1207 revocable trust, is the same as that required to make a will.
1208 736.0602 Revocation or amendment of revocable trust.--
1209 (1) Unless the terms of a trust expressly provide that the
1210 trust is irrevocable, the settlor may revoke or amend the trust.
1211 This subsection does not apply to a trust created under an
1212 instrument executed before the effective date of this code.

1213 (2) If a revocable trust is created or funded by more than
1214 one settlor:
1215 (a) To the extent the trust consists of community
1216 property, the trust may be revoked by either spouse acting alone
1217 but may be amended only by joint action of both spouses.
1218 (b) To the extent the trust consists of property other
1219 than community property, each settlor may revoke or amend the
1220 trust with regard to the portion of the trust property
1221 attributable to that settlor's contribution.
1222 (c) Upon the revocation or amendment of the trust by fewer
1223 than all of the settlors, the trustee shall promptly notify the
1224 other settlors of the revocation or amendment.
1225 (3) Subject to s. 736.0403(2), the settlor may revoke or
1226 amend a revocable trust:
1227 (a) By substantial compliance with a method provided in
1228 the terms of the trust; or
1229 (b) If the terms of the trust do not provide a method, by:
1230 1. A later will or codicil that expressly refers to the
1231 trust or specifically devises property that would otherwise have
1232 passed according to the terms of the trust; or
1233 2. Any other method manifesting clear and convincing
1234 evidence of the settlor's intent.
1235 (4) Upon revocation of a revocable trust, the trustee
1236 shall deliver the trust property as the settlor directs.
1237 (5) A settlor's powers with respect to revocation,
1238 amendment, or distribution of trust property may be exercised by
1239 an agent under a power of attorney only as authorized by s.
1240 709.08.

1241 (6) A guardian of the property of the settlor may exercise
1242 a settlor's powers with respect to revocation, amendment, or
1243 distribution of trust property only as provided in s. 744.441.
1244 (7) A trustee who does not know that a trust has been
1245 revoked or amended is not liable for distributions made and
1246 other actions taken on the assumption that the trust had not
1247 been amended or revoked.
1248 736.0603 Settlor's powers; powers of withdrawal.--
1249 (1) While a trust is revocable, the duties of the trustee
1250 are owed exclusively to the settlor.
1251 (2) During the period the power may be exercised, the
1252 holder of a power of withdrawal has the rights of a settlor of a
1253 revocable trust under this section to the extent of the property
1254 subject to the power.
1255 736.0604 Limitation on action contesting validity of
1256 revocable trust.--An action to contest the validity of a trust
1257 that was revocable at the settlor's death is barred, if not
1258 commenced within the earlier of:
1259 (1) The time as provided in chapter 95; or
1260 (2) Six months after the trustee sent the person a copy of
1261 the trust instrument and a notice informing the person of the
1262 trust's existence, of the trustee's name and address, and of the
1263 time allowed for commencing a proceeding.
1264 Section 7. Part VII of chapter 736, Florida Statutes,
1265 consisting of sections 736.0701, 736.0702, 736.0703, 736.0704,
1266 736.0705, 736.0706, 736.0707, 736.0708, and 736.0709, is created
1267 to read:
1268

1269 PART VII
1270 OFFICE OF TRUSTEE
1271
1272 736.0701 Accepting or declining trusteeship.--
1273 (1) Except as otherwise provided in subsection (3), a
1274 person designated as trustee accepts the trusteeship:
1275 (a) By substantially complying with a method of acceptance
1276 provided in the terms of the trust; or
1277 (b) If the terms of the trust do not provide a method or
1278 the method provided in the terms is not expressly made
1279 exclusive, by accepting delivery of the trust property,
1280 exercising powers or performing duties as trustee, or otherwise
1281 indicating acceptance of the trusteeship.
1282 (2) A person designated as trustee who has not accepted
1283 the trusteeship may decline the trusteeship. A designated
1284 trustee who does not accept the trusteeship within a reasonable
1285 time after knowing of the designation is deemed to have declined
1286 the trusteeship.
1287 (3) A person designated as trustee may, without accepting
1288 the trusteeship:
1289 (a) Act to preserve the trust property if, within a
1290 reasonable time after acting, the person sends to a qualified
1291 beneficiary a written statement declining the trusteeship.
1292 (b) Inspect or investigate trust property to determine
1293 potential liability under environmental or other law or for any
1294 other purpose.
1295 736.0702 Trustee's bond.--

1296 (1) A trustee shall give bond to secure performance of the
1297 trustee's duties only if the court finds that a bond is needed
1298 to protect the interests of the beneficiaries or is required by
1299 the terms of the trust and the court has not dispensed with the
1300 requirement.
1301 (2) The court may specify the amount of a bond, the
1302 trustee's liabilities under the bond, and whether sureties are
1303 necessary. The court may modify or terminate a bond at any time.
1304 736.0703 Cotrustees.--
1305 (1) Cotrustees who are unable to reach a unanimous
1306 decision may act by majority decision.
1307 (2) If a vacancy occurs in a cotrusteeship, the remaining
1308 cotrustees or a majority of the remaining cotrustees may act for
1309 the trust.
1310 (3) A cotrustee must participate in the performance of a
1311 trustee's function unless the cotrustee is unavailable to
1312 perform the function because of absence, illness,
1313 disqualification under other provision of law, or other
1314 temporary incapacity or the cotrustee has properly delegated the
1315 performance of the function to another cotrustee.
1316 (4) If a cotrustee is unavailable to perform duties
1317 because of absence, illness, disqualification under other law,
1318 or other temporary incapacity, and prompt action is necessary to
1319 achieve the purposes of the trust or to avoid injury to the
1320 trust property, the remaining cotrustee or a majority of the
1321 remaining cotrustees may act for the trust.
1322 (5) A cotrustee may not delegate to another cotrustee the
1323 performance of a function the settlor reasonably expected the

1324 cotrustees to perform jointly. A cotrustee may revoke a
1325 delegation previously made.
1326 (6) Except as otherwise provided in subsection (7), a
1327 cotrustee who does not join in an action of another cotrustee is
1328 not liable for the action.
1329 (7) Each cotrustee shall exercise reasonable care to:
1330 (a) Prevent a cotrustee from committing a breach of trust.
1331 (b) Compel a cotrustee to redress a breach of trust.
1332 (8) A dissenting cotrustee who joins in an action at the
1333 direction of the majority of the cotrustees and who notifies any
1334 cotrustee of the dissent at or before the time of the action is
1335 not liable for the action.
1336 736.0704 Vacancy in trusteeship; appointment of
1337 successor.--
1338 (1) A vacancy in a trusteeship occurs if:
1339 (a) A person designated as trustee declines the
1340 trusteeship;
1341 (b) A person designated as trustee cannot be identified or
1342 does not exist;
1343 (c) A trustee resigns;
1344 (d) A trustee is disqualified or removed;
1345 (e) A trustee dies; or
1346 (f) A trustee is adjudicated to be incapacitated.
1347 (2) If one or more cotrustees remain in office, a vacancy
1348 in a trusteeship need not be filled. A vacancy in a trusteeship
1349 must be filled if the trust has no remaining trustee.

1350 (3) A vacancy in a trusteeship of a noncharitable trust
1351 that is required to be filled must be filled in the following
1352 order of priority:
1353 (a) By a person named or designated pursuant to the terms
1354 of the trust to act as successor trustee.
1355 (b) By a person appointed by unanimous agreement of the
1356 qualified beneficiaries.
1357 (c) By a person appointed by the court.
1358 (4) A vacancy in a trusteeship of a charitable trust that
1359 is required to be filled must be filled in the following order
1360 of priority:
1361 (a) By a person named or designated pursuant to the terms
1362 of the trust to act as successor trustee.
1363 (b) By a person selected by unanimous agreement of the
1364 charitable organizations expressly designated to receive
1365 distributions under the terms of the trust.
1366 (c) By a person appointed by the court.
1367 (5) The court may appoint an additional trustee or special
1368 fiduciary whenever the court considers the appointment necessary
1369 for the administration of the trust, whether or not a vacancy in
1370 a trusteeship exists or is required to be filled.
1371 736.0705 Resignation of trustee.--
1372 (1) A trustee may resign:
1373 (a) Upon at least 30 days' notice to the qualified
1374 beneficiaries, the settlor, if living, and all cotrustees; or
1375 (b) With the approval of the court.

1376 (2) In approving a resignation, the court may issue orders
1377 and impose conditions reasonably necessary for the protection of
1378 the trust property.
1379 (3) Any liability of a resigning trustee or of any
1380 sureties on the trustee's bond for acts or omissions of the
1381 trustee is not discharged or affected by the trustee's
1382 resignation.
1383 736.0706 Removal of trustee.--
1384 (1) The settlor, a cotrustee, or a beneficiary may request
1385 the court to remove a trustee or a trustee may be removed by the
1386 court on the court's own initiative.
1387 (2) The court may remove a trustee if:
1388 (a) The trustee has committed a serious breach of trust;
1389 (b) The lack of cooperation among cotrustees substantially
1390 impairs the administration of the trust;
1391 (c) Due to the unfitness, unwillingness, or persistent
1392 failure of the trustee to administer the trust effectively, the
1393 court determines that removal of the trustee best serves the
1394 interests of the beneficiaries; or
1395 (d) There has been a substantial change of circumstances
1396 or removal is requested by all of the qualified beneficiaries,
1397 the court finds that removal of the trustee best serves the
1398 interests of all of the beneficiaries and is not inconsistent
1399 with a material purpose of the trust, and a suitable cotrustee
1400 or successor trustee is available.
1401 (3) Pending a final decision on a request to remove a
1402 trustee, or in lieu of or in addition to removing a trustee, the
1403 court may order such appropriate relief under s. 736.1001(2) as

1404 may be necessary to protect the trust property or the interests
1405 of the beneficiaries.
1406 736.0707 Delivery of property by former trustee.--
1407 (1) Unless a cotrustee remains in office or the court
1408 otherwise orders and until the trust property is delivered to a
1409 successor trustee or other person entitled to the property, a
1410 trustee who has resigned or been removed has the duties of a
1411 trustee and the powers necessary to protect the trust property.
1412 (2) A trustee who has resigned or been removed shall
1413 within a reasonable time deliver the trust property within the
1414 trustee's possession to the cotrustee, successor trustee, or
1415 other person entitled to the property, subject to the right of
1416 the trustee to retain a reasonable reserve for the payment of
1417 debts, expenses, and taxes. The provisions of this subsection
1418 are in addition to and are not in derogation of the rights of a
1419 removed or resigning trustee under the common law.
1420 736.0708 Compensation of trustee.--
1421 (1) If the terms of a trust do not specify the trustee's
1422 compensation, a trustee is entitled to compensation that is
1423 reasonable under the circumstances.
1424 (2) If the terms of a trust specify the trustee's
1425 compensation, the trustee is entitled to be compensated as
1426 specified but the court may allow more or less compensation if:
1427 (a) The duties of the trustee are substantially different
1428 from those contemplated when the trust was created; or
1429 (b) The compensation specified by the terms of the trust
1430 would be unreasonably low or high.

1431 (3) If the trustee has rendered other services in
1432 connection with the administration of the trust, the trustee
1433 shall also be allowed reasonable compensation for the other
1434 services rendered in addition to reasonable compensation as
1435 trustee.
1436 736.0709 Reimbursement of expenses.--
1437 (1) A trustee is entitled to be reimbursed out of the
1438 trust property, with interest as appropriate, for reasonable
1439 expenses that were properly incurred in the administration of
1440 the trust.
1441 (2) An advance by the trustee of money for the protection
1442 of the trust gives rise to a lien against trust property to
1443 secure reimbursement with reasonable interest.
1444 Section 8. Part VIII of chapter 736, Florida Statutes,
1445 consisting of sections 736.0801, 736.0802, 736.0803, 736.0804,
1446 736.0805, 736.0806, 736.0807, 736.0808, 736.0809, 736.0810,
1447 736.08105, 736.0811, 736.0812, 736.08125, 736.0813, 736.08135,
1448 736.0814, 736.08147, 736.0815, 736.0816, 736.08163, 736.08165,
1449 and 736.0817, is created to read:
1450
1451 PART VIII
1452 DUTIES AND POWERS OF TRUSTEE
1453
1454 736.0801 Duty to administer trust.--Upon acceptance of a
1455 trusteeship, the trustee shall administer the trust in good
1456 faith, in accordance with its terms and purposes and the
1457 interests of the beneficiaries, and in accordance with this
1458 code.

1459 736.0802 Duty of loyalty.--
1460 (1) As between a trustee and the beneficiaries, a trustee
1461 shall administer the trust solely in the interests of the
1462 beneficiaries.
1463 (2) Subject to the rights of persons dealing with or
1464 assisting the trustee as provided in s. 736.1016, a sale,
1465 encumbrance, or other transaction involving the investment or
1466 management of trust property entered into by the trustee for the
1467 trustee's own personal account or which is otherwise affected by
1468 a conflict between the trustee's fiduciary and personal
1469 interests is voidable by a beneficiary affected by the
1470 transaction unless:
1471 (a) The transaction was authorized by the terms of the
1472 trust;
1473 (b) The transaction was approved by the court;
1474 (c) The beneficiary did not commence a judicial proceeding
1475 within the time allowed by s. 736.1008;
1476 (d) The beneficiary consented to the trustee's conduct,
1477 ratified the transaction, or released the trustee in compliance
1478 with s. 736.1012;
1479 (e) The transaction involves a contract entered into or
1480 claim acquired by the trustee when that person had not become or
1481 contemplated becoming trustee; or
1482 (f) The transaction was consented to in writing by a
1483 settlor of the trust while the trust was revocable.
1484 (3) A sale, encumbrance, or other transaction involving
1485 the investment or management of trust property is presumed to be
1486 affected by a conflict between personal and fiduciary interests

1487 if the sale, encumbrance, or other transaction is entered into
1488 by the trustee with:
1489 (a) The trustee's spouse;
1490 (b) The trustee's descendants, siblings, parents, or their
1491 spouses;
1492 (c) An officer, director, employee, agent, or attorney of
1493 the trustee; or
1494 (d) A corporation or other person or enterprise in which
1495 the trustee, or a person that owns a significant interest in the
1496 trustee, has an interest that might affect the trustee's best
1497 judgment.
1498 (4) A transaction not concerning trust property in which
1499 the trustee engages in the trustee's individual capacity
1500 involves a conflict between personal and fiduciary interests if
1501 the transaction concerns an opportunity properly belonging to
1502 the trust.
1503 (5)(a) An investment by a trustee authorized by lawful
1504 authority to engage in trust business, as defined in s.
1505 658.12(20), in investment instruments, as defined in s.
1506 660.25(6), that are owned or controlled by the trustee or its
1507 affiliate, or from which the trustee or its affiliate receives
1508 compensation for providing services in a capacity other than as
1509 trustee, is not presumed to be affected by a conflict between
1510 personal and fiduciary interests provided the investment
1511 otherwise complies with chapters 518 and 660 and the trustee
1512 complies with the disclosure requirements of this subsection.
1513 (b) A trustee who invests trust funds in investment
1514 instruments that are owned or controlled by the trustee or its

1515 affiliate shall disclose the following to all qualified
1516 beneficiaries:
1517 1. Notice that the trustee has invested trust funds in
1518 investment instruments owned or controlled by the trustee or its
1519 affiliate.
1520 2. The identity of the investment instruments.
1521 3. The identity and relationship to the trustee of any
1522 affiliate that owns or controls the investment instruments.
1523 (c) A trustee who invests trust funds in investment
1524 instruments with respect to which the trustee or its affiliate
1525 receives compensation for providing services in a capacity other
1526 than as trustee shall disclose to all qualified beneficiaries
1527 the nature of the services provided by the trustee or its
1528 affiliate and all compensation, including, but not limited to,
1529 fees or commissions, paid or to be paid by the account and
1530 received or to be received by an affiliate arising from such
1531 affiliated investment.
1532 (d) Disclosure required by this subsection shall be made
1533 at least annually unless there has been no change in the method
1534 or increase in the rate at which such compensation is calculated
1535 since the most recent disclosure. The disclosure may be given in
1536 a trust disclosure document as defined in s. 736.1008, in a copy
1537 of the prospectus for the investment instrument, in any other
1538 written disclosure prepared for the investment instrument under
1539 applicable federal or state law, or in a written summary that
1540 includes all compensation received or to be received by the
1541 trustee and any affiliate of the trustee and an explanation of

1542 the manner in which such compensation is calculated, either as a
1543 percentage of the assets invested or by some other method.
1544 (e) This subsection shall apply as follows:
1545 1. This subsection does not apply to qualified investment
1546 instruments or to a trust for which a right of revocation
1547 exists.
1548 2. For investment instruments other than qualified
1549 investment instruments, paragraphs (a), (b), (c), and (d) shall
1550 apply to irrevocable trusts created on or after July 1, 2007,
1551 that expressly authorize the trustee, by specific reference to
1552 this subsection, to invest in investment instruments owned or
1553 controlled by the trustee or its affiliate.
1554 3. For investment instruments other than qualified
1555 investment instruments, paragraphs (a), (b), (c), and (d) shall
1556 apply to irrevocable trusts not described in subparagraph 2.
1557 only as follows:
1558 a. Such paragraphs shall not apply until 60 days after the
1559 statement required in paragraph (f) is provided and no objection
1560 is made or any objection which is made has been terminated.
1561 (I) An objection is made if, within 60 days after the date
1562 of the statement required in paragraph (f), a super majority of
1563 the eligible beneficiaries deliver to the trustee written
1564 objections to the application of this subsection to such trust.
1565 An objection shall be deemed to be delivered to the trustee on
1566 the date the objection is mailed to the mailing address listed
1567 in the notice provided in paragraph (f).
1568 (II) An objection is terminated upon the earlier of the
1569 receipt of consent from a super majority of eligible

1570 beneficiaries of the class that made the objection or the
1571 resolution of the objection pursuant to this subparagraph.
1572 (III) If an objection is delivered to the trustee, the
1573 trustee may petition the court for an order overruling the
1574 objection and authorizing the trustee to make investments under
1575 this subsection. The burden shall be on the trustee to show good
1576 cause for the relief sought.
1577 (IV) Any qualified beneficiary may petition the court for
1578 an order to prohibit, limit, or restrict a trustee's authority
1579 to make investments under this subsection. The burden shall be
1580 upon the petitioning beneficiary to show good cause for the
1581 relief sought.
1582 (V) The court may award costs and attorney's fees relating
1583 to any petition under this subparagraph in the same manner as in
1584 chancery actions. When costs and attorney's fees are to be paid
1585 out of the trust, the court, in its discretion, may direct from
1586 which part of the trust such costs and fees shall be paid.
1587 b. The objection of a super majority of eligible
1588 beneficiaries under this subparagraph may thereafter be removed
1589 by the written consent of a super majority of the class or
1590 classes of those eligible beneficiaries that made the objection.
1591 (f)1. Any time prior to initially investing in any
1592 investment instrument described in this subsection other than a
1593 qualified investment instrument, the trustee of a trust
1594 described in subparagraph (e)3. shall provide to all qualified
1595 beneficiaries a statement containing the following:

1596 a. The name, telephone number, street address, and mailing
1597 address of the trustee and of any individuals who may be
1598 contacted for further information.
1599 b. A statement that, unless a super majority of the
1600 eligible beneficiaries objects to the application of this
1601 subsection to the trust within 60 days after the date the
1602 statement pursuant to this subsection was delivered, this
1603 subsection shall apply to the trust.
1604 c. A statement that, if this subsection applies to the
1605 trust, the trustee will have the right to make investments in
1606 investment instruments, as defined in s. 660.25(6), that are
1607 owned or controlled by the trustee or its affiliate, or from
1608 which the trustee or its affiliate receives compensation for
1609 providing services in a capacity other than as trustee, and that
1610 the trustee or its affiliate may receive fees in addition to the
1611 trustee's compensation for administering the trust.
1612
1613 A statement by the trustee is not delivered if the statement is
1614 accompanied by another written communication other than a
1615 written communication by the trustee that refers only to the
1616 statement.
1617 2. For purposes of paragraph (e) and this paragraph:
1618 a. "Eligible beneficiaries" means:
1619 (I) If at the time the determination is made there are one
1620 or more beneficiaries as described in s. 736.0103(14)(c), the
1621 beneficiaries described in s. 736.0103(14)(a) and (c); or

1622 (II) If there is no beneficiary described in s.
1623 736.0103(14)(c), the beneficiaries described in s.
1624 736.0103(14)(a) and (b).
1625 b. "Super majority of the eligible beneficiaries" means:
1626 (I) If at the time the determination is made there are one
1627 or more beneficiaries as described in s. 736.0103(14)(c), at
1628 least two-thirds in interest of the beneficiaries described in
1629 s. 736.0103(14)(a) or two-thirds in interest of the
1630 beneficiaries described in s. 736.0103(14)(c), if the interests
1631 of the beneficiaries are reasonably ascertainable; otherwise,
1632 two-thirds in number of either such class; or
1633 (II) If there is no beneficiary as described in s.
1634 736.0103(14)(c), at least two-thirds in interest of the
1635 beneficiaries described in s. 736.0103(14)(a) or two-thirds in
1636 interest of the beneficiaries described in s. 736.0103(14)(b),
1637 if the interests of the beneficiaries are reasonably
1638 ascertainable; otherwise, two-thirds in number of either such
1639 class.
1640 c. "Qualified investment instrument" means a mutual fund,
1641 common trust fund, or money market fund described in and
1642 governed by s. 736.0816(3).
1643 d. An irrevocable trust is created upon execution of the
1644 trust instrument. If a trust that was revocable when created
1645 thereafter becomes irrevocable, the irrevocable trust is created
1646 when the right of revocation terminates.
1647 (g) Nothing in this chapter is intended to create or imply
1648 a duty for the trustee to seek the application of this
1649 subsection to invest in investment instruments described in

1650 paragraph (a), and no inference of impropriety shall be made as
1651 a result of a trustee electing not to invest trust assets in
1652 investment instruments described in paragraph (a).
1653 (6) In voting shares of stock or in exercising powers of
1654 control over similar interests in other forms of enterprise, the
1655 trustee shall act in the best interests of the beneficiaries. If
1656 the trust is the sole owner of a corporation or other form of
1657 enterprise, the trustee shall elect or appoint directors or
1658 other managers who will manage the corporation or enterprise in
1659 the best interests of the beneficiaries.
1660 (7) This section does not preclude the following
1661 transactions, if fair to the beneficiaries:
1662 (a) An agreement between a trustee and a beneficiary
1663 relating to the appointment or compensation of the trustee;
1664 (b) A payment of reasonable compensation to the trustee;
1665 (c) A transaction between a trust and another trust, the
1666 decedent's estate, or a guardian of the property of which the
1667 trustee is a fiduciary or in which a beneficiary has an
1668 interest;
1669 (d) A deposit of trust money in a regulated financial-
1670 service institution operated by the trustee; or
1671 (e) An advance by the trustee of money for the protection
1672 of the trust.
1673 (8) This section does not preclude the employment of
1674 persons, including, but not limited to, attorneys, accountants,
1675 investment advisers, or agents, even if they are the trustee, an
1676 affiliate of the trustee, or otherwise associated with the
1677 trustee, to advise or assist the trustee in the exercise of any

1678 of the trustee's powers and to pay reasonable compensation and
1679 costs incurred in connection with such employment from the
1680 assets of the trust; to act without independent investigation on
1681 their recommendations; and, instead of acting personally, to
1682 employ one or more agents to perform any act of administration,
1683 whether or not discretionary.
1684 (9) The court may appoint a special fiduciary to act with
1685 respect to any proposed transaction that might violate this
1686 section if entered into by the trustee.
1687 (10) Payment of costs or attorney's fees incurred in any
1688 trust proceeding from the assets of the trust may be made by the
1689 trustee without the approval of any person and without court
1690 authorization, except that court authorization shall be required
1691 if an action has been filed or defense asserted against the
1692 trustee based upon a breach of trust. Court authorization is not
1693 required if the action or defense is later withdrawn or
1694 dismissed by the party that is alleging a breach of trust or
1695 resolved without a determination by the court that the trustee
1696 has committed a breach of trust.
1697 736.0803 Impartiality.--If a trust has two or more
1698 beneficiaries, the trustee shall act impartially in
1699 administering the trust property, giving due regard to the
1700 beneficiaries' respective interests.
1701 736.0804 Prudent administration.--A trustee shall
1702 administer the trust as a prudent person would, by considering
1703 the purposes, terms, distribution requirements, and other
1704 circumstances of the trust. In satisfying this standard, the
1705 trustee shall exercise reasonable care, skill, and caution.

1706 736.0805 Expenses of administration.--In administering a
1707 trust, the trustee shall only incur expenses that are reasonable
1708 in relation to the trust property, the purposes of the trust,
1709 and the skills of the trustee.
1710 736.0806 Trustee's skills.--A trustee who has special
1711 skills or expertise, or is named trustee in reliance on the
1712 trustee's representation that the trustee has special skills or
1713 expertise, shall use those special skills or expertise.
1714 736.0807 Delegation by trustee.--
1715 (1) A trustee may delegate duties and powers that a
1716 prudent trustee of comparable skills could properly delegate
1717 under the circumstances. The trustee shall exercise reasonable
1718 care, skill, and caution in:
1719 (a) Selecting an agent.
1720 (b) Establishing the scope and terms of the delegation,
1721 consistent with the purposes and terms of the trust.
1722 (c) Reviewing the agent's actions periodically, in order
1723 to monitor the agent's performance and compliance with the terms
1724 of the delegation.
1725 (2) In performing a delegated function, an agent owes a
1726 duty to the trust to exercise reasonable care to comply with the
1727 terms of the delegation.
1728 (3) A trustee who complies with subsection (1) is not
1729 liable to the beneficiaries or to the trust for an action of the
1730 agent to whom the function was delegated.
1731 (4) By accepting a delegation of powers or duties from the
1732 trustee of a trust that is subject to the law of this state, an
1733 agent submits to the jurisdiction of the courts of this state.

1734 736.0808 Powers to direct.--
1735 (1) Subject to ss. 736.0403(2) and 736.0602(3)(a), the
1736 trustee may follow a direction of the settlor that is contrary
1737 to the terms of the trust while a trust is revocable.
1738 (2) If the terms of a trust confer on a person other than
1739 the settlor of a revocable trust, the power to direct certain
1740 actions of the trustee, the trustee shall act in accordance with
1741 an exercise of the power unless the attempted exercise is
1742 manifestly contrary to the terms of the trust or the trustee
1743 knows the attempted exercise would constitute a serious breach
1744 of a fiduciary duty that the person holding the power owes to
1745 the beneficiaries of the trust.
1746 (3) The terms of a trust may confer on a trustee or other
1747 person a power to direct the modification or termination of the
1748 trust.
1749 (4) A person, other than a beneficiary, who holds a power
1750 to direct is presumptively a fiduciary who, as such, is required
1751 to act in good faith with regard to the purposes of the trust
1752 and the interests of the beneficiaries. The holder of a power to
1753 direct is liable for any loss that results from breach of a
1754 fiduciary duty.
1755 736.0809 Control and protection of trust property.--A
1756 trustee shall take reasonable steps to take control of and
1757 protect the trust property.
1758 736.0810 Recordkeeping and identification of trust
1759 property.--
1760 (1) A trustee shall keep clear, distinct, and accurate
1761 records of the administration of the trust.

1762 (2) A trustee shall keep trust property separate from the
1763 trustee's own property.
1764 (3) Except as otherwise provided in subsection (4), a
1765 trustee shall cause the trust property to be designated so that
1766 the interest of the trust, to the extent feasible, appears in
1767 records maintained by a party other than a trustee or
1768 beneficiary.
1769 (4) If the trustee maintains records clearly indicating
1770 the respective interests, a trustee may invest as a whole the
1771 property of two or more separate trusts.
1772 736.08105 Duty to ascertain marketable title of trust real
1773 property.--A trustee holding title to real property received
1774 from a settlor or estate shall not be required to obtain title
1775 insurance or proof of marketable title until a marketable title
1776 is required for a sale or conveyance of the real property.
1777 736.0811 Enforcement and defense of claims.--A trustee
1778 shall take reasonable steps to enforce claims of the trust and
1779 to defend claims against the trust.
1780 736.0812 Collecting trust property.--A trustee shall take
1781 reasonable steps to compel a former trustee or other person to
1782 deliver trust property to the trustee and, except as provided in
1783 s. 736.08125, to redress a breach of trust known to the trustee
1784 to have been committed by a former trustee.
1785 736.08125 Protection of successor trustees.--
1786 (1) A successor trustee is not personally liable for
1787 actions taken by any prior trustee, nor does any successor
1788 trustee have a duty to institute any proceeding against any
1789 prior trustee, or file any claim against any prior trustee's

1790 estate, for any of the prior trustee's actions as trustee under
1791 any of the following circumstances:
1792 (a) As to a successor trustee who succeeds a trustee who
1793 was also the settlor of a trust that was revocable during the
1794 time that the settlor served as trustee;
1795 (b) As to any beneficiary who has waived any accounting
1796 required by s. 736.0813, but only as to the periods included in
1797 the waiver;
1798 (c) As to any beneficiary who has released the successor
1799 trustee from the duty to institute any proceeding or file any
1800 claim;
1801 (d) As to any person who is not an eligible beneficiary;
1802 or
1803 (e) As to any eligible beneficiary:
1804 1. If a supermajority of the eligible beneficiaries have
1805 released the successor trustee;
1806 2. If the eligible beneficiary has not delivered a written
1807 request to the successor trustee to institute an action or file
1808 a claim against the prior trustee within 6 months after the date
1809 of the successor trustee's acceptance of the trust, if the
1810 successor trustee has notified the eligible beneficiary in
1811 writing of acceptance by the successor trustee in accordance
1812 with 736.0813(1)(a) and that writing advises the beneficiary
1813 that, unless the beneficiary delivers the written request within
1814 6 months after the date of acceptance, the right to proceed
1815 against the successor trustee will be barred pursuant to this
1816 section; or

1817 3. For any action or claim that the eligible beneficiary
1818 is barred from bringing against the prior trustee.
1819 (2) For the purposes of this section, the term:
1820 (a) "Eligible beneficiaries" means:
1821 1. At the time the determination is made, if there are one
1822 or more beneficiaries as described in s. 736.0103(14)(c), the
1823 beneficiaries described in s. 736.0103(14)(a) and (c); or
1824 2. If there is no beneficiary as described in s.
1825 736.0103(14)(c), the beneficiaries described in s.
1826 736.0103(14)(a) and (b).
1827 (b) "Supermajority of eligible beneficiaries" means at
1828 least two-thirds in interest of the eligible beneficiaries if
1829 the interests of the eligible beneficiaries are reasonably
1830 ascertainable, otherwise, at least two-thirds in number of the
1831 eligible beneficiaries.
1832 (3) Nothing in this section affects any liability of the
1833 prior trustee or the right of the successor trustee or any
1834 beneficiary to pursue an action or claim against the prior
1835 trustee.
1836 736.0813 Duty to inform and account.--The trustee shall
1837 keep the qualified beneficiaries of the trust reasonably
1838 informed of the trust and its administration.
1839 (1) The trustee's duty to inform and account includes, but
1840 is not limited to, the following:
1841 (a) Within 60 days after acceptance of the trust, the
1842 trustee shall give notice to the qualified beneficiaries of the
1843 acceptance of the trust and the full name and address of the
1844 trustee.

1845 (b) Within 60 days after the date the trustee acquires
1846 knowledge of the creation of an irrevocable trust, or the date
1847 the trustee acquires knowledge that a formerly revocable trust
1848 has become irrevocable, whether by the death of the settlor or
1849 otherwise, the trustee shall give notice to the qualified
1850 beneficiaries of the trust's existence, the identity of the
1851 settlor or settlors, the right to request a copy of the trust
1852 instrument, and the right to accountings under this section.
1853 (c) Upon reasonable request, the trustee shall provide a
1854 qualified beneficiary with a complete copy of the trust
1855 instrument.
1856 (d) A trustee of an irrevocable trust shall provide a
1857 trust accounting, as set forth in s. 736.08135, to each
1858 qualified beneficiary annually and on termination of the trust
1859 or on change of the trustee.
1860 (e) Upon reasonable request, the trustee shall provide a
1861 qualified beneficiary with relevant information about the assets
1862 and liabilities of the trust and the particulars relating to
1863 administration.
1864
1865 Paragraphs (a) and (b) do not apply to an irrevocable trust
1866 created before the effective date of this code, or to a
1867 revocable trust that becomes irrevocable before the effective
1868 date of this code. Paragraph (a) does not apply to a trustee who
1869 accepts a trusteeship before the effective date of this code.
1870 (2) A qualified beneficiary may waive the trustee's duty
1871 to account under paragraph (1)(d). A qualified beneficiary may
1872 withdraw a waiver previously given. Waivers and withdrawals of

1873 prior waivers under this subsection must be in writing.
1874 Withdrawals of prior waivers are effective only with respect to
1875 accountings for future periods.
1876 (3) The representation provisions of part III apply with
1877 respect to all rights of a qualified beneficiary under this
1878 section.
1879 (4) As provided in s. 736.0603(1), the trustee's duties
1880 under this section extend only to the settlor while a trust is
1881 revocable.
1882 (5) This section applies to trust accountings rendered for
1883 accounting periods beginning on or after January 1, 2008.
1884 736.08135 Trust accountings.--
1885 (1) A trust accounting must be a reasonably understandable
1886 report from the date of the last accounting or, if none, from
1887 the date on which the trustee became accountable, that
1888 adequately discloses the information required in subsection (2).
1889 (2)(a) The accounting must begin with a statement
1890 identifying the trust, the trustee furnishing the accounting,
1891 and the time period covered by the accounting.
1892 (b) The accounting must show all cash and property
1893 transactions and all significant transactions affecting
1894 administration during the accounting period, including
1895 compensation paid to the trustee and the trustee's agents. Gains
1896 and losses realized during the accounting period and all
1897 receipts and disbursements must be shown.
1898 (c) To the extent feasible, the accounting must identify
1899 and value trust assets on hand at the close of the accounting
1900 period. For each asset or class of assets reasonably capable of

1901 valuation, the accounting shall contain two values, the asset
1902 acquisition value or carrying value and the estimated current
1903 value. The accounting must identify each known noncontingent
1904 liability with an estimated current amount of the liability if
1905 known.
1906 (d) To the extent feasible, the accounting must show
1907 significant transactions that do not affect the amount for which
1908 the trustee is accountable, including name changes in investment
1909 holdings, adjustments to carrying value, a change of custodial
1910 institutions, and stock splits.
1911 (e) The accounting must reflect the allocation of
1912 receipts, disbursements, accruals, or allowances between income
1913 and principal when the allocation affects the interest of any
1914 beneficiary of the trust.
1915 (f) The trustee shall include in the final accounting a
1916 plan of distribution for any undistributed assets shown on the
1917 final accounting.
1918 (3) This section applies to all trust accountings rendered
1919 for any accounting periods beginning on or after January 1,
1920 2003.
1921 736.0814 Discretionary powers; tax savings.--
1922 (1) Notwithstanding the breadth of discretion granted to a
1923 trustee in the terms of the trust, including the use of such
1924 terms as "absolute," "sole," or "uncontrolled," the trustee
1925 shall exercise a discretionary power in good faith and in
1926 accordance with the terms and purposes of the trust and the
1927 interests of the beneficiaries. A court shall not determine that
1928 a trustee abused its discretion merely because the court would

1929 have exercised the discretion in a different manner or would not
1930 have exercised the discretion.
1931 (2) Subject to subsection (3) and unless the terms of the
1932 trust expressly indicate that a rule in this subsection does not
1933 apply, a person who is a beneficiary and a trustee may not:
1934 (a) Make discretionary distributions of either principal
1935 or income to or for the benefit of that trustee, except to
1936 provide for that trustee's health, education, maintenance, or
1937 support as described in ss. 2041 and 2514 of the Internal
1938 Revenue Code;
1939 (b) Make discretionary allocations of receipts or expenses
1940 as between principal and income, unless the trustee acts in a
1941 fiduciary capacity whereby the trustee has no power to enlarge
1942 or shift any beneficial interest except as an incidental
1943 consequence of the discharge of the trustee's fiduciary duties;
1944 (c) Make discretionary distributions of either principal
1945 or income to satisfy any of the trustee's legal support
1946 obligations; or
1947 (d) Exercise any other power, including, but not limited
1948 to, the right to remove or to replace any trustee, so as to
1949 cause the powers enumerated in paragraph (a), paragraph (b), or
1950 paragraph (c) to be exercised on behalf of, or for the benefit
1951 of, a beneficiary who is also a trustee.
1952 (3) Subsection (2) does not apply to:
1953 (a) A power held by the settlor of the trust;
1954 (b) A power held by the settlor's spouse who is the
1955 trustee of a trust for which a marital deduction, as defined in

1956 s. 2056(a) or s. 2523(a) of the Internal Revenue Code of 1986,
1957 as amended, was previously allowed;
1958 (c) Any trust during any period that the trust may be
1959 revoked or amended by its settlor; or
1960 (d) A trust if contributions to the trust qualify for the
1961 annual exclusion under s. 2503(c) of the Internal Revenue Code
1962 of 1986, as amended.
1963 (4) A power whose exercise is limited or prohibited by
1964 subsection (2) may be exercised by the remaining trustees whose
1965 exercise of the power is not so limited or prohibited. If there
1966 is no trustee qualified to exercise the power, on petition by
1967 any qualified beneficiary, the court may appoint an independent
1968 trustee with authority to exercise the power.
1969 (5) A person who has the right to remove or to replace a
1970 trustee does not possess nor may that person be deemed to
1971 possess, by virtue of having that right, the powers of the
1972 trustee that is subject to removal or to replacement.
1973 736.08147 Duty to distribute trust income.--If a will or
1974 trust instrument granting income to the settlor's or testator's
1975 spouse for life is silent as to the time of distribution of
1976 income and the frequency of distributions, the trustee shall
1977 distribute all net income, as defined in chapter 738, to the
1978 spouse no less frequently than annually. This provision shall
1979 apply to any trust established before, on, or after July 1,
1980 2007, unless the trust instrument expressly directs or permits
1981 net income to be distributed less frequently than annually.
1982 736.0815 General powers of trustee.--

1983 (1) A trustee, without authorization by the court, may,
1984 except as limited or restricted by this code, exercise:
1985 (a) Powers conferred by the terms of the trust.
1986 (b) Except as limited by the terms of the trust:
1987 1. All powers over the trust property that an unmarried
1988 competent owner has over individually owned property.
1989 2. Any other powers appropriate to achieve the proper
1990 investment, management, and distribution of the trust property.
1991 3. Any other powers conferred by this code.
1992 (2) The exercise of a power is subject to the fiduciary
1993 duties prescribed by this code.
1994 736.0816 Specific powers of trustee.--Except as limited or
1995 restricted by this code, a trustee may:
1996 (1) Collect trust property and accept or reject additions
1997 to the trust property from a settlor, including an asset in
1998 which the trustee is personally interested, and hold property in
1999 the name of a nominee or in other form without disclosure of the
2000 trust so that title to the property may pass by delivery but the
2001 trustee is liable for any act of the nominee in connection with
2002 the property so held.
2003 (2) Acquire or sell property, for cash or on credit, at
2004 public or private sale.
2005 (3) Acquire an undivided interest in a trust asset,
2006 including, but not limited to, a money market mutual fund,
2007 mutual fund, or common trust fund, in which asset the trustee
2008 holds an undivided interest in any trust capacity, including any
2009 money market or other mutual fund from which the trustee or any
2010 affiliate or associate of the trustee is entitled to receive

2011 reasonable compensation for providing necessary services as an
2012 investment adviser, portfolio manager, or servicing agent. A
2013 trustee or affiliate or associate of the trustee may receive
2014 compensation for such services in addition to fees received for
2015 administering the trust provided such compensation is fully
2016 disclosed in writing to all qualified beneficiaries.
2017 (4) Exchange, partition, or otherwise change the character
2018 of trust property.
2019 (5) Deposit trust money in an account in a regulated
2020 financial-service institution.
2021 (6) Borrow money, with or without security, and mortgage
2022 or pledge trust property for a period within or extending beyond
2023 the duration of the trust and advance money for the protection
2024 of the trust.
2025 (7) With respect to an interest in a proprietorship,
2026 partnership, limited liability company, business trust,
2027 corporation, or other form of business or enterprise, continue
2028 the business or other enterprise and take any action that may be
2029 taken by shareholders, members, or property owners, including,
2030 but not limited to, merging, dissolving, or otherwise changing
2031 the form of business organization or contributing additional
2032 capital.
2033 (8) With respect to stocks or other securities, exercise
2034 the rights of an absolute owner, including, but not limited to,
2035 the right to:
2036 (a) Vote, or give proxies to vote, with or without power
2037 of substitution, or enter into or continue a voting trust
2038 agreement.

2039 (b) Hold a security in the name of a nominee or in other
2040 form without disclosure of the trust so that title may pass by
2041 delivery.
2042 (c) Pay calls, assessments, and other sums chargeable or
2043 accruing against the securities, and sell or exercise stock
2044 subscription or conversion rights.
2045 (d) Deposit the securities with a depositary or other
2046 regulated financial-service institution.
2047 (9) With respect to an interest in real property,
2048 construct, or make ordinary or extraordinary repairs to,
2049 alterations to, or improvements in, buildings or other
2050 structures, demolish improvements, raze existing or erect new
2051 party walls or buildings, subdivide or develop land, dedicate
2052 land to public use or grant public or private easements, and
2053 make or vacate plats and adjust boundaries.
2054 (10) Enter into a lease for any purpose as lessor or
2055 lessee, including a lease or other arrangement for exploration
2056 and removal of natural resources, with or without the option to
2057 purchase or renew, for a period within or extending beyond the
2058 duration of the trust.
2059 (11) Grant an option involving a sale, lease, or other
2060 disposition of trust property or acquire an option for the
2061 acquisition of property, including an option exercisable beyond
2062 the duration of the trust, and exercise an option so acquired.
2063 (12) Insure the property of the trust against damage or
2064 loss and insure the trustee, trustee's agents, and beneficiaries
2065 against liability arising from the administration of the trust.

2066 (13) Abandon or decline to administer property of no value
2067 or of insufficient value to justify the collection or continued
2068 administration of such property.
2069 (14) Pay or contest any claim, settle a claim by or
2070 against the trust, and release, in whole or in part, a claim
2071 belonging to the trust.
2072 (15) Pay taxes, assessments, compensation of the trustee
2073 and of employees and agents of the trust, and other expenses
2074 incurred in the administration of the trust.
2075 (16) Allocate items of income or expense to trust income
2076 or principal, as provided by law.
2077 (17) Exercise elections with respect to federal, state,
2078 and local taxes.
2079 (18) Select a mode of payment under any employee benefit
2080 or retirement plan, annuity, or life insurance payable to the
2081 trustee, exercise rights under such plan, annuity, or insurance,
2082 including exercise of the right to indemnification for expenses
2083 and against liabilities, and take appropriate action to collect
2084 the proceeds.
2085 (19) Make loans out of trust property, including, but not
2086 limited to, loans to a beneficiary on terms and conditions that
2087 are fair and reasonable under the circumstances, and the trustee
2088 has a lien on future distributions for repayment of those loans.
2089 (20) Employ persons, including, but not limited to,
2090 attorneys, accountants, investment advisers, or agents, even if
2091 they are the trustee, an affiliate of the trustee, or otherwise
2092 associated with the trustee, to advise or assist the trustee in
2093 the exercise of any of the trustee's powers and pay reasonable

2094 compensation and costs incurred in connection with such
2095 employment from the assets of the trust and act without
2096 independent investigation on the recommendations of such
2097 persons.
2098 (21) Pay an amount distributable to a beneficiary who is
2099 under a legal disability or who the trustee reasonably believes
2100 is incapacitated, by paying the amount directly to the
2101 beneficiary or applying the amount for the beneficiary's
2102 benefit, or by:
2103 (a) Paying the amount to the beneficiary's guardian of the
2104 property or, if the beneficiary does not have a guardian of the
2105 property, the beneficiary's guardian of the person;
2106 (b) Paying the amount to the beneficiary's custodian under
2107 a Uniform Transfers to Minors Act or custodial trustee under a
2108 Uniform Custodial Trust Act, and, for that purpose, creating a
2109 custodianship or custodial trust;
2110 (c) Paying the amount to an adult relative or other person
2111 having legal or physical care or custody of the beneficiary, to
2112 be expended on the beneficiary's behalf, if the trustee does not
2113 know of a guardian of the property, guardian of the person,
2114 custodian, or custodial trustee; or
2115 (d) Managing the amount as a separate fund on the
2116 beneficiary's behalf, subject to the beneficiary's continuing
2117 right to withdraw the distribution.
2118 (22) On distribution of trust property or the division or
2119 termination of a trust, make distributions in divided or
2120 undivided interests, allocate particular assets in proportionate

2121 or disproportionate shares, value the trust property for those
2122 purposes, and adjust for resulting differences in valuation.
2123 (23) Prosecute or defend, including appeals, an action,
2124 claim, or judicial proceeding in any jurisdiction to protect
2125 trust property or the trustee in the performance of the
2126 trustee's duties.
2127 (24) Sign and deliver contracts and other instruments that
2128 are useful to achieve or facilitate the exercise of the
2129 trustee's powers.
2130 (25) On termination of the trust, exercise the powers
2131 appropriate to wind up the administration of the trust and
2132 distribute the trust property to the persons entitled to the
2133 property, subject to the right of the trustee to retain a
2134 reasonable reserve for the payment of debts, expenses, and
2135 taxes.
2136 736.08163 Powers of trustees relating to environmental or
2137 human health laws or to trust property contaminated with
2138 hazardous or toxic substances; liability.--
2139 (1) From the creation of a trust until final distribution
2140 of the assets from the trust, the trustee has, without court
2141 authorization, the powers specified in subsection (2).
2142 (2) Unless otherwise provided in the trust instrument, a
2143 trustee has the power, acting reasonably, to:
2144 (a) Inspect or investigate, or cause to be inspected or
2145 investigated, property held by the trustee, including interests
2146 in sole proprietorships, partnerships, or corporations and any
2147 assets owned by any such business entity for the purpose of
2148 determining compliance with an environmental law affecting that

2149 property or to respond to an actual or threatened violation of
2150 an environmental law affecting that property;
2151 (b) Take, on behalf of the trust, any action necessary to
2152 prevent, abate, or otherwise remedy an actual or potential
2153 violation of an environmental law affecting property held by the
2154 trustee, before or after initiation of an enforcement action by
2155 a governmental body;
2156 (c) Refuse to accept property in trust if the trustee
2157 determines that any property to be donated or conveyed to the
2158 trustee is contaminated with a hazardous substance or is being
2159 used or has been used for an activity directly or indirectly
2160 involving a hazardous substance, which circumstance could result
2161 in liability to the trust or trustee or otherwise impair the
2162 value of the assets to be held;
2163 (d) Settle or compromise at any time any claim against the
2164 trust or trustee that may be asserted by a governmental body or
2165 private party that involves the alleged violation of an
2166 environmental law affecting property of any trust over which the
2167 trustee has responsibility;
2168 (e) Disclaim any power granted by any document, law, or
2169 rule of law that, in the sole judgment of the trustee, may cause
2170 the trustee to incur personal liability, or the trust to incur
2171 liability, under any environmental law;
2172 (f) Decline to serve as a trustee, or having undertaken to
2173 serve as a trustee, resign at any time, if the trustee believes
2174 there is or may be a conflict of interest in its fiduciary
2175 capacity and in its individual capacity because of potential
2176 claims or liabilities that may be asserted against the trustee

2177 on behalf of the trust by reason of the type or condition of the
2178 assets held; or
2179 (g) Charge against the income and principal of the trust
2180 the cost of any inspection, investigation, review, abatement,
2181 response, cleanup, or remedial action that this section
2182 authorizes the trustee to take and, if the trust terminates or
2183 closes or the trust property is transferred to another trustee,
2184 hold assets sufficient to cover the cost of cleaning up any
2185 known environmental problem.
2186 (3) A trustee is not personally liable to any beneficiary
2187 or any other person for a decrease in value of assets in a trust
2188 by reason of the trustee's compliance or efforts to comply with
2189 an environmental law, specifically including any reporting
2190 requirement under that law.
2191 (4) A trustee that acquires ownership or control of a
2192 vessel or other property, without having owned, operated, or
2193 materially participated in the management of that vessel or
2194 property before assuming ownership or control as trustee, is not
2195 considered an owner or operator for purposes of liability under
2196 chapter 376, chapter 403, or any other environmental law. A
2197 trustee that willfully, knowingly, or recklessly causes or
2198 exacerbates a release or threatened release of a hazardous
2199 substance is personally liable for the cost of the response, to
2200 the extent that the release or threatened release is
2201 attributable to the trustee's activities. This subsection does
2202 not preclude the filing of claims against the assets that
2203 constitute the trust held by the trustee or the filing of
2204 actions against the trustee in its representative capacity and

2205 in any such action, an award or judgment against the trustee
2206 must be satisfied only from the assets of the trust.
2207 (5) The acceptance by the trustee of the property or a
2208 failure by the trustee to inspect or investigate the property
2209 does not create any inference as to whether there is liability
2210 under an environmental law with respect to that property.
2211 (6) For the purposes of this section, the term "hazardous
2212 substance" means a substance defined as hazardous or toxic, or
2213 any contaminant, pollutant, or constituent thereof, or otherwise
2214 regulated, by an environmental law.
2215 (7) This section does not apply to any trust created under
2216 a document executed before July 1, 1995, unless the trust is
2217 amendable and the settlor amends the trust at any time to
2218 incorporate the provisions of this section.
2219 736.08165 Administration pending outcome of contest or
2220 other proceeding.--
2221 (1) Pending the outcome of a proceeding filed to determine
2222 the validity of all or part of a trust or the beneficiaries of
2223 all or part of a trust, the trustee shall proceed with the
2224 administration of the trust as if no proceeding had been
2225 commenced, except no action may be taken and no distribution may
2226 be made to a beneficiary in contravention of the rights of those
2227 persons who may be affected by the outcome of the proceeding.
2228 (2) Upon motion of a party and after notice to interested
2229 persons, a court, on good cause shown, may make an exception to
2230 the prohibition under subsection (1) and authorize the trustee
2231 to act or to distribute trust assets to a beneficiary subject to

2232 any conditions the court, in the court's discretion, may impose,
2233 including the posting of bond by the beneficiary.
2234 736.0817 Distribution on termination.--Upon the occurrence
2235 of an event terminating or partially terminating a trust, the
2236 trustee shall proceed expeditiously to distribute the trust
2237 property to the persons entitled to the property, subject to the
2238 right of the trustee to retain a reasonable reserve for the
2239 payment of debts, expenses, and taxes. The provisions of this
2240 section are in addition to and are not in derogation of the
2241 rights of a trustee under the common law with respect to final
2242 distribution of a trust.
2243 Section 9. Part IX of chapter 736, Florida Statutes,
2244 consisting of section 736.0901, is created to read:
2245
2246 PART IX
2247 TRUST INVESTMENTS
2248
2249 736.0901 Applicability of chapter 518.--A trustee shall
2250 invest trust property in accordance with chapter 518.
2251 Section 10. Part X of chapter 736, Florida Statutes,
2252 consisting of sections 736.1001, 736.1002, 736.1003, 736.1004,
2253 736.1005, 736.1006, 736.1007, 736.1008, 736.1009, 736.1010,
2254 736.1011, 736.1012, 736.1013, 736.1014, 736.1015, 736.1016,
2255 736.1017, and 736.1018, is created to read:
2256
2257 PART X
2258 LIABILITY OF TRUSTEE AND RIGHTS OF PERSONS DEALING WITH TRUSTEE
2259

2260 736.1001 Remedies for breach of trust.--
2261 (1) A violation by a trustee of a duty the trustee owes to
2262 a beneficiary is a breach of trust.
2263 (2) To remedy a breach of trust that has occurred or may
2264 occur, the court may:
2265 (a) Compel the trustee to perform the trustee's duties;
2266 (b) Enjoin the trustee from committing a breach of trust;
2267 (c) Compel the trustee to redress a breach of trust by
2268 paying money or restoring property or by other means;
2269 (d) Order a trustee to account;
2270 (e) Appoint a special fiduciary to take possession of the
2271 trust property and administer the trust;
2272 (f) Suspend the trustee;
2273 (g) Remove the trustee as provided in s. 736.706;
2274 (h) Reduce or deny compensation to the trustee;
2275 (i) Subject to s. 736.1016, void an act of the trustee,
2276 impose a lien or a constructive trust on trust property, or
2277 trace trust property wrongfully disposed of and recover the
2278 property or its proceeds; or
2279 (j) Order any other appropriate relief.
2280 (3) As an illustration of the remedies available to the
2281 court and without limiting the court's discretion as provided in
2282 subsection (2), if a breach of trust results in the favoring of
2283 any beneficiary to the detriment of any other beneficiary or
2284 consists of an abuse of the trustee's discretion:
2285 (a) To the extent the breach of trust has resulted in no
2286 distribution to a beneficiary or a distribution that is too
2287 small, the court may require the trustee to pay from the trust

2288 to the beneficiary an amount the court determines will restore
2289 the beneficiary, in whole or in part, to his or her appropriate
2290 position.
2291 (b) To the extent the breach of trust has resulted in a
2292 distribution to a beneficiary that is too large, the court may
2293 restore the beneficiaries, the trust, or both, in whole or in
2294 part, to their appropriate positions by requiring the trustee to
2295 withhold an amount from one or more future distributions to the
2296 beneficiary who received the distribution that was too large or
2297 by requiring that beneficiary to return some or all of the
2298 distribution to the trust.
2299 736.1002 Damages for breach of trust.--
2300 (1) A trustee who commits a breach of trust is liable for
2301 the greater of:
2302 (a) The amount required to restore the value of the trust
2303 property and trust distributions to what they would have been if
2304 the breach had not occurred, including lost income, capital
2305 gain, or appreciation that would have resulted from proper
2306 administration; or
2307 (b) The profit the trustee made by reason of the breach.
2308 (2) Except as otherwise provided in this subsection, if
2309 more than one person, including a trustee or trustees, is liable
2310 to the beneficiaries for a breach of trust, each liable person
2311 is entitled to pro rata contribution from the other person or
2312 persons. A person is not entitled to contribution if the person
2313 committed the breach of trust in bad faith. A person who
2314 received a benefit from the breach of trust is not entitled to

2315 contribution from another person to the extent of the benefit
2316 received.
2317 (3) In determining the pro rata shares of liable persons
2318 in the entire liability for a breach of trust:
2319 (a) Their relative degrees of fault shall be the basis for
2320 allocation of liability.
2321 (b) If equity requires, the collective liability of some
2322 as a group shall constitute a single share.
2323 (c) Principles of equity applicable to contribution
2324 generally shall apply.
2325 (4) The right of contribution shall be enforced as
2326 follows:
2327 (a) Contribution may be enforced by separate action,
2328 whether or not judgment has been entered in an action against
2329 two or more liable persons for the same breach of trust.
2330 (b) When a judgment has been entered in an action against
2331 two or more liable persons for the same breach of trust,
2332 contribution may be enforced in that action by judgment in favor
2333 of one judgment defendant against any other judgment defendants
2334 by motion upon notice to all parties to the action.
2335 (c) If there is a judgment for breach of trust against the
2336 liable person seeking contribution, any separate action by that
2337 person to enforce contribution must be commenced within 1 year
2338 after the judgment has become final by lapse of time for appeal
2339 or after appellate review.
2340 (d) If there is no judgment for the breach of trust
2341 against the liable person seeking contribution, the person's
2342 right of contribution is barred unless the person has:

2343 1. Discharged by payment the common liability within the
2344 period of the statute of limitations applicable to the
2345 beneficiary's right of action against the liable person and the
2346 person has commenced an action for contribution within 1 year
2347 after payment, or
2348 2. Agreed, while action is pending against the liable
2349 person, to discharge the common liability and has within 1 year
2350 after the agreement paid the liability and commenced the
2351 person's action for contribution.
2352 (5) The beneficiary's recovery of a judgment for breach of
2353 trust against one liable person does not of itself discharge
2354 other liable persons from liability for the breach of trust
2355 unless the judgment is satisfied. The satisfaction of the
2356 judgment does not impair any right of contribution.
2357 (6) The judgment of the court in determining the liability
2358 of several defendants to the beneficiary for breach of trust is
2359 binding upon such defendants in determining the right of such
2360 defendants to contribution.
2361 (7) Subsection (2) applies to all causes of action for
2362 breach of trust pending on July 1, 2007, under which causes of
2363 action the right of contribution among persons jointly and
2364 severally liable is involved and to all causes of action filed
2365 after July 1, 2007.
2366 736.1003 Damages in absence of breach.--Absent a breach of
2367 trust, a trustee is not liable to a beneficiary for a loss or
2368 depreciation in the value of trust property or for not having
2369 made a profit.
2370 736.1004 Attorney's fees and costs.--

2371 (1)(a) In all actions for breach of fiduciary duty or
2372 challenging the exercise of, or failure to exercise, a trustee's
2373 powers; and
2374 (b) In proceedings arising under ss. 736.0410-736.0417,
2375
2376 the court shall award taxable costs as in chancery actions,
2377 including attorney fees and guardian ad litem fees.
2378 (2) When awarding taxable costs under this section,
2379 including attorney fees and guardian ad litem fees, the court,
2380 in its discretion, may direct payment from a party's interest,
2381 if any, in the trust or enter a judgment that may be satisfied
2382 from other property of the party, or both.
2383 736.1005 Attorney's fees for services to the trust.--
2384 (1) Any attorney who has rendered services to a trust may
2385 be awarded reasonable compensation from the trust. The attorney
2386 may apply to the court for an order awarding attorney's fees
2387 and, after notice and service on the trustee and all
2388 beneficiaries entitled to an accounting under s. 736.0813, the
2389 court shall enter an order on the fee application.
2390 (2) Whenever attorney's fees are to be paid out of the
2391 trust, the court, in its discretion, may direct from what part
2392 of the trust the fees shall be paid.
2393 (3) Except when a trustee's interest may be adverse in a
2394 particular matter, the attorney shall give reasonable notice in
2395 writing to the trustee of the attorney's retention by an
2396 interested person and the attorney's entitlement to fees
2397 pursuant to this section. A court may reduce any fee award for
2398 services rendered by the attorney prior to the date of actual

2399 notice to the trustee, if the actual notice date is later than a
2400 date of reasonable notice. In exercising this discretion, the
2401 court may exclude compensation for services rendered after the
2402 reasonable notice date but prior to the date of actual notice.
2403 736.1006 Costs in trust proceedings.--
2404 (1) In all trust proceedings, costs may be awarded as in
2405 chancery actions.
2406 (2) Whenever costs are to be paid out of the trust, the
2407 court, in its discretion, may direct from what part of the trust
2408 the costs shall be paid.
2409 736.1007 Trustee's attorney's fees.--
2410 (1) If the trustee of a revocable trust retains an
2411 attorney to render legal services in connection with the initial
2412 administration of the trust, the attorney is entitled to
2413 reasonable compensation for those legal services, payable from
2414 the assets of the trust without court order. The trustee and the
2415 attorney may agree to compensation that is determined in a
2416 manner or amount other than the manner or amount provided in
2417 this section. The agreement is not binding on a person who bears
2418 the impact of the compensation unless that person is a party to
2419 or otherwise consents to be bound by the agreement. The
2420 agreement may provide that the trustee is not individually
2421 liable for the attorney's fees and costs.
2422 (2) Unless otherwise agreed, compensation based on the
2423 value of the trust assets immediately following the settlor's
2424 death and the income earned by the trust during initial
2425 administration at the rate of 75 percent of the schedule
2426 provided in s. 733.6171(3)(a)-(h) is presumed to be reasonable

2427 total compensation for ordinary services of all attorneys
2428 employed generally to advise a trustee concerning the trustee's
2429 duties in initial trust administration.
2430 (3) An attorney who is retained to render only limited and
2431 specifically defined legal services shall be compensated as
2432 provided in the retaining agreement. If the amount or method of
2433 determining compensation is not provided in the agreement, the
2434 attorney is entitled to a reasonable fee, taking into account
2435 the factors set forth in subsection (6).
2436 (4) Ordinary services of the attorney in an initial trust
2437 administration include legal advice and representation
2438 concerning the trustee's duties relating to:
2439 (a) Review of the trust instrument and each amendment for
2440 legal sufficiency and interpretation.
2441 (b) Implementation of substitution of the successor
2442 trustee.
2443 (c) Persons who must or should be served with required
2444 notices and the method and timing of such service.
2445 (d) The obligation of a successor to require a former
2446 trustee to provide an accounting.
2447 (e) The trustee's duty to protect, insure, and manage
2448 trust assets and the trustee's liability relating to these
2449 duties.
2450 (f) The trustee's duty regarding investments imposed by
2451 the prudent investor rule.
2452 (g) The trustee's obligation to inform and account to
2453 beneficiaries and the method of satisfaction of such
2454 obligations, the liability of the trust and trustee to the

2455 settlor's creditors, and the advisability or necessity for
2456 probate proceedings to bar creditors.
2457 (h) Contributions due to the personal representative of
2458 the settlor's estate for payment of expenses of administration
2459 and obligations of the settlor's estate.
2460 (i) Identifying tax returns required to be filed by the
2461 trustee, the trustee's liability for payment of taxes, and the
2462 due date of returns.
2463 (j) Filing a nontaxable affidavit, if not filed by a
2464 personal representative.
2465 (k) Order of payment of expenses of administration of the
2466 trust and order and priority of abatement of trust
2467 distributions.
2468 (l) Distribution of income or principal to beneficiaries
2469 or funding of further trusts provided in the governing
2470 instrument.
2471 (m) Preparation of any legal documents required to effect
2472 distribution.
2473 (n) Fiduciary duties, avoidance of self-dealing, conflicts
2474 of interest, duty of impartiality, and obligations to
2475 beneficiaries.
2476 (o) If there is a conflict of interest between a trustee
2477 who is a beneficiary and other beneficiaries of the trust,
2478 advice to the trustee on limitations of certain authority of the
2479 trustee regarding discretionary distributions or exercise of
2480 certain powers and alternatives for appointment of an
2481 independent trustee and appropriate procedures.

2482 (p) Procedures for the trustee's discharge from liability
2483 for administration of the trust on termination or resignation.
2484 (5) In addition to the attorney's fees for ordinary
2485 services, the attorney for the trustee shall be allowed further
2486 reasonable compensation for any extraordinary service. What
2487 constitutes an extraordinary service may vary depending on many
2488 factors, including the size of the trust. Extraordinary services
2489 may include, but are not limited to:
2490 (a) Involvement in a trust contest, trust construction, a
2491 proceeding for determination of beneficiaries, a contested
2492 claim, elective share proceedings, apportionment of estate
2493 taxes, or other adversary proceedings or litigation by or
2494 against the trust.
2495 (b) Representation of the trustee in an audit or any
2496 proceeding for adjustment, determination, or collection of any
2497 taxes.
2498 (c) Tax advice on postmortem tax planning, including, but
2499 not limited to, disclaimer, renunciation of fiduciary
2500 commission, alternate valuation date, allocation of
2501 administrative expenses between tax returns, the QTIP or reverse
2502 QTIP election, allocation of GST exemption, qualification for
2503 Internal Revenue Code ss. 303 and 6166 privileges, deduction of
2504 last illness expenses, distribution planning, asset basis
2505 considerations, throwback rules, handling income or deductions
2506 in respect of a decedent, valuation discounts, special use and
2507 other valuation, handling employee benefit or retirement
2508 proceeds, prompt assessment request, or request for release from
2509 personal liability for payment of tax.

2510 (d) Review of an estate tax return and preparation or
2511 review of other tax returns required to be filed by the trustee.
2512 (e) Preparation of decedent's federal estate tax return.
2513 If this return is prepared by the attorney, a fee of one-half of
2514 1 percent up to a value of $10 million and one-fourth of 1
2515 percent on the value in excess of $10 million, of the gross
2516 estate as finally determined for federal estate tax purposes, is
2517 presumed to be reasonable compensation for the attorney for this
2518 service. These fees shall include services for routine audit of
2519 the return, not beyond the examining agent level, if required.
2520 (f) Purchase, sale, lease, or encumbrance of real property
2521 by the trustee or involvement in zoning, land use,
2522 environmental, or other similar matters.
2523 (g) Legal advice regarding carrying on of decedent's
2524 business or conducting other commercial activity by the trustee.
2525 (h) Legal advice regarding claims for damage to the
2526 environment or related procedures.
2527 (i) Legal advice regarding homestead status of trust real
2528 property or proceedings involving the status.
2529 (j) Involvement in fiduciary, employee, or attorney
2530 compensation disputes.
2531 (k) Considerations of special valuation of trust assets,
2532 including discounts for blockage, minority interests, lack of
2533 marketability, and environmental liability.
2534 (6) Upon petition of any interested person in a proceeding
2535 to review the compensation paid or to be paid to the attorney
2536 for the trustee, the court may increase or decrease the
2537 compensation for ordinary services of the attorney for the

2538 trustee or award compensation for extraordinary services if the
2539 facts and circumstances of the particular administration
2540 warrant. In determining reasonable compensation, the court shall
2541 consider all of the following factors giving such weight to each
2542 as the court may determine to be appropriate:
2543 (a) The promptness, efficiency, and skill with which the
2544 initial administration was handled by the attorney.
2545 (b) The responsibilities assumed by, and potential
2546 liabilities of, the attorney.
2547 (c) The nature and value of the assets that are affected
2548 by the decedent's death.
2549 (d) The benefits or detriments resulting to the trust or
2550 the trust's beneficiaries from the attorney's services.
2551 (e) The complexity or simplicity of the administration and
2552 the novelty of issues presented.
2553 (f) The attorney's participation in tax planning for the
2554 estate, the trust, and the trust's beneficiaries and tax return
2555 preparation or review and approval.
2556 (g) The nature of the trust assets, the expenses of
2557 administration, and the claims payable by the trust and the
2558 compensation paid to other professionals and fiduciaries.
2559 (h) Any delay in payment of the compensation after the
2560 services were furnished.
2561 (i) Any other relevant factors.
2562 (7) The court may determine reasonable attorney's
2563 compensation without receiving expert testimony. Any party may
2564 offer expert testimony after notice to interested persons. If
2565 expert testimony is offered, an expert witness fee may be

2566 awarded by the court and paid from the assets of the trust. The
2567 court shall direct from what part of the trust the fee is to be
2568 paid.
2569 (8) If a separate written agreement regarding compensation
2570 exists between the attorney and the settlor, the attorney shall
2571 furnish a copy to the trustee prior to commencement of
2572 employment and, if employed, shall promptly file and serve a
2573 copy on all interested persons. A separate agreement or a
2574 provision in the trust suggesting or directing the trustee to
2575 retain a specific attorney does not obligate the trustee to
2576 employ the attorney or obligate the attorney to accept the
2577 representation but, if the attorney who is a party to the
2578 agreement or who drafted the trust is employed, the compensation
2579 paid shall not exceed the compensation provided in the
2580 agreement.
2581 (9) Court proceedings to determine compensation, if
2582 required, are a part of the trust administration process and the
2583 costs, including fees for the trustee's attorney, shall be
2584 determined by the court and paid from the assets of the trust
2585 unless the court finds the attorney's fees request to be
2586 substantially unreasonable. The court shall direct from what
2587 part of the trust the fees are to be paid.
2588 (10) As used in this section, the term "initial trust
2589 administration" means administration of a revocable trust during
2590 the period that begins with the death of the settlor and ends on
2591 the final distribution of trust assets outright or to continuing
2592 trusts created under the trust agreement but, if an estate tax
2593 return is required, not until after issuance of an estate tax

2594 closing letter or other evidence of termination of the estate
2595 tax proceeding. This initial period is not intended to include
2596 continued regular administration of the trust.
2597 736.1008 Limitations on proceedings against trustees.--
2598 (1) Except as provided in subsection (2), all claims by a
2599 beneficiary against a trustee for breach of trust are barred as
2600 provided in chapter 95 as to:
2601 (a) All matters adequately disclosed in a trust disclosure
2602 document issued by the trustee, with the limitations period
2603 beginning on the date of receipt of adequate disclosure.
2604 (b) All matters not adequately disclosed in a trust
2605 disclosure document if the trustee has issued a final trust
2606 accounting and has given written notice to the beneficiary of
2607 the availability of the trust records for examination and that
2608 any claims with respect to matters not adequately disclosed may
2609 be barred unless an action is commenced within the applicable
2610 limitations period provided in chapter 95. The limitations
2611 period begins on the date of receipt of the final trust
2612 accounting and notice.
2613 (2) Unless sooner barred by adjudication, consent, or
2614 limitations, a beneficiary is barred from bringing an action
2615 against a trustee for breach of trust with respect to a matter
2616 that was adequately disclosed in a trust disclosure document
2617 unless a proceeding to assert the claim is commenced within 6
2618 months after receipt from the trustee of the trust disclosure
2619 document or a limitation notice that applies to that disclosure
2620 document, whichever is received later.

2621 (3) When a trustee has not issued a final trust accounting
2622 or has not given written notice to the beneficiary of the
2623 availability of the trust records for examination and that
2624 claims with respect to matters not adequately disclosed may be
2625 barred, a claim against the trustee for breach of trust based on
2626 a matter not adequately disclosed in a trust disclosure document
2627 accrues when the beneficiary has actual knowledge of the
2628 trustee's repudiation of the trust or adverse possession of
2629 trust assets, and is barred as provided in chapter 95.
2630 (4) As used in this section, the term:
2631 (a) "Trust disclosure document" means a trust accounting
2632 or any other written report of the trustee. A trust disclosure
2633 document adequately discloses a matter if the document provides
2634 sufficient information so that a beneficiary knows of a claim or
2635 reasonably should have inquired into the existence of a claim
2636 with respect to that matter.
2637 (b) "Trust accounting" means an accounting that adequately
2638 discloses the information required by and that substantially
2639 complies with the standards set forth in s. 736.08135.
2640 (c) "Limitation notice" means a written statement of the
2641 trustee that an action by a beneficiary against the trustee for
2642 breach of trust based on any matter adequately disclosed in a
2643 trust disclosure document may be barred unless the action is
2644 commenced within 6 months after receipt of the trust disclosure
2645 document or receipt of a limitation notice that applies to that
2646 trust disclosure document, whichever is later. A limitation
2647 notice may but is not required to be in the following form: "An
2648 action for breach of trust based on matters disclosed in a trust

2649 accounting or other written report of the trustee may be subject
2650 to a 6-month statute of limitations from the receipt of the
2651 trust accounting or other written report. If you have questions,
2652 please consult your attorney."
2653 (5) For purposes of this section, a limitation notice
2654 applies to a trust disclosure document when the limitation
2655 notice is:
2656 (a) Contained as a part of the trust disclosure document
2657 or as a part of another trust disclosure document received
2658 within 1 year prior to the receipt of the latter trust
2659 disclosure document;
2660 (b) Accompanied concurrently by the trust disclosure
2661 document or by another trust disclosure document that was
2662 received within 1 year prior to the receipt of the latter trust
2663 disclosure document;
2664 (c) Delivered separately within 10 days after the delivery
2665 of the trust disclosure document or of another trust disclosure
2666 document that was received within 1 year prior to the receipt of
2667 the latter trust disclosure document. For purposes of this
2668 paragraph, a limitation notice is not delivered separately if
2669 the notice is accompanied by another written communication,
2670 other than a written communication that refers only to the
2671 limitation notice; or
2672 (d) Received more than 10 days after the delivery of the
2673 trust disclosure document but only if the limitation notice
2674 references that trust disclosure document and:
2675 1. Offers to provide to the beneficiary on request another
2676 copy of that trust disclosure document if the document was

2677 received by the beneficiary within 1 year prior to receipt of
2678 the limitation notice; or
2679 2. Is accompanied by another copy of that trust disclosure
2680 document if the trust disclosure document was received by the
2681 beneficiary 1 year or more prior to the receipt of the
2682 limitation notice.
2683 (6) This section applies to trust accountings for
2684 accounting periods beginning on or after January 1, 2008, and to
2685 written reports, other than trust accountings, received by a
2686 beneficiary on or after January 1, 2008.
2687 736.1009 Reliance on trust instrument.--A trustee who acts
2688 in reasonable reliance on the terms of the trust as expressed in
2689 the trust instrument is not liable to a beneficiary for a breach
2690 of trust to the extent the breach resulted from the reliance.
2691 736.1010 Event affecting administration or
2692 distribution.--If the happening of an event, including marriage,
2693 divorce, performance of educational requirements, or death,
2694 affects the administration or distribution of a trust, a trustee
2695 who has exercised reasonable care to ascertain the happening of
2696 the event is not liable for a loss resulting from the trustee's
2697 lack of knowledge.
2698 736.1011 Exculpation of trustee.--
2699 (1) A term of a trust relieving a trustee of liability for
2700 breach of trust is unenforceable to the extent that the term:
2701 (a) Relieves the trustee of liability for breach of trust
2702 committed in bad faith or with reckless indifference to the
2703 purposes of the trust or the interests of the beneficiaries; or

2704 (b) Was inserted into the trust instrument as the result
2705 of an abuse by the trustee of a fiduciary or confidential
2706 relationship with the settlor.
2707 (2) An exculpatory term drafted or caused to be drafted by
2708 the trustee is invalid as an abuse of a fiduciary or
2709 confidential relationship unless the trustee proves that the
2710 exculpatory term is fair under the circumstances and that the
2711 term's existence and contents were adequately communicated
2712 directly to the settlor.
2713 736.1012 Beneficiary's consent, release, or
2714 ratification.--A trustee is not liable to a beneficiary for
2715 breach of trust if the beneficiary consented to the conduct
2716 constituting the breach, released the trustee from liability for
2717 the breach, or ratified the transaction constituting the breach,
2718 unless:
2719 (1) The consent, release, or ratification of the
2720 beneficiary was induced by improper conduct of the trustee; or
2721 (2) At the time of the consent, release, or ratification,
2722 the beneficiary did not know of the beneficiary's rights or of
2723 the material facts relating to the breach.
2724 736.1013 Limitation on personal liability of trustee.--
2725 (1) Except as otherwise provided in the contract, a
2726 trustee is not personally liable on a contract properly entered
2727 into in the trustee's fiduciary capacity in the course of
2728 administering the trust if the trustee in the contract disclosed
2729 the fiduciary capacity.
2730 (2) A trustee is personally liable for torts committed in
2731 the course of administering a trust or for obligations arising

2732 from ownership or control of trust property only if the trustee
2733 is personally at fault.
2734 (3) A claim based on a contract entered into by a trustee
2735 in the trustee's fiduciary capacity, on an obligation arising
2736 from ownership or control of trust property, or on a tort
2737 committed in the course of administering a trust may be asserted
2738 in a judicial proceeding against the trustee in the trustee's
2739 fiduciary capacity, whether or not the trustee is personally
2740 liable for the claim.
2741 (4) Issues of liability between the trust estate and the
2742 trustee individually may be determined in a proceeding for
2743 accounting, surcharge, or indemnification or in any other
2744 appropriate proceeding.
2745 736.1014 Limitations on actions against certain trusts.--
2746 (1) After the death of a settlor, no creditor of the
2747 settlor may bring, maintain, or continue any direct action
2748 against a trust described in s. 733.707(3), the trustee of the
2749 trust, or any beneficiary of the trust that is dependent on the
2750 individual liability of the settlor. Such claims and causes of
2751 action against the settlor shall be presented and enforced
2752 against the settlor's estate as provided in part VII of chapter
2753 733 and the personal representative of the settlor's estate may
2754 obtain payment from the trustee of a trust described in s.
2755 733.707(3) as provided in ss. 733.607(2), 733.707(3), and
2756 736.05053.
2757 (2) This section does not preclude a direct action against
2758 a trust described in s. 733.707(3), the trustee of the trust, or

2759 a beneficiary of the trust that is not dependent on the
2760 individual liability of the settlor.
2761 (3) This section does not affect the lien of any duly
2762 recorded mortgage or security interest or the lien of any person
2763 in possession of personal property or the right to foreclose and
2764 enforce the mortgage or lien.
2765 736.1015 Interest as general partner.--
2766 (1) Unless personal liability is imposed in the contract,
2767 a trustee who holds an interest as a general partner in a
2768 general or limited partnership is not personally liable on a
2769 contract entered into by the partnership after the trust's
2770 acquisition of the interest if the fiduciary capacity was
2771 disclosed in the contract or in a statement previously filed
2772 pursuant to a Uniform Partnership Act or Uniform Limited
2773 Partnership Act.
2774 (2) A trustee who holds an interest as a general partner
2775 is not personally liable for torts committed by the partnership
2776 or for obligations arising from ownership or control of the
2777 interest unless the trustee is personally at fault.
2778 (3) If the trustee of a revocable trust holds an interest
2779 as a general partner, the settlor is personally liable for
2780 contracts and other obligations of the partnership as if the
2781 settlor were a general partner.
2782 736.1016 Protection of person dealing with trustee.--
2783 (1) A person other than a beneficiary who in good faith
2784 assists a trustee or who in good faith and for value deals with
2785 a trustee, without knowledge that the trustee is exceeding or

2786 improperly exercising the trustee's powers, is protected from
2787 liability as if the trustee properly exercised the power.
2788 (2) A person other than a beneficiary who in good faith
2789 deals with a trustee is not required to inquire into the extent
2790 of the trustee's powers or the propriety of their exercise.
2791 (3) A person who in good faith delivers assets to a
2792 trustee need not ensure their proper application.
2793 (4) A person other than a beneficiary who in good faith
2794 assists a former trustee or who in good faith and for value
2795 deals with a former trustee, without knowledge that the
2796 trusteeship has terminated, is protected from liability as if
2797 the former trustee were still a trustee.
2798 (5) Comparable protective provisions of other laws
2799 relating to commercial transactions or transfer of securities by
2800 fiduciaries prevail over the protection provided by this
2801 section.
2802 736.1017 Certification of trust.--
2803 (1) Instead of furnishing a copy of the trust instrument
2804 to a person other than a beneficiary, the trustee may furnish to
2805 the person a certification of trust containing the following
2806 information:
2807 (a) The trust exists and the date the trust instrument was
2808 executed.
2809 (b) The identity of the settlor.
2810 (c) The identity and address of the currently acting
2811 trustee.
2812 (d) The powers of the trustee.

2813 (e) The revocability or irrevocability of the trust and
2814 the identity of any person holding a power to revoke the trust.
2815 (f) The authority of cotrustees to sign or otherwise
2816 authenticate and whether all or less than all are required in
2817 order to exercise powers of the trustee.
2818 (g) The manner of taking title to trust property.
2819 (2) A certification of trust may be signed or otherwise
2820 authenticated by any trustee.
2821 (3) A certification of trust must state that the trust has
2822 not been revoked, modified, or amended in any manner that would
2823 cause the representations contained in the certification of
2824 trust to be incorrect.
2825 (4) A certification of trust need not contain the
2826 dispositive terms of a trust.
2827 (5) A recipient of a certification of trust may require
2828 the trustee to furnish copies of any excerpts from the original
2829 trust instrument and later amendments that designate the trustee
2830 and confer upon the trustee the power to act in the pending
2831 transaction.
2832 (6) A person who acts in reliance on a certification of
2833 trust without knowledge that the representations contained in
2834 the certification are incorrect is not liable to any person for
2835 so acting and may assume without inquiry the existence of the
2836 facts contained in the certification. Knowledge of the terms of
2837 the trust may not be inferred solely from the fact that a copy
2838 of all or part of the trust instrument is held by the person
2839 relying on the certification.

2840 (7) A person who in good faith enters into a transaction
2841 in reliance on a certification of trust may enforce the
2842 transaction against the trust property as if the representations
2843 contained in the certification were correct.
2844 (8) This section does not limit the right of a person to
2845 obtain a copy of the trust instrument when required to be
2846 furnished by law or in a judicial proceeding concerning the
2847 trust.
2848 736.1018 Improper distribution or payment; liability of
2849 distributee.--Any person who received a distribution or was paid
2850 improperly from a trust shall return the assets or funds
2851 received and the income from those assets or interest on the
2852 funds from the date of distribution or payment unless the
2853 distribution or payment cannot be questioned because of
2854 adjudication, estoppel, or limitations. If the person does not
2855 have the assets or funds, the value of the assets or funds at
2856 the date of disposition, income from the assets or funds, and
2857 gain received by the person from the assets or funds shall be
2858 returned.
2859 Section 11. Part XI of chapter 736, Florida Statutes,
2860 consisting of sections 736.1101, 736.1102, 736.1103, 736.1104,
2861 736.1105, 736.1106, 736.1107, and 736.1108, is created to read:
2862
2863 PART XI
2864 RULES OF CONSTRUCTION
2865
2866 736.1101 Rules of construction; general
2867 provisions.--Except as provided in s. 736.0105(2):

2868 (1) The intent of the settlor as expressed in the terms of
2869 the trust controls the legal effect of the dispositions made in
2870 the trust.
2871 (2) The rules of construction as expressed in this part
2872 shall apply unless a contrary intent is indicated by the terms
2873 of the trust.
2874 736.1102 Construction of generic terms.--Adopted persons
2875 and persons born out of wedlock are included in class gift
2876 terminology and terms of relationship, in accordance with rules
2877 for determining relationships for purposes of intestate
2878 succession.
2879 736.1103 Gifts to multi-generation classes to be per
2880 stirpes.--Class gifts to descendants, issue, and other multi-
2881 generation classes shall be per stirpes.
2882 736.1104 Killer not entitled to receive property or other
2883 benefits by reason of victim's death.--
2884 (1) A beneficiary of a trust who unlawfully and
2885 intentionally kills or unlawfully and intentionally participates
2886 in procuring the death of the settlor or another person on whose
2887 death such beneficiary's interest depends, is not entitled to
2888 any trust interest, including homestead, dependent on the
2889 victim's death and such interest shall devolve as though the
2890 killer had predeceased the victim.
2891 (2) A final judgment of conviction of murder in any degree
2892 is conclusive for the purposes of this section. In the absence
2893 of a murder conviction in any degree, the court may determine by
2894 the greater weight of the evidence whether the killing was
2895 unlawful and intentional for purposes of this section.

2896 736.1105 Dissolution of marriage; effect on revocable
2897 trust.--Unless the trust instrument or the judgment for
2898 dissolution of marriage or divorce expressly provides otherwise,
2899 if a revocable trust is executed by a husband or wife as settlor
2900 prior to annulment of the marriage or entry of a judgment for
2901 dissolution of marriage or divorce of the settlor from the
2902 settlor's spouse, any provision of the trust that affects the
2903 settlor's spouse will become void upon annulment of the marriage
2904 or entry of the judgment of dissolution of marriage or divorce
2905 and any such trust shall be administered and construed as if the
2906 settlor's spouse had died on the date of the annulment or on
2907 entry of the judgment for dissolution of marriage or divorce.
2908 736.1106 Antilapse; survivorship with respect to future
2909 interests under terms of inter vivos and testamentary trusts;
2910 substitute takers.--
2911 (1) As used in this section, the term:
2912 (a) "Beneficiary" means the beneficiary of a future
2913 interest and includes a class member if the future interest is
2914 in the form of a class gift.
2915 (b) "Distribution date," with respect to a future
2916 interest, means the time when the future interest is to take
2917 effect in possession or enjoyment. The distribution date need
2918 not occur at the beginning or end of a calendar day, but can
2919 occur at a time during the course of a day.
2920 (c) "Future interest" includes an alternative future
2921 interest and a future interest in the form of a class gift.
2922 (d) "Future interest under the terms of a trust" means a
2923 future interest created by an inter vivos or testamentary

2924 transfer to an existing trust or creating a trust or by an
2925 exercise of a power of appointment to an existing trust
2926 directing the continuance of an existing trust, designating a
2927 beneficiary of an existing trust, or creating a trust.
2928 (e) "Surviving beneficiary" or "surviving descendant"
2929 means a beneficiary or a descendant who did not predecease the
2930 distribution date or is not deemed to have predeceased the
2931 distribution date by operation of law.
2932 (2) A future interest under the terms of a trust is
2933 contingent upon the beneficiary surviving the distribution date.
2934 Unless a contrary intent appears in the trust instrument, if a
2935 beneficiary of a future interest under the terms of a trust
2936 fails to survive the distribution date, and the deceased
2937 beneficiary leaves surviving descendants, a substitute gift is
2938 created in the beneficiary's surviving descendants. They take
2939 per stirpes the property to which the beneficiary would have
2940 been entitled if the beneficiary had survived the distribution
2941 date.
2942 (3) In the application of this section:
2943 (a) Words of survivorship attached to a future interest
2944 are a sufficient indication of an intent contrary to the
2945 application of this section.
2946 (b) A residuary clause in a will is not a sufficient
2947 indication of an intent contrary to the application of this
2948 section, whether or not the will specifically provides that
2949 lapsed or failed devises are to pass under the residuary clause.

2950 (4) If, after the application of subsections (2) and (3),
2951 there is no surviving taker, the property passes in the
2952 following order:
2953 (a) If the future interest was created by the exercise of
2954 a power of appointment, the property passes under the donor's
2955 gift-in-default clause, if any, which clause is treated as
2956 creating a future interest under the terms of a trust.
2957 (b) If no taker is produced by the application of
2958 paragraph (a) and the trust was created in a nonresiduary devise
2959 or appointment in the transferor's will, the property passes
2960 under the residuary clause in the transferor's will. For
2961 purposes of this section, the residuary clause is treated as
2962 creating a future interest under the terms of a trust.
2963 (c) If no taker is produced by the application of
2964 paragraph (a) or paragraph (b), the property passes to those
2965 persons, including the state, and in such shares as would
2966 succeed to the transferor's intestate estate under the intestate
2967 succession law of the transferor's domicile if the transferor
2968 died when the disposition is to take effect in possession or
2969 enjoyment.
2970
2971 For purposes of paragraphs (b) and (c), the term "transferor"
2972 with respect to a future interest created by the exercise of a
2973 power of appointment, means the donor if the power was a
2974 nongeneral power and the donee if the power was a general power.
2975 (5) This section applies to all trusts other than trusts
2976 that were irrevocable before the effective date of this code.

2977 736.1107 Change in securities; accessions;
2978 nonademption.--A gift of specific securities, rather than their
2979 equivalent value, entitles the beneficiary only to:
2980 (1) As much of the gifted securities of the same issuer
2981 held by the trust estate at the time of the occurrence of the
2982 event entitling the beneficiary to distribution.
2983 (2) Any additional or other securities of the same issuer
2984 held by the trust estate because of action initiated by the
2985 issuer, excluding any acquired by exercise of purchase options.
2986 (3) Securities of another issuer held by the trust estate
2987 as a result of a merger, consolidation, reorganization, or other
2988 similar action initiated by the original issuer.
2989 736.1108 Penalty clause for contest.--
2990 (1) A provision in a trust instrument purporting to
2991 penalize any interested person for contesting the trust
2992 instrument or instituting other proceedings relating to a trust
2993 estate or trust assets is unenforceable.
2994 (2) This section applies to trusts created on or after
2995 October 1, 1993. For purposes of this subsection, a revocable
2996 trust shall be treated as created when the right of revocation
2997 terminates.
2998 Section 12. Part XII of chapter 736, Florida Statutes,
2999 consisting of sections 736.1201, 736.1202, 736.1203, 736.1204,
3000 736.1205, 736.1206, 736.1207, 736.1208, 736.1209, and 736.1210,
3001 is created to read:
3002
3003 PART XII
3004 CHARITABLE TRUSTS

3005
3006 736.1201 Definitions.--As used in this part:
3007 (1) "Charitable organization" means an organization
3008 described in s. 501(c)(3) of the Internal Revenue Code and
3009 exempt from tax under s. 501(a) of the Internal Revenue Code.
3010 (2) "Internal Revenue Code" means the Internal Revenue
3011 Code of 1986, as amended.
3012 (3) "Private foundation trust" means a trust, including a
3013 trust described in s. 4947(a)(1) of the Internal Revenue Code,
3014 as defined in s. 509(a) of the Internal Revenue Code.
3015 (4) "Split interest trust" means a trust for individual
3016 and charitable beneficiaries that is subject to the provisions
3017 of s. 4947(a)(2) of the Internal Revenue Code.
3018 (5) "State attorney" means the state attorney for the
3019 judicial circuit of the principal place of administration of the
3020 trust pursuant to s. 736.0108.
3021 736.1202 Application of this part.--Except as otherwise
3022 provided in the trust, the provisions of this part apply to all
3023 private foundation trusts and split interest trusts, whether
3024 created or established before or after November 1, 1971, and to
3025 all trust assets acquired by the trustee before or after
3026 November 1, 1971.
3027 736.1203 Trustee of a private foundation trust or a split
3028 interest trust.--Except as provided in s. 736.1205, the trustee
3029 of a private foundation trust or a split interest trust has the
3030 duties and powers conferred on the trustee by this part.
3031 736.1204 Powers and duties of trustee of a private
3032 foundation trust or a split interest trust.--

3033 (1) In the exercise of a trustee's powers, including the
3034 powers granted by this part, a trustee has a duty to act with
3035 due regard to the trustee's obligation as a fiduciary, including
3036 a duty not to exercise any power in such a way as to:
3037 (a) Deprive the trust of an otherwise available tax
3038 exemption, deduction, or credit for tax purposes;
3039 (b) Deprive a donor of a trust asset or tax deduction or
3040 credit; or
3041 (c) Operate to impose a tax on a donor, trust, or other
3042 person.
3043
3044 For purposes of this subsection, the term "tax" includes, but is
3045 not limited to, any federal, state, or local excise, income,
3046 gift, estate, or inheritance tax.
3047 (2) Except as provided in s. 736.1205, a trustee of a
3048 private foundation trust shall make distributions at such time
3049 and in such manner as not to subject the trust to tax under s.
3050 4942 of the Internal Revenue Code.
3051 (3) Except as provided in subsection (4) and in s.
3052 736.1205, a trustee of a private foundation trust, or a split
3053 interest trust to the extent that the split interest trust is
3054 subject to the provisions of s. 4947(a)(2) of the Internal
3055 Revenue Code, in the exercise of the trustee's powers shall not:
3056 (a) Engage in any act of self-dealing as defined in s.
3057 4941(d) of the Internal Revenue Code;
3058 (b) Retain any excess business holdings as defined in s.
3059 4943(c) of the Internal Revenue Code;

3060 (c) Make any investments in a manner that subjects the
3061 foundation to tax under s. 4944 of the Internal Revenue Code; or
3062 (d) Make any taxable expenditures as defined in s. 4945(d)
3063 of the Internal Revenue Code.
3064 (4) Paragraphs (3)(b) and (c) shall not apply to a split
3065 interest trust if:
3066 (a) All the interest from income, and none of the
3067 remainder interest, of the trust is devoted solely to one or
3068 more of the purposes described in s. 170(c)(2)(B) of the
3069 Internal Revenue Code, and all amounts in the trust for which a
3070 deduction was allowed under s. 170, s. 545(b)(2), s. 556(b)(2),
3071 s. 642(c), s. 2055, s. 2106(a)(2), or s. 2522 of the Internal
3072 Revenue Code have an aggregate fair market value of not more
3073 than 60 percent of the aggregate fair market value of all
3074 amounts in the trust; or
3075 (b) A deduction was allowed under s. 170, s. 545(b)(2), s.
3076 556(b)(2), s. 642(c), s. 2055, s. 2106(a)(2), or s. 2522 of the
3077 Internal Revenue Code for amounts payable under the terms of the
3078 trust to every remainder beneficiary but not to any income
3079 beneficiary.
3080 736.1205 Notice that this part does not apply.--In the
3081 case of a power to make distributions, if the trustee determines
3082 that the governing instrument contains provisions that are more
3083 restrictive than s. 736.1204(2), or if the trust contains other
3084 powers, inconsistent with the provisions of s. 736.1204(3) that
3085 specifically direct acts by the trustee, the trustee shall
3086 notify the state attorney when the trust becomes subject to this
3087 part. Section 736.1204 does not apply to any trust for which

3088 notice has been given pursuant to this section unless the trust
3089 is amended to comply with the terms of this part.
3090 736.1206 Power to amend trust instrument.--
3091 (1) In the case of a trust that is solely for a named
3092 charitable organization or organizations and for which the
3093 trustee does not possess any discretion concerning the
3094 distribution of income or principal among two or more such
3095 organizations, the trustee may amend the governing instrument to
3096 comply with the provisions of s. 736.1204(2) with the consent of
3097 the named charitable organization or organizations.
3098 (2) In the case of a charitable trust that is not subject
3099 to the provisions of subsection (1), the trustee may amend the
3100 governing instrument to comply with the provisions of s.
3101 736.1204(2) with the consent of the state attorney.
3102 736.1207 Power of court to permit deviation.--This part
3103 does not affect the power of a court to relieve a trustee from
3104 any restrictions on the powers and duties that are placed on the
3105 trustee by the governing instrument or applicable law for cause
3106 shown and on complaint of the trustee, state attorney, or an
3107 affected beneficiary and notice to the affected parties.
3108 736.1208 Release; property and persons affected; manner of
3109 effecting.--
3110 (1) The trustee of a trust, all of the unexpired interests
3111 in which are devoted to one or more charitable purposes, may
3112 release a power to select charitable donees unless the creating
3113 instrument provides otherwise.
3114 (2) The release of a power to select charitable donees may
3115 apply to all or any part of the property subject to the power

3116 and may reduce or limit the charitable organizations, or classes
3117 of charitable organizations, in whose favor the power is
3118 exercisable.
3119 (3) A release shall be effected by a duly acknowledged
3120 written instrument signed by the trustee and delivered as
3121 provided in subsection (4).
3122 (4) Delivery of a release shall be accomplished as
3123 follows:
3124 (a) If the release is accomplished by specifying a
3125 charitable organization or organizations as beneficiary or
3126 beneficiaries of the trust, by delivery of a copy of the release
3127 to each designated charitable organization.
3128 (b) If the release is accomplished by reducing the class
3129 of permissible charitable organizations, by delivery of a copy
3130 of the release to the state attorney.
3131 (5) If a release is accomplished by specifying a public
3132 charitable organization or organizations as beneficiary or
3133 beneficiaries of the trust, the trust at all times thereafter
3134 shall be operated exclusively for the benefit of, and be
3135 supervised by, the specified public charitable organization or
3136 organizations.
3137 736.1209 Election to come under this part.--With the
3138 consent of that organization or organizations, a trustee of a
3139 trust for the benefit of a public charitable organization or
3140 organizations may come under s. 736.0838(5) by filing with the
3141 state attorney an election, accompanied by the proof of required
3142 consent. Thereafter the trust shall be subject to s.
3143 736.1208(5).

3144 736.1210 Interpretation.--This part shall be interpreted
3145 to effectuate the intent of the state to preserve, foster, and
3146 encourage gifts to, or for the benefit of, charitable
3147 organizations.
3148 Section 13. Part XIII of chapter 736, Florida Statutes,
3149 consisting of sections 736.1301, 736.1302, and 736.1303, is
3150 created to read:
3151
3152 PART XIII
3153 MISCELLANEOUS
3154
3155 736.1301 Electronic records and signatures.--Any
3156 provisions of this code governing the legal effect, validity, or
3157 enforceability of electronic records or electronic signatures,
3158 and of contracts formed or performed with the use of such
3159 records or signatures, are deemed to conform to the requirements
3160 of s. 102 of the Electronic Signatures in Global and National
3161 Commerce Act, 15 U.S.C. s. 7002, and supersede, modify, and
3162 limit the requirements of the Electronic Signatures in Global
3163 and National Commerce Act.
3164 736.1302 Severability clause.--If any provision of this
3165 code or its application to any person or circumstances is held
3166 invalid, the invalidity does not affect other provisions or
3167 applications of this code that can be given effect without the
3168 invalid provision or application, and to this end the provisions
3169 of this code are severable.
3170 736.1303 Application to existing relationships.--

3171 (1) Except as otherwise provided in this code, on July 1,
3172 2007:
3173 (a) This code applies to all trusts created before, on, or
3174 after such date.
3175 (b) This code applies to all judicial proceedings
3176 concerning trusts commenced on or after such date.
3177 (c) This code applies to judicial proceedings concerning
3178 trusts commenced before such date, unless the court finds that
3179 application of a particular provision of this code would
3180 substantially interfere with the effective conduct of the
3181 judicial proceedings or prejudice the rights of the parties, in
3182 which case the particular provision of this code does not apply
3183 and the superseded law applies.
3184 (d) Any rule of construction or presumption provided in
3185 this code applies to trust instruments executed before the
3186 effective date of this code unless there is a clear indication
3187 of a contrary intent in the terms of the trust.
3188 (e) An act done before such date is not affected by this
3189 code.
3190 (2) If a right is acquired, extinguished, or barred on the
3191 expiration of a prescribed period that has commenced to run
3192 under any other law before July 1, 2007, that law continues to
3193 apply to the right even if it has been repealed or superseded.
3194 Section 14. Paragraph (a) of subsection (5) of section
3195 497.458, Florida Statutes, is amended to read:
3196 497.458 Disposition of proceeds received on contracts.--
3197 (5) The trustee of the trust established pursuant to this
3198 section shall only have the power to:

3199 (a) Invest in investments as prescribed in s. 215.47 and
3200 exercise the powers set forth in part VIII of chapter 736 ~~part~~
3201 ~~IV of chapter 737~~, provided that the licensing authority may by
3202 order require the trustee to liquidate or dispose of any
3203 investment within 30 days after such order, or within such other
3204 times as the order may direct. The licensing authority may issue
3205 such order if it determines that the investment violates any
3206 provision of this chapter or is not in the best interests of the
3207 preneed contract holders whose contracts are secured by the
3208 trust funds.
3209 Section 15. Section 518.117, Florida Statutes, is created
3210 to read:
3211 518.117 Permissible investments of fiduciary funds.--A
3212 fiduciary that is authorized by lawful authority to engage in
3213 trust business as defined in s. 658.12(20) may invest fiduciary
3214 funds in accordance with s. 660.417 so long as the investment
3215 otherwise complies with this chapter.
3216 Section 16. Subsection (2) of section 607.0802, Florida
3217 Statutes, is amended to read:
3218 607.0802 Qualifications of directors.--
3219 (2) In the event that the eligibility to serve as a member
3220 of the board of directors of a condominium association,
3221 cooperative association, homeowners' association, or mobile home
3222 owners' association is restricted to membership in such
3223 association and membership is appurtenant to ownership of a
3224 unit, parcel, or mobile home, a grantor of a trust described in
3225 s. 733.707(3), or a qualified beneficiary as defined in s.
3226 736.0103(14) ~~737.303(4)(b)~~ of a trust which owns a unit, parcel,

3227 or mobile home shall be deemed a member of the association and
3228 eligible to serve as a director of the condominium association,
3229 cooperative association, homeowners' association, or mobile home
3230 owners' association, provided that said beneficiary occupies the
3231 unit, parcel, or mobile home.
3232 Section 17. Subsection (2) of section 617.0802, Florida
3233 Statutes, is amended to read:
3234 617.0802 Qualifications of directors.--
3235 (2) In the event that the eligibility to serve as a member
3236 of the board of directors of a condominium association,
3237 cooperative association, homeowners' association, or mobile home
3238 owners' association is restricted to membership in such
3239 association and membership is appurtenant to ownership of a
3240 unit, parcel, or mobile home, a grantor of a trust described in
3241 s. 733.707(3), or a qualified beneficiary as defined in s.
3242 736.0103(14) ~~737.303(4)(b)~~ of a trust which owns a unit, parcel,
3243 or mobile home shall be deemed a member of the association and
3244 eligible to serve as a director of the condominium association,
3245 cooperative association, homeowners' association, or mobile home
3246 owners' association, provided that said beneficiary occupies the
3247 unit, parcel, or mobile home.
3248 Section 18. Subsection (6) of section 660.25, Florida
3249 Statutes, renumbered as subsection (7) and amended, and a new
3250 subsection (6) is added to that section, to read:
3251 660.25 Definitions.--Subject to other definitions
3252 contained in other sections of this code, and unless the context
3253 otherwise requires, in this chapter:

3254 (6) "Investment instrument" means any security as defined
3255 in s. 2(a)(1) of the Securities Act of 1933; any security of an
3256 open-end or closed-end management investment company or
3257 investment trust registered under the Investment Company Act of
3258 1940, 15 U.S.C. ss. 80a-1 et seq., as amended; any contract of
3259 sale of a commodity for future delivery within the meaning of s.
3260 2(i) of the Commodity Exchange Act; or any other interest in
3261 securities, including, but not limited to, shares or interests
3262 in a private investment fund, including, but not limited to, a
3263 private investment fund organized as a limited partnership, a
3264 limited liability company, a statutory or common law business
3265 trust, a statutory trust, or a real estate investment trust, a
3266 joint venture, or any other general or limited partnership;
3267 derivatives or other interests of any nature in securities such
3268 as options, options on futures, and variable forward contracts;
3269 mutual funds; common trust funds; money market funds; hedge
3270 funds; private equity or venture capital funds; insurance
3271 contracts; and other entities or vehicles investing in
3272 securities or interests in securities whether registered or
3273 otherwise.
3274 (7) ~~(6)~~ Terms used but not defined in this chapter, but
3275 which are expressly defined in chapter 518, the financial
3276 institutions codes, chapter 732, chapter 733, chapter 734,
3277 chapter 735, chapter 736 ~~737~~, chapter 738, chapter 744, or
3278 chapter 747, shall in this chapter, unless the context otherwise
3279 requires, have the meanings ascribed to them in said chapters;
3280 and references in any of said chapters to a "trust company" or

3281 to "trust companies" shall include every trust department as
3282 defined in s. 658.12.
3283 Section 19. Section 660.417, Florida Statutes, is amended
3284 to read:
3285 660.417 Investment of fiduciary funds in investment
3286 instruments ~~into mutual fund accounts~~; permissible activity
3287 under certain circumstances; limitations.--
3288 (1) In addition to other investments authorized by law for
3289 the investment of funds held by a fiduciary, or by the
3290 instrument governing the fiduciary relationship, ~~and~~
3291 ~~notwithstanding any other provision of law,~~ a bank or trust
3292 company acting as a fiduciary, agent or otherwise may, in the
3293 exercise of its investment discretion or at the direction of
3294 another person authorized to direct investment of funds held by
3295 the bank or trust company as fiduciary, invest and reinvest in
3296 investment instruments ~~the securities of an open-end or closed-~~
3297 ~~end management investment company or investment trust registered~~
3298 ~~under the Investment Company Act of 1940, 15 U.S.C. ss. 80a-1 et~~
3299 ~~seq., as amended,~~ so long as the ~~portfolio of such~~ investment
3300 instruments consist ~~company or investment trust consists~~
3301 substantially of investments not prohibited by the governing
3302 instrument.
3303 (2) The fact that such bank or trust company or an
3304 affiliate of the bank or trust company provides services with
3305 respect to ~~the~~ investment instruments ~~company or investment~~
3306 ~~trust~~ such as that of an investment adviser, administrator,
3307 broker, custodian, transfer agent, placement agent, servicing
3308 agent, registrar, underwriter, sponsor, distributor, or manager

3309 or in any other capacity, ~~otherwise~~ and is receiving reasonable
3310 compensation for those services, shall not preclude such bank or
3311 trust company from investing or reinvesting in investment
3312 instruments ~~the securities of the open-end or closed-end~~
3313 ~~management investment trust registered under the Investment~~
3314 ~~Company Act of 1940, 15 U.S.C. ss. 80a-1 et seq., as amended~~.
3315 However, with respect to any funds so invested, the basis
3316 (expressed as a percentage of asset value or otherwise) upon
3317 which such compensation is calculated shall be disclosed (by
3318 prospectus, account statement or otherwise) to all persons to
3319 whom statements of such account are rendered.
3320 (3) The fact that such bank or trust company or an
3321 affiliate of the bank or trust company owns or controls
3322 investment instruments shall not preclude the bank or trust
3323 company acting as a fiduciary from investing or reinvesting in
3324 such investment instruments, provided such investment
3325 instruments:
3326 (a) Are held for sale by the bank or trust company or by
3327 an affiliate of the bank or trust company in the ordinary course
3328 of its business of providing investment services to its
3329 customers and do not include any such interests held by the bank
3330 or trust company or by an affiliate of the bank or trust company
3331 for its own account.
3332 (b) Are sold primarily to accounts for which the bank or
3333 trust company is not acting as a fiduciary upon terms that are
3334 not more favorable to the buyer than the terms upon which they
3335 are sold to accounts for which the bank or trust company is
3336 acting as a fiduciary.

3337 Section 20. Paragraphs (a), (d), and (e) of subsection (1)
3338 and subsections (2), (3), (9), and (10) of section 660.46,
3339 Florida Statutes, are amended to read:
3340 660.46 Substitution of fiduciaries.--
3341 (1) The provisions of this section shall apply to the
3342 transfer of fiduciary accounts by substitution, and for those
3343 purposes these provisions shall constitute alternative
3344 procedures to those provided or required by any other provisions
3345 of law relating to the transfer of fiduciary accounts or the
3346 substitution of persons acting or who are to act in a fiduciary
3347 capacity. In this section, and only for its purposes, the term:
3348 (a) "Limitation notice" has the meaning ascribed in s.
3349 736.1008(4) ~~737.307(3)~~.
3350 (d) "Trust accounting" has the meaning ascribed in s.
3351 736.08135 ~~737.3035~~.
3352 (e) "Trust disclosure document" has the meaning ascribed
3353 in s. 736.1008(4)(a) ~~737.307(2)~~.
3354 (2) Any original fiduciary and any proposed substitute
3355 fiduciary may, with respect to any fiduciary account or accounts
3356 which they shall mutually select, initiate proceedings by
3357 joining in the filing of a petition in the circuit court,
3358 requesting the substitution of the proposed substitute fiduciary
3359 for the original fiduciary as to such fiduciary account or
3360 accounts. The petition may be filed in the county in which the
3361 main office of the original fiduciary is located and, except to
3362 the extent inconsistent with the provisions of this section,
3363 shall be governed by the Florida Rules of Civil Procedure;
3364 however, if any fiduciary account is then the subject of a

3365 proceeding in a court in this state pursuant to the Florida
3366 Probate Code, the Florida Guardianship Law, chapter 736 ~~737~~, or
3367 chapter 747, the petition relating to such fiduciary account
3368 shall be filed in that proceeding and shall be governed by the
3369 procedural or other relevant rules applicable to such proceeding
3370 except to the extent inconsistent with the provisions of this
3371 section.
3372 (3) Unless a waiver or consent shall be filed in the
3373 proceedings as provided in subsection (4), the provisions of s.
3374 731.301(1) and (2) shall apply with respect to notice of the
3375 proceedings to all persons who are then cofiduciaries with the
3376 original fiduciary, other than a person joining as a petitioner
3377 in the proceedings; to all persons named in the governing
3378 instrument as substitutes or successors to the fiduciary
3379 capacity of the original fiduciary; to the persons then living
3380 who are entitled under the governing instrument to appoint a
3381 substitute or successor to act in the fiduciary capacity of the
3382 original fiduciary; to all vested beneficiaries of the fiduciary
3383 account; and to all then-living originators of the governing
3384 instrument. Unless a waiver or consent shall be filed in the
3385 proceedings as provided in subsection (4), the provisions of s.
3386 731.301 shall apply with respect to notice to all contingent
3387 beneficiaries of the fiduciary account. Only the persons or
3388 classes of persons described in the foregoing provisions of this
3389 subsection shall be deemed to be interested persons for the
3390 purposes of this section and the proceedings and notices
3391 provided for in this section; and the provisions of ss.
3392 731.301(3) and 731.303(3) and~~,~~ (4)~~,~~ and ~~(5),~~ part III of chapter

3393 736, relating to notice requirements, the effect of notice, and
3394 representation of interests, shall apply to the proceedings
3395 provided for in this section.
3396 (9) Unless previously or otherwise barred by adjudication,
3397 waiver, consent, limitation, or the provisions of subsection
3398 (8), an action for breach of trust or breach of fiduciary duties
3399 or responsibilities against an original fiduciary in whose place
3400 and stead another trust company or trust department has been
3401 substituted pursuant to the provisions of this section is barred
3402 for any beneficiary who has received a trust disclosure document
3403 adequately disclosing the matter unless a proceeding to assert
3404 the claim is commenced within 6 months after receipt of the
3405 trust disclosure document or the limitation notice that applies
3406 to the trust disclosure document, whichever is received later.
3407 In any event, and notwithstanding lack of adequate disclosure,
3408 all claims against such original fiduciary which has complied
3409 with the requirements of s. 736.1008 ~~issued a final trust~~
3410 ~~disclosure document received by the beneficiary and has informed~~
3411 ~~the beneficiary of the location and availability of records for~~
3412 ~~his or her examination~~ are barred as provided in chapter 95.
3413 Section 736.1008(4)(a) and (c) ~~737.307(2) and (3)~~ applies to
3414 this subsection.
3415 (10) A beneficiary has received a final trust disclosure
3416 document or a limitation notice if, when the beneficiary is an
3417 adult, it is received by him or her or if, when the beneficiary
3418 is a minor or a disabled person, it is received by his or her
3419 representative as provided in part III of chapter 736 ~~defined in~~
3420 ~~s. 731.303~~.

3421 Section 21. Section 660.418, Florida Statutes, is amended
3422 to read:
3423 660.418 Investment of fiduciary funds in syndicate
3424 securities.--Notwithstanding any other provision of law, any
3425 financial institution with fiduciary powers may, in its
3426 fiduciary capacity, purchase bonds or other securities
3427 underwritten or otherwise distributed by the financial
3428 institution or by a syndicate that includes the financial
3429 institution, or an affiliate of the financial institution,
3430 provided that such purchase is made through a licensed
3431 securities dealer, is otherwise prudent, and is not prohibited
3432 by the instrument governing the fiduciary relationship and that
3433 disclosure is made at least annually to those persons entitled
3434 to a statement of accounts pursuant to s. 736.0813 ~~737.303(4)~~
3435 indicating that such securities have been or may be purchased.
3436 This section applies to purchases of bonds or other securities
3437 made at the time of the initial offering of such bonds or
3438 securities or at any time after such initial offering.
3439 Section 22. Subsection (5) of section 689.071, Florida
3440 Statutes, is amended to read:
3441 689.071 Land trusts transferring interests in real estate;
3442 ownership vests in trustee.--
3443 (5) In addition to any other limitation on personal
3444 liability existing pursuant to statute or otherwise, the
3445 provisions of s. 736.1013 ~~737.306~~ apply to the trustee of a land
3446 trust created pursuant to this section.
3447 Section 23. Subsections (1) and (4) of section 689.075,
3448 Florida Statutes, are amended to read:

3449 689.075 Inter vivos trusts; powers retained by settlor.--
3450 (1) A trust which is otherwise valid and which complies
3451 with s. 736.0403 ~~737.111~~, including, but not limited to, a trust
3452 the principal of which is composed of real property, intangible
3453 personal property, tangible personal property, the possible
3454 expectancy of receiving as a named beneficiary death benefits as
3455 described in s. 733.808, or any combination thereof, and which
3456 has been created by a written instrument shall not be held
3457 invalid or an attempted testamentary disposition for any one or
3458 more of the following reasons:
3459 (a) Because the settlor or another person or both possess
3460 the power to revoke, amend, alter, or modify the trust in whole
3461 or in part;
3462 (b) Because the settlor or another person or both possess
3463 the power to appoint by deed or will the persons and
3464 organizations to whom the income shall be paid or the principal
3465 distributed;
3466 (c) Because the settlor or another person or both possess
3467 the power to add to, or withdraw from, the trust all or any part
3468 of the principal or income at one time or at different times;
3469 (d) Because the settlor or another person or both possess
3470 the power to remove the trustee or trustees and appoint a
3471 successor trustee or trustees;
3472 (e) Because the settlor or another person or both possess
3473 the power to control the trustee or trustees in the
3474 administration of the trust;

3475 (f) Because the settlor has retained the right to receive
3476 all or part of the income of the trust during her or his life or
3477 for any part thereof; or
3478 (g) Because the settlor is, at the time of the execution
3479 of the instrument, or thereafter becomes, sole trustee.
3480 (4) This section shall be applicable to trusts executed
3481 before or after July 1, 1969, by persons who are living on or
3482 after said date. ~~However, the requirement of conformity with the~~
3483 ~~formalities for the execution of wills as found in paragraph~~
3484 ~~(1)(g) shall not be imposed upon any trust executed prior to~~
3485 ~~July 1, 1969.~~
3486 Section 24. Section 689.175, Florida Statutes, is created
3487 to read:
3488 689.175 Worthier title doctrine abolished.--The doctrine
3489 of worthier title is abolished as a rule of law and as a rule of
3490 construction. Language in a governing instrument describing the
3491 beneficiaries of a disposition as the transferor's "heirs,"
3492 "heirs at law," "next of kin," "distributees," "relatives," or
3493 "family," or language of similar import, does not create or
3494 presumptively create a reversionary interest in the transferor.
3495 Section 25. Subsection (8) of section 709.08, Florida
3496 Statutes, is amended to read:
3497 709.08 Durable power of attorney.--
3498 (8) STANDARD OF CARE.--Except as otherwise provided in
3499 paragraph (4)(e), an attorney in fact is a fiduciary who must
3500 observe the standards of care applicable to trustees as
3501 described in s. 736.0901 ~~737.302~~. The attorney in fact is not
3502 liable to third parties for any act pursuant to the durable

3503 power of attorney if the act was authorized at the time. If the
3504 exercise of the power is improper, the attorney in fact is
3505 liable to interested persons as described in s. 731.201 for
3506 damage or loss resulting from a breach of fiduciary duty by the
3507 attorney in fact to the same extent as the trustee of an express
3508 trust.
3509 Section 26. Paragraph (c) of subsection (2) of section
3510 721.08, Florida Statutes, is amended to read:
3511 721.08 Escrow accounts; nondisturbance instruments;
3512 alternate security arrangements; transfer of legal title.--
3513 (2) One hundred percent of all funds or other property
3514 which is received from or on behalf of purchasers of the
3515 timeshare plan or timeshare interest prior to the occurrence of
3516 events required in this subsection shall be deposited pursuant
3517 to an escrow agreement approved by the division. The funds or
3518 other property may be released from escrow only as follows:
3519 (c) Compliance with conditions.--
3520 1. Timeshare licenses.--If the timeshare plan is one in
3521 which timeshare licenses are to be sold and no cancellation or
3522 default has occurred, the escrow agent may release the escrowed
3523 funds or other property to or on the order of the developer upon
3524 presentation of:
3525 a. An affidavit by the developer that all of the following
3526 conditions have been met:
3527 (I) Expiration of the cancellation period.
3528 (II) Completion of construction.
3529 (III) Closing.
3530 (IV) Either:

3531 (A) Execution, delivery, and recordation by each
3532 interestholder of the nondisturbance and notice to creditors
3533 instrument, as described in this section; or
3534 (B) Transfer by the developer of legal title to the
3535 subject accommodations and facilities, or all use rights
3536 therein, into a trust satisfying the requirements of
3537 subparagraph 4. and the execution, delivery, and recordation by
3538 each other interestholder of the nondisturbance and notice to
3539 creditors instrument, as described in this section.
3540 b. A certified copy of each recorded nondisturbance and
3541 notice to creditors instrument.
3542 c. One of the following:
3543 (I) A copy of a memorandum of agreement, as defined in s.
3544 721.05, together with satisfactory evidence that the original
3545 memorandum of agreement has been irretrievably delivered for
3546 recording to the appropriate official responsible for
3547 maintaining the public records in the county in which the
3548 subject accommodations and facilities are located. The original
3549 memorandum of agreement must be recorded within 180 days after
3550 the date on which the purchaser executed her or his purchase
3551 agreement.
3552 (II) A notice delivered for recording to the appropriate
3553 official responsible for maintaining the public records in each
3554 county in which the subject accommodations and facilities are
3555 located notifying all persons of the identity of an independent
3556 escrow agent or trustee satisfying the requirements of
3557 subparagraph 4. that shall maintain separate books and records,
3558 in accordance with good accounting practices, for the timeshare

3559 plan in which timeshare licenses are to be sold. The books and
3560 records shall indicate each accommodation and facility that is
3561 subject to such a timeshare plan and each purchaser of a
3562 timeshare license in the timeshare plan.
3563 2. Timeshare estates.--If the timeshare plan is one in
3564 which timeshare estates are to be sold and no cancellation or
3565 default has occurred, the escrow agent may release the escrowed
3566 funds or other property to or on the order of the developer upon
3567 presentation of:
3568 a. An affidavit by the developer that all of the following
3569 conditions have been met:
3570 (I) Expiration of the cancellation period.
3571 (II) Completion of construction.
3572 (III) Closing.
3573 b. If the timeshare estate is sold by agreement for deed,
3574 a certified copy of the recorded nondisturbance and notice to
3575 creditors instrument, as described in this section.
3576 c. Evidence that each accommodation and facility:
3577 (I) Is free and clear of the claims of any
3578 interestholders, other than the claims of interestholders that,
3579 through a recorded instrument, are irrevocably made subject to
3580 the timeshare instrument and the use rights of purchasers made
3581 available through the timeshare instrument;
3582 (II) Is the subject of a recorded nondisturbance and
3583 notice to creditors instrument that complies with subsection (3)
3584 and s. 721.17; or
3585 (III) Has been transferred into a trust satisfying the
3586 requirements of subparagraph 4.

3587 d. Evidence that the timeshare estate:
3588 (I) Is free and clear of the claims of any
3589 interestholders, other than the claims of interestholders that,
3590 through a recorded instrument, are irrevocably made subject to
3591 the timeshare instrument and the use rights of purchasers made
3592 available through the timeshare instrument; or
3593 (II) Is the subject of a recorded nondisturbance and
3594 notice to creditors instrument that complies with subsection (3)
3595 and s. 721.17.
3596 3. Personal property timeshare interests.--If the
3597 timeshare plan is one in which personal property timeshare
3598 interests are to be sold and no cancellation or default has
3599 occurred, the escrow agent may release the escrowed funds or
3600 other property to or on the order of the developer upon
3601 presentation of:
3602 a. An affidavit by the developer that all of the following
3603 conditions have been met:
3604 (I) Expiration of the cancellation period.
3605 (II) Completion of construction.
3606 (III) Closing.
3607 b. If the personal property timeshare interest is sold by
3608 agreement for transfer, evidence that the agreement for transfer
3609 complies fully with s. 721.06 and this section.
3610 c. Evidence that one of the following has occurred:
3611 (I) Transfer by the owner of the underlying personal
3612 property of legal title to the subject accommodations and
3613 facilities or all use rights therein into a trust satisfying the
3614 requirements of subparagraph 4.; or

3615 (II) Transfer by the owner of the underlying personal
3616 property of legal title to the subject accommodations and
3617 facilities or all use rights therein into an owners' association
3618 satisfying the requirements of subparagraph 5.
3619 d. Evidence of compliance with the provisions of
3620 subparagraph 6., if required.
3621 e. If a personal property timeshare plan is created with
3622 respect to accommodations and facilities that are located on or
3623 in an oceangoing vessel, including a "documented vessel" or a
3624 "foreign vessel," as defined and governed by 46 U.S.C., chapter
3625 301:
3626 (I) In making the transfer required in sub-subparagraph
3627 c., the developer shall use as its transfer instrument a
3628 document that establishes and protects the continuance of the
3629 use rights in the subject accommodations and facilities in a
3630 manner that is enforceable by the trust or owners' association.
3631 (II) The transfer instrument shall comply fully with the
3632 provisions of this chapter, shall be part of the timeshare
3633 instrument, and shall contain specific provisions that:
3634 (A) Prohibit the vessel owner, the developer, any manager
3635 or operator of the vessel, the owners' association or the
3636 trustee, the managing entity, or any other person from incurring
3637 any liens against the vessel except for liens that are required
3638 for the operation and upkeep of the vessel, including liens for
3639 fuel expenditures, repairs, crews' wages, and salvage, and
3640 except as provided in sub-sub-subparagraphs 4.b.(III) and
3641 5.b.(III). All expenses, fees, and taxes properly incurred in
3642 connection with the creation, satisfaction, and discharge of any

3643 such permitted lien, or a prorated portion thereof if less than
3644 all of the accommodations on the vessel are subject to the
3645 timeshare plan, shall be common expenses of the timeshare plan.
3646 (B) Grant a lien against the vessel in favor of the
3647 owners' association or trustee to secure the full and faithful
3648 performance of the vessel owner and developer of all of their
3649 obligations to the purchasers.
3650 (C) Establish governing law in a jurisdiction that
3651 recognizes and will enforce the timeshare instrument and the
3652 laws of the jurisdiction of registry of the vessel.
3653 (D) Require that a description of the use rights of
3654 purchasers be posted and displayed on the vessel in a manner
3655 that will give notice of such rights to any party examining the
3656 vessel. This notice must identify the owners' association or
3657 trustee and include a statement disclosing the limitation on
3658 incurring liens against the vessel described in sub-sub-sub-
3659 subparagraph (A).
3660 (E) Include the nondisturbance and notice to creditors
3661 instrument for the vessel owner and any other interestholders.
3662 (F) The owners' association created under subparagraph 5.
3663 or trustee created under subparagraph 4. shall have access to
3664 any certificates of classification in accordance with the
3665 timeshare instrument.
3666 (III) If the vessel is a foreign vessel, the vessel must
3667 be registered in a jurisdiction that permits a filing evidencing
3668 the use rights of purchasers in the subject accommodations and
3669 facilities, offers protection for such use rights against
3670 unfiled and inferior claims, and recognizes the document or

3671 instrument creating such use rights as a lien against the
3672 vessel.
3673 (IV) In addition to the disclosures required by s.
3674 721.07(5), the public offering statement and purchase contract
3675 must contain a disclosure in conspicuous type in substantially
3676 the following form:
3677
3678 The laws of the State of Florida govern the offering of this
3679 timeshare plan in this state. There are inherent risks in
3680 purchasing a timeshare interest in this timeshare plan because
3681 the accommodations and facilities of the timeshare plan are
3682 located on a vessel that will sail into international waters and
3683 into waters governed by many different jurisdictions. Therefore,
3684 the laws of the State of Florida cannot fully protect your
3685 purchase of an interest in this timeshare plan. Specifically,
3686 management and operational issues may need to be addressed in
3687 the jurisdiction in which the vessel is registered, which is
3688 (insert jurisdiction in which vessel is registered) . Concerns
3689 of purchasers may be sent to (insert name of applicable
3690 regulatory agency and address) .
3691
3692 4. Trust.--
3693 a. If the subject accommodations or facilities, or all use
3694 rights therein, are to be transferred into a trust in order to
3695 comply with this paragraph, such transfer shall take place
3696 pursuant to this subparagraph.
3697 b. Prior to the transfer by each interestholder of the
3698 subject accommodations and facilities, or all use rights

3699 therein, to a trust, any lien or other encumbrance against such
3700 accommodations and facilities, or use rights therein, shall be
3701 made subject to a nondisturbance and notice to creditors
3702 instrument pursuant to subsection (3). No transfer pursuant to
3703 this subparagraph shall become effective until the trustee
3704 accepts such transfer and the responsibilities set forth herein.
3705 A trust established pursuant to this subparagraph shall comply
3706 with the following provisions:
3707 (I) The trustee shall be an individual or a business
3708 entity authorized and qualified to conduct trust business in
3709 this state. Any corporation authorized to do business in this
3710 state may act as trustee in connection with a timeshare plan
3711 pursuant to this chapter. The trustee must be independent from
3712 any developer or managing entity of the timeshare plan or any
3713 interestholder of any accommodation or facility of such plan.
3714 (II) The trust shall be irrevocable so long as any
3715 purchaser has a right to occupy any portion of the timeshare
3716 property pursuant to the timeshare plan.
3717 (III) The trustee shall not convey, hypothecate, mortgage,
3718 assign, lease, or otherwise transfer or encumber in any fashion
3719 any interest in or portion of the timeshare property with
3720 respect to which any purchaser has a right of use or occupancy
3721 unless the timeshare plan is terminated pursuant to the
3722 timeshare instrument, or such conveyance, hypothecation,
3723 mortgage, assignment, lease, transfer, or encumbrance is
3724 approved by a vote of two-thirds of all voting interests of the
3725 timeshare plan and such decision is declared by a court of
3726 competent jurisdiction to be in the best interests of the

3727 purchasers of the timeshare plan. The trustee shall notify the
3728 division in writing within 10 days after receiving notice of the
3729 filing of any petition relating to obtaining such a court order.
3730 The division shall have standing to advise the court of the
3731 division's interpretation of the statute as it relates to the
3732 petition.
3733 (IV) All purchasers of the timeshare plan or the owners'
3734 association of the timeshare plan shall be the express
3735 beneficiaries of the trust. The trustee shall act as a fiduciary
3736 to the beneficiaries of the trust. The personal liability of the
3737 trustee shall be governed by ss. 736.08125, 736.08163, 736.1013,
3738 and 736.1015 ~~s. 737.306~~. The agreement establishing the trust
3739 shall set forth the duties of the trustee. The trustee shall be
3740 required to furnish promptly to the division upon request a copy
3741 of the complete list of the names and addresses of the owners in
3742 the timeshare plan and a copy of any other books and records of
3743 the timeshare plan required to be maintained pursuant to s.
3744 721.13 that are in the possession, custody, or control of the
3745 trustee. All expenses reasonably incurred by the trustee in the
3746 performance of its duties, together with any reasonable
3747 compensation of the trustee, shall be common expenses of the
3748 timeshare plan.
3749 (V) The trustee shall not resign upon less than 90 days'
3750 prior written notice to the managing entity and the division. No
3751 resignation shall become effective until a substitute trustee,
3752 approved by the division, is appointed by the managing entity
3753 and accepts the appointment.

3754 (VI) The documents establishing the trust arrangement
3755 shall constitute a part of the timeshare instrument.
3756 (VII) For trusts holding property in a timeshare plan
3757 located outside this state, the trust and trustee holding such
3758 property shall be deemed in compliance with the requirements of
3759 this subparagraph if such trust and trustee are authorized and
3760 qualified to conduct trust business under the laws of such
3761 jurisdiction and the agreement or law governing such trust
3762 arrangement provides substantially similar protections for the
3763 purchaser as are required in this subparagraph for trusts
3764 holding property in a timeshare plan in this state.
3765 (VIII) The trustee shall have appointed a registered agent
3766 in this state for service of process. In the event such a
3767 registered agent is not appointed, service of process may be
3768 served pursuant to s. 721.265.
3769 5. Owners' association.--
3770 a. If the subject accommodations or facilities, or all use
3771 rights therein, are to be transferred into an owners'
3772 association in order to comply with this paragraph, such
3773 transfer shall take place pursuant to this subparagraph.
3774 b. Prior to the transfer by each interestholder of the
3775 subject accommodations and facilities, or all use rights
3776 therein, to an owners' association, any lien or other
3777 encumbrance against such accommodations and facilities, or use
3778 rights therein, shall be made subject to a nondisturbance and
3779 notice to creditors instrument pursuant to subsection (3). No
3780 transfer pursuant to this subparagraph shall become effective
3781 until the owners' association accepts such transfer and the

3782 responsibilities set forth herein. An owners' association
3783 established pursuant to this subparagraph shall comply with the
3784 following provisions:
3785 (I) The owners' association shall be a business entity
3786 authorized and qualified to conduct business in this state.
3787 Control of the board of directors of the owners' association
3788 must be independent from any developer or managing entity of the
3789 timeshare plan or any interestholder.
3790 (II) The bylaws of the owners' association shall provide
3791 that the corporation may not be voluntarily dissolved without
3792 the unanimous vote of all owners of personal property timeshare
3793 interests so long as any purchaser has a right to occupy any
3794 portion of the timeshare property pursuant to the timeshare
3795 plan.
3796 (III) The owners' association shall not convey,
3797 hypothecate, mortgage, assign, lease, or otherwise transfer or
3798 encumber in any fashion any interest in or portion of the
3799 timeshare property with respect to which any purchaser has a
3800 right of use or occupancy, unless the timeshare plan is
3801 terminated pursuant to the timeshare instrument, or unless such
3802 conveyance, hypothecation, mortgage, assignment, lease,
3803 transfer, or encumbrance is approved by a vote of two-thirds of
3804 all voting interests of the association and such decision is
3805 declared by a court of competent jurisdiction to be in the best
3806 interests of the purchasers of the timeshare plan. The owners'
3807 association shall notify the division in writing within 10 days
3808 after receiving notice of the filing of any petition relating to
3809 obtaining such a court order. The division shall have standing

3810 to advise the court of the division's interpretation of the
3811 statute as it relates to the petition.
3812 (IV) All purchasers of the timeshare plan shall be members
3813 of the owners' association and shall be entitled to vote on
3814 matters requiring a vote of the owners' association as provided
3815 in this chapter or the timeshare instrument. The owners'
3816 association shall act as a fiduciary to the purchasers of the
3817 timeshare plan. The articles of incorporation establishing the
3818 owners' association shall set forth the duties of the owners'
3819 association. All expenses reasonably incurred by the owners'
3820 association in the performance of its duties, together with any
3821 reasonable compensation of the officers or directors of the
3822 owners' association, shall be common expenses of the timeshare
3823 plan.
3824 (V) The documents establishing the owners' association
3825 shall constitute a part of the timeshare instrument.
3826 (VI) For owners' associations holding property in a
3827 timeshare plan located outside this state, the owners'
3828 association holding such property shall be deemed in compliance
3829 with the requirements of this subparagraph if such owners'
3830 association is authorized and qualified to conduct owners'
3831 association business under the laws of such jurisdiction and the
3832 agreement or law governing such arrangement provides
3833 substantially similar protections for the purchaser as are
3834 required in this subparagraph for owners' associations holding
3835 property in a timeshare plan in this state.
3836 (VII) The owners' association shall have appointed a
3837 registered agent in this state for service of process. In the

3838 event such a registered agent cannot be located, service of
3839 process may be made pursuant to s. 721.265.
3840 6. Personal property subject to certificate of title.--If
3841 any personal property that is an accommodation or facility of a
3842 timeshare plan is subject to a certificate of title in this
3843 state pursuant to chapter 319 or chapter 328, the following
3844 notation must be made on such certificate of title pursuant to
3845 s. 319.27(1) or s. 328.15(1):
3846
3847 The further transfer or encumbrance of the property subject to
3848 this certificate of title, or any lien or encumbrance thereon,
3849 is subject to the requirements of section 721.17, Florida
3850 Statutes, and the transferee or lienor agrees to be bound by all
3851 of the obligations set forth therein.
3852 7. If the developer has previously provided a certified
3853 copy of any document required by this paragraph, she or he may
3854 for all subsequent disbursements substitute a true and correct
3855 copy of the certified copy, provided no changes to the document
3856 have been made or are required to be made.
3857 8. In the event that use rights relating to an
3858 accommodation or facility are transferred into a trust pursuant
3859 to subparagraph 4. or into an owners' association pursuant to
3860 subparagraph 5., all other interestholders, including the owner
3861 of the underlying fee or underlying personal property, must
3862 execute a nondisturbance and notice to creditors instrument
3863 pursuant to subsection (3).
3864 Section 27. Paragraph (e) of subsection (1) of section
3865 721.53, Florida Statutes, is amended to read:

3866 721.53 Subordination instruments; alternate security
3867 arrangements.--
3868 (1) With respect to each accommodation or facility of a
3869 multisite timeshare plan, the developer shall provide the
3870 division with satisfactory evidence that one of the following
3871 has occurred with respect to each interestholder prior to
3872 offering the accommodation or facility as a part of the
3873 multisite timeshare plan:
3874 (e) The interestholder has transferred the subject
3875 accommodation or facility or all use rights therein to a trust
3876 that complies with this paragraph. Prior to such transfer, any
3877 lien or other encumbrance against such accommodation or facility
3878 shall be made subject to a nondisturbance and notice to
3879 creditors instrument pursuant to paragraph (a) or a
3880 subordination and notice to creditors instrument pursuant to
3881 paragraph (b). No transfer pursuant to this paragraph shall
3882 become effective until the trust accepts such transfer and the
3883 responsibilities set forth herein. A trust established pursuant
3884 to this paragraph shall comply with the following provisions:
3885 1. The trustee shall be an individual or a business entity
3886 authorized and qualified to conduct trust business in this
3887 state. Any corporation authorized to do business in this state
3888 may act as trustee in connection with a timeshare plan pursuant
3889 to this chapter. The trustee must be independent from any
3890 developer or managing entity of the timeshare plan or any
3891 interestholder of any accommodation or facility of such plan.
3892 The same trustee may hold the accommodations and facilities, or

3893 use rights therein, for one or more of the component sites of
3894 the timeshare plan.
3895 2. The trust shall be irrevocable so long as any purchaser
3896 has a right to occupy any portion of the timeshare property
3897 pursuant to the timeshare plan.
3898 3. The trustee shall not convey, hypothecate, mortgage,
3899 assign, lease, or otherwise transfer or encumber in any fashion
3900 any interests in or portion of the timeshare property with
3901 respect to which any purchaser has a right of use or occupancy
3902 unless the timeshare plan is terminated pursuant to the
3903 timeshare instrument, or the timeshare property held in trust is
3904 deleted from a multisite timeshare plan pursuant to s.
3905 721.552(3), or such conveyance, hypothecation, mortgage,
3906 assignment, lease, transfer, or encumbrance is approved by vote
3907 of two-thirds of all voting interests of the timeshare plan and
3908 such decision is declared by a court of competent jurisdiction
3909 to be in the best interests of the purchasers of the timeshare
3910 plan.
3911 4. All purchasers of the timeshare plan or the owners'
3912 association of the timeshare plan shall be express beneficiaries
3913 of the trust. The trustee shall act as a fiduciary to the
3914 beneficiaries of the trust. The personal liability of the
3915 trustee shall be governed by ss. 736.08125, 736.08163, 736.1013,
3916 and 736.1015 ~~s. 737.306~~. The agreement establishing the trust
3917 shall set forth the duties of the trustee. The trustee shall be
3918 required to furnish promptly to the division upon request a copy
3919 of the complete list of the names and addresses of the owners in
3920 the timeshare plan and a copy of any other books and records of

3921 the timeshare plan required to be maintained pursuant to s.
3922 721.13 that are in the possession of the trustee. All expenses
3923 reasonably incurred by the trustee in the performance of its
3924 duties, together with any reasonable compensation of the
3925 trustee, shall be common expenses of the timeshare plan.
3926 5. The trustee shall not resign upon less than 90 days'
3927 prior written notice to the managing entity and the division. No
3928 resignation shall become effective until a substitute trustee,
3929 approved by the division, is appointed by the managing entity
3930 and accepts the appointment.
3931 6. The documents establishing the trust arrangement shall
3932 constitute a part of the timeshare instrument.
3933 7. For trusts holding property in component sites located
3934 outside this state, the trust holding such property shall be
3935 deemed in compliance with the requirements of this paragraph, if
3936 such trust is authorized and qualified to conduct trust business
3937 under the laws of such jurisdiction and the agreement or law
3938 governing such trust arrangement provides substantially similar
3939 protections for the purchaser as are required in this paragraph
3940 for trusts holding property in a component site located in this
3941 state.
3942 8. The trustee shall have appointed a registered agent in
3943 this state for service of process. In the event such a
3944 registered agent is not appointed, service of process may be
3945 served pursuant to s. 721.265.
3946 Section 28. Section 731.103, Florida Statutes, is amended
3947 to read:

3948 731.103 Evidence as to death or status.--In proceedings
3949 under this code and under chapter 736, the ~~rules of evidence in~~
3950 ~~civil actions are applicable unless specifically changed by the~~
3951 ~~code. The~~ following additional rules relating to determination
3952 of death and status are applicable:
3953 (1) An authenticated copy of a death certificate issued by
3954 an official or agency of the place where the death purportedly
3955 occurred is prima facie proof of the fact, place, date, and time
3956 of death and the identity of the decedent.
3957 (2) A copy of any record or report of a governmental
3958 agency, domestic or foreign, that a person is alive, missing,
3959 detained, or, from the facts related, presumed dead is prima
3960 facie evidence of the status and of the dates, circumstances,
3961 and places disclosed by the record or report.
3962 (3) A person who is absent from the place of his or her
3963 last known domicile for a continuous period of 5 years and whose
3964 absence is not satisfactorily explained after diligent search
3965 and inquiry is presumed to be dead. The person's death is
3966 presumed to have occurred at the end of the period unless there
3967 is evidence establishing that death occurred earlier. Evidence
3968 showing that the absent person was exposed to a specific peril
3969 of death may be a sufficient basis for the court determining at
3970 any time after such exposure that he or she died less than 5
3971 years after the date on which his or her absence commenced. A
3972 petition for this determination shall be filed in the county in
3973 Florida where the decedent maintained his or her domicile or in
3974 any county of this state if the decedent was not a resident of
3975 Florida at the time his or her absence commenced.

3976 (4) This section does not preclude the establishment of
3977 death by direct or circumstantial evidence prior to expiration
3978 of the 5-year time period set forth in subsection (3).
3979 Section 29. Section 731.1035, Florida Statutes, is created
3980 to read:
3981 731.1035 Applicable rules of evidence.--In proceedings
3982 under this code, the rules of evidence in civil actions are
3983 applicable unless specifically changed by the code.
3984 Section 30. Section 731.201, Florida Statutes, is amended
3985 to read:
3986 731.201 General definitions.--Subject to additional
3987 definitions in subsequent chapters that are applicable to
3988 specific chapters or parts, and unless the context otherwise
3989 requires, in this code, in s. 409.9101, and in chapters 736 ~~737~~,
3990 738, 739, and 744, the term:
3991 (1) "Authenticated," when referring to copies of documents
3992 or judicial proceedings required to be filed with the court
3993 under this code, means a certified copy or a copy authenticated
3994 according to the Federal Rules of Civil Procedure.
3995 (2) "Beneficiary" means heir at law in an intestate estate
3996 and devisee in a testate estate. The term "beneficiary" does not
3997 apply to an heir at law or a devisee after that person's
3998 interest in the estate has been satisfied. In the case of a
3999 devise to an existing trust or trustee, or to a trust or trustee
4000 described by will, the trustee is a beneficiary of the estate.
4001 Except as otherwise provided in this subsection, the beneficiary
4002 of the trust is not a beneficiary of the estate of which that
4003 trust or the trustee of that trust is a beneficiary. However, if

4004 each trustee is also a personal representative of the estate,
4005 each qualified beneficiary ~~the beneficiary or beneficiaries~~ of
4006 the trust as defined in s. 736.0103(14) ~~737.303(4)(b)~~ shall be
4007 regarded as a beneficiary of the estate.
4008 (3) "Child" includes a person entitled to take as a child
4009 under this code by intestate succession from the parent whose
4010 relationship is involved, and excludes any person who is only a
4011 stepchild, a foster child, a grandchild, or a more remote
4012 descendant.
4013 (4) "Claim" means a liability of the decedent, whether
4014 arising in contract, tort, or otherwise, and funeral expense.
4015 The term does not include an expense of administration or
4016 estate, inheritance, succession, or other death taxes.
4017 (5) "Clerk" means the clerk or deputy clerk of the court.
4018 (6) "Court" means the circuit court.
4019 (7) "Curator" means a person appointed by the court to
4020 take charge of the estate of a decedent until letters are
4021 issued.
4022 (8) "Devise," when used as a noun, means a testamentary
4023 disposition of real or personal property and, when used as a
4024 verb, means to dispose of real or personal property by will or
4025 trust. The term includes "gift," "give," "bequeath," "bequest,"
4026 and "legacy." A devise is subject to charges for debts,
4027 expenses, and taxes as provided in this code, the will, or the
4028 trust.
4029 (9) "Devisee" means a person designated in a will or trust
4030 to receive a devise. Except as otherwise provided in this
4031 subsection, in the case of a devise to an existing trust or

4032 trustee, or to a trust or trustee of a trust described by will,
4033 the trust or trustee, rather than the beneficiaries of the
4034 trust, is the devisee. However, if each trustee is also a
4035 personal representative of the estate, each qualified
4036 beneficiary ~~the beneficiary or beneficiaries~~ of the trust as
4037 defined in s. 736.0103(14) ~~737.303(4)(b)~~ shall be regarded as a
4038 devisee.
4039 (10) "Distributee" means a person who has received estate
4040 property from a personal representative or other fiduciary other
4041 than as a creditor or purchaser. A testamentary trustee is a
4042 distributee only to the extent of distributed assets or
4043 increments to them remaining in the trustee's hands. A
4044 beneficiary of a testamentary trust to whom the trustee has
4045 distributed property received from a personal representative is
4046 a distributee. For purposes of this provision, "testamentary
4047 trustee" includes a trustee to whom assets are transferred by
4048 will, to the extent of the devised assets.
4049 (11) "Domicile" means a person's usual place of dwelling
4050 and shall be synonymous with residence.
4051 (12) "Estate" means the property of a decedent that is the
4052 subject of administration.
4053 (13) "Exempt property" means the property of a decedent's
4054 estate which is described in s. 732.402.
4055 (14) "File" means to file with the court or clerk.
4056 (15) "Foreign personal representative" means a personal
4057 representative of another state or a foreign country.
4058 (16) "Formal notice" means formal notice under the Florida
4059 Probate Rules.

4060 (17) "Grantor" means one who creates or adds to a trust
4061 and includes "settlor" or "trustor" and a testator who creates
4062 or adds to a trust.
4063 (18) "Heirs" or "heirs at law" means those persons,
4064 including the surviving spouse, who are entitled under the
4065 statutes of intestate succession to the property of a decedent.
4066 (19) "Incompetent" means a minor or a person adjudicated
4067 incompetent.
4068 (20) "Informal notice" or "notice" means informal notice
4069 under the Florida Probate Rules.
4070 (21) "Interested person" means any person who may
4071 reasonably be expected to be affected by the outcome of the
4072 particular proceeding involved. In any proceeding affecting the
4073 estate or the rights of a beneficiary in the estate, the
4074 personal representative of the estate shall be deemed to be an
4075 interested person. In any proceeding affecting the expenses of
4076 the administration and obligations of a decedent's estate, or
4077 any claims described in s. 733.702(1), the trustee of a trust
4078 described in s. 733.707(3) is an interested person in the
4079 administration of the grantor's estate. The term does not
4080 include a beneficiary who has received complete distribution.
4081 The meaning, as it relates to particular persons, may vary from
4082 time to time and must be determined according to the particular
4083 purpose of, and matter involved in, any proceedings.
4084 (22) "Letters" means authority granted by the court to the
4085 personal representative to act on behalf of the estate of the
4086 decedent and refers to what has been known as letters

4087 testamentary and letters of administration. All letters shall be
4088 designated "letters of administration."
4089 (23) "Other state" means any state of the United States
4090 other than Florida and includes the District of Columbia, the
4091 Commonwealth of Puerto Rico, and any territory or possession
4092 subject to the legislative authority of the United States.
4093 (24) "Parent" excludes any person who is only a
4094 stepparent, foster parent, or grandparent.
4095 (25) "Personal representative" means the fiduciary
4096 appointed by the court to administer the estate and refers to
4097 what has been known as an administrator, administrator cum
4098 testamento annexo, administrator de bonis non, ancillary
4099 administrator, ancillary executor, or executor.
4100 (26) "Petition" means a written request to the court for
4101 an order.
4102 (27) "Power of appointment" means an authority, other than
4103 as an incident of the beneficial ownership of property, to
4104 designate recipients of beneficial interests in property.
4105 (28) ~~(27)~~ "Probate of will" means all steps necessary to
4106 establish the validity of a will and to admit a will to probate.
4107 (29) ~~(28)~~ "Property" means both real and personal property
4108 or any interest in it and anything that may be the subject of
4109 ownership.
4110 (30) ~~(29)~~ "Protected homestead" means the property
4111 described in s. 4(a)(1), Art. X of the State Constitution on
4112 which at the death of the owner the exemption inures to the
4113 owner's surviving spouse or heirs under s. 4(b), Art. X of the

4114 State Constitution. For purposes of the code, real property
4115 owned as tenants by the entirety is not protected homestead.
4116 (31) ~~(30)~~ "Residence" means a person's place of dwelling.
4117 (32) ~~(31)~~ "Residuary devise" means a devise of the assets
4118 of the estate which remain after the provision for any devise
4119 which is to be satisfied by reference to a specific property or
4120 type of property, fund, sum, or statutory amount. If the will
4121 contains no devise which is to be satisfied by reference to a
4122 specific property or type of property, fund, sum, or statutory
4123 amount, "residuary devise" or "residue" means a devise of all
4124 assets remaining after satisfying the obligations of the estate.
4125 (33) ~~(32)~~ "Security" means a security as defined in s.
4126 517.021.
4127 (34) ~~(33)~~ "Security interest" means a security interest as
4128 defined in s. 671.201.
4129 (35) ~~(34)~~ "Trust" means an express trust, private or
4130 charitable, with additions to it, wherever and however created.
4131 It also includes a trust created or determined by a judgment or
4132 decree under which the trust is to be administered in the manner
4133 of an express trust. "Trust" excludes other constructive trusts,
4134 and it excludes resulting trusts; conservatorships; custodial
4135 arrangements pursuant to the Florida Uniform Transfers to Minors
4136 Act; business trusts providing for certificates to be issued to
4137 beneficiaries; common trust funds; land trusts under s. 689.05;
4138 trusts created by the form of the account or by the deposit
4139 agreement at a financial institution; voting trusts; security
4140 arrangements; liquidation trusts; trusts for the primary purpose
4141 of paying debts, dividends, interest, salaries, wages, profits,

4142 pensions, or employee benefits of any kind; and any arrangement
4143 under which a person is nominee or escrowee for another.
4144 (36) ~~(35)~~ "Trustee" includes an original, additional,
4145 surviving, or successor trustee, whether or not appointed or
4146 confirmed by court.
4147 (37) ~~(36)~~ "Will" means an instrument, including a codicil,
4148 executed by a person in the manner prescribed by this code,
4149 which disposes of the person's property on or after his or her
4150 death and includes an instrument which merely appoints a
4151 personal representative or revokes or revises another will.
4152 Section 31. Paragraph (a) of subsection (1) and subsection
4153 (5) of section 731.303, Florida Statutes, are amended to read:
4154 731.303 Representation.--In the administration of or in
4155 judicial proceedings involving estates of decedents or trusts,
4156 the following apply:
4157 (1) Persons are bound by orders binding others in the
4158 following cases:
4159 (a) 1. Orders binding the sole holder or all coholders of a
4160 power of revocation or a general, special, or limited power of
4161 appointment, including one in the form of a power of amendment
4162 or revocation to the extent that the power has not become
4163 unexercisable in fact, bind all persons to the extent that their
4164 interests, as persons who may take by virtue of the exercise or
4165 nonexercise of the power, are subject to the power.
4166 2. Subparagraph 1. does not apply to:
4167 a. Any matter determined by the court to involve fraud or
4168 bad faith by the trustee;
4169 b. A power of a trustee to distribute trust property; or

4170 c. A power of appointment held by a person while the
4171 person is the sole trustee.
4172 (5) The holder of a power of appointment over property not
4173 held in trust may represent and bind persons whose interests, as
4174 permissible appointees, takers in default, or otherwise, are
4175 subject to the power. Representation under this subsection does
4176 not apply to:
4177 (a) Any matter determined by the court to involve fraud or
4178 bad faith by the trustee;
4179 (b) A power of a trustee to distribute trust property; or
4180 (c) A power of appointment held by a person while the
4181 person is the sole trustee ~~When a sole holder or coholder of a~~
4182 ~~general, special, or limited power of appointment, including an~~
4183 ~~exercisable power of amendment or revocation over property in an~~
4184 ~~estate or trust, is bound by:~~
4185 ~~(a) Agreements, waivers, consents, or approvals; or~~
4186 ~~(b) Accounts, trust accountings, or other written reports~~
4187 ~~that adequately disclose matters set forth therein,~~
4188
4189 ~~then all persons who may take by virtue of, and whose interests~~
4190 ~~are subject to, the exercise or nonexercise of the power are~~
4191 ~~also bound, but only to the extent of their interests which~~
4192 ~~could otherwise be affected by the exercise or nonexercise of~~
4193 ~~the power~~.
4194 Section 32. Subsection (5) of section 732.2075, Florida
4195 Statutes, is amended to read:
4196 732.2075 Sources from which elective share payable;
4197 abatement.--

4198 (5) Unless otherwise provided in the trust instrument or,
4199 in the decedent's will if there is no provision in the trust
4200 instrument, any amount to be satisfied from trust property shall
4201 be paid from the assets of the trust in the order provided for
4202 claims under s. 736.05053 ~~737.3054~~(2) and (3). A direction in
4203 the decedent's will is effective only for revocable trusts.
4204 Section 33. Subsection (2) of section 732.513, Florida
4205 Statutes, is amended to read:
4206 732.513 Devises to trustee.--
4207 (2) The devise shall not be invalid for any or all of the
4208 following reasons:
4209 (a) Because the trust is amendable or revocable, or both,
4210 by any person.
4211 (b) Because the trust has been amended or revoked in part
4212 after execution of the will or a codicil to it.
4213 ~~(c) Because the trust instrument or any amendment to it~~
4214 ~~was not executed in the manner required for wills.~~
4215 (c) ~~(d)~~ Because the only res of the trust is the possible
4216 expectancy of receiving, as a named beneficiary, a devise under
4217 a will or death benefits as described in s. 733.808, and even
4218 though the testator or other person has reserved any or all
4219 rights of ownership in the death benefit policy, contract, or
4220 plan, including the right to change the beneficiary.
4221 (d) ~~(e)~~ Because of any of the provisions of s. 689.075.
4222 Section 34. Section 732.603, Florida Statutes, is amended
4223 to read:
4224 (Substantial rewording of section. See
4225 s. 732.603, F.S., for present text.)

4226 732.603 Antilapse; deceased devisee; class gifts.--
4227 (1) Unless a contrary intent appears in the will, if a
4228 devisee who is a grandparent, or a descendant of a grandparent,
4229 of the testator:
4230 (a) Is dead at the time of the execution of the will;
4231 (b) Fails to survive the testator; or
4232 (c) Is required by the will or by operation of law to be
4233 treated as having predeceased the testator,
4234
4235 a substitute gift is created in the devisee's surviving
4236 descendants who take per stirpes the property to which the
4237 devisee would have been entitled had the devisee survived the
4238 testator.
4239 (2) When a power of appointment is exercised by will,
4240 unless a contrary intent appears in the document creating the
4241 power of appointment or in the testator's will, if an appointee
4242 who is a grandparent, or a descendant of a grandparent, of the
4243 donor of the power:
4244 (a) Is dead at the time of the execution of the will or
4245 the creation of the power;
4246 (b) Fails to survive the testator; or
4247 (c) Is required by the will, the document creating the
4248 power, or by operation of law to be treated as having
4249 predeceased the testator,
4250
4251 a substitute gift is created in the appointee's surviving
4252 descendants who take per stirpes the property to which the
4253 appointee would have been entitled had the appointee survived

4254 the testator. Unless the language creating a power of
4255 appointment expressly excludes the substitution of the
4256 descendants of an object of a power for the object, a surviving
4257 descendant of a deceased object of a power of appointment may be
4258 substituted for the object whether or not the descendant is an
4259 object of the power.
4260 (3) In the application of this section:
4261 (a) Words of survivorship in a devise or appointment to an
4262 individual, such as "if he survives me," or to "my surviving
4263 children," are a sufficient indication of an intent contrary to
4264 the application of subsections (1) and (2). Words of
4265 survivorship used by the donor of the power in a power to
4266 appoint to an individual, such as the term "if he survives the
4267 donee," or in a power to appoint to the donee's "then surviving
4268 children," are a sufficient indication of an intent contrary to
4269 the application of subsection (2).
4270 (b) The term:
4271 1. "Appointment" includes an alternative appointment and
4272 an appointment in the form of a class gift.
4273 2. "Appointee" includes:
4274 a. A class member if the appointment is in the form of a
4275 class gift.
4276 b. An individual or class member who was deceased at the
4277 time the testator executed his or her will as well as an
4278 individual or class member who was then living but who failed to
4279 survive the testator.
4280 3. "Devise" also includes an alternative devise and a
4281 devise in the form of a class gift.

4282 4. "Devisee" also includes:
4283 a. A class member if the devise is in the form of a class
4284 gift.
4285 b. An individual or class member who was deceased at the
4286 time the testator executed his or her will as well as an
4287 individual or class member who was then living but who failed to
4288 survive the testator.
4289 (4) This section applies only to outright devises and
4290 appointments. Devises and appointments in trust, including to a
4291 testamentary trust, are subject to s. 736.1106.
4292 Section 35. Section 732.604, Florida Statutes, is amended
4293 to read:
4294 732.604 Failure of testamentary provision.--
4295 (1) Except as provided in s. 732.603, if a devise other
4296 than a residuary devise fails for any reason, it becomes a part
4297 of the residue.
4298 (2) Except as provided in s. 732.603, if the residue is
4299 devised to two or more persons, the share of a residuary devisee
4300 that fails for any reason ~~and the devise to one of the residuary~~
4301 ~~devisees fails for any reason, that devise~~ passes to the other
4302 residuary devisee, or to the other residuary devisees in
4303 proportion to the ~~their~~ interests of each in the remaining part
4304 of the residue.
4305 Section 36. Section 732.611, Florida Statutes, is amended
4306 to read:
4307 732.611 Devises to multi-generation classes to be per
4308 stirpes.--Unless the will provides otherwise, all devises to

4309 descendants, issue, and other multi-generation classes shall be
4310 per stirpes.
4311 Section 37. Subsection (1) of section 733.212, Florida
4312 Statutes, is amended to read:
4313 733.212 Notice of administration; filing of objections.--
4314 (1) The personal representative shall promptly serve a
4315 copy of the notice of administration on the following persons
4316 who are known to the personal representative:
4317 (a) The decedent's surviving spouse;
4318 (b) Beneficiaries;
4319 (c) The trustee of any trust described in s. 733.707(3)
4320 and each qualified beneficiary of the trust as defined in s.
4321 736.0103(14) ~~737.303(4)(b)~~, if each trustee is also a personal
4322 representative of the estate; and
4323 (d) Persons who may be entitled to exempt property
4324
4325 in the manner provided for service of formal notice, unless
4326 served under s. 733.2123. The personal representative may
4327 similarly serve a copy of the notice on any devisees under a
4328 known prior will or heirs or others who claim or may claim an
4329 interest in the estate.
4330 Section 38. Subsection (1) of section 733.602, Florida
4331 Statutes, is amended to read:
4332 733.602 General duties.--
4333 (1) A personal representative is a fiduciary who shall
4334 observe the standards of care applicable to trustees as
4335 described by part VII of chapter 736 ~~s. 737.302~~. A personal
4336 representative is under a duty to settle and distribute the

4337 estate of the decedent in accordance with the terms of the
4338 decedent's will and this code as expeditiously and efficiently
4339 as is consistent with the best interests of the estate. A
4340 personal representative shall use the authority conferred by
4341 this code, the authority in the will, if any, and the authority
4342 of any order of the court, for the best interests of interested
4343 persons, including creditors.
4344 Section 39. Subsection (4) of section 733.805, Florida
4345 Statutes, is amended to read:
4346 733.805 Order in which assets abate.--
4347 (4) In determining the contribution required under s.
4348 733.607(2), subsections (1)-(3) of this section and s. 736.05053
4349 ~~737.3054~~(2) shall be applied as if the beneficiaries of the
4350 estate and the beneficiaries of a trust described in s.
4351 733.707(3), other than the estate or trust itself, were taking
4352 under a common instrument.
4353 Section 40. Paragraph (j) of subsection (1) of section
4354 733.817, Florida Statutes, is amended to read:
4355 733.817 Apportionment of estate taxes.--
4356 (1) For purposes of this section:
4357 (j) "Residuary devise" has the meaning set forth in s.
4358 731.201~~(31)~~.
4359 Section 41. Paragraphs (a) and (f) of subsection (8) and
4360 paragraphs (a) and (d) of subsection (9) of section 738.104,
4361 Florida Statutes, are amended to read:
4362 738.104 Trustee's power to adjust.--
4363 (8) With respect to a trust in existence on January 1,
4364 2003:

4365 (a) A trustee shall not have the power to adjust under
4366 this section until the statement required in subsection (9) is
4367 provided and either no objection is made or any objection which
4368 is made has been terminated.
4369 1. An objection is made if, within 60 days after the date
4370 of the statement required in subsection (9), a super majority of
4371 the eligible ~~trust~~ beneficiaries deliver to the trustee a
4372 written objection to the application of this section to such
4373 trust. An objection shall be deemed to be delivered to the
4374 trustee on the date the objection is mailed to the mailing
4375 address listed in the notice provided in subsection (9).
4376 2. An objection is terminated upon the earlier of the
4377 receipt of consent from a super majority of eligible ~~trust~~
4378 beneficiaries of the class that made the objection, or the
4379 resolution of the objection pursuant to paragraph (c).
4380 (f) The objection of a super majority of eligible
4381 beneficiaries under this subsection shall be valid for a period
4382 of 1 year after the date of the notice set forth in subsection
4383 (9). Upon expiration of the objection, the trustee may
4384 thereafter give a new notice under subsection (9).
4385 (9)(a) A trustee of a trust in existence on January 1,
4386 2003, that is not prohibited under subsection (3) from
4387 exercising the power to adjust shall, any time prior to
4388 initially exercising the power, provide to all eligible
4389 ~~reasonably ascertainable current~~ beneficiaries ~~described in s.~~
4390 ~~737.303(4)(b)1. and all reasonably ascertainable remainder~~
4391 ~~beneficiaries described in s. 737.303(4)(b)2.~~ a statement
4392 containing the following:

4393 1. The name, telephone number, street address, and mailing
4394 address of the trustee and of any individuals who may be
4395 contacted for further information;
4396 2. A statement that unless a super majority of the
4397 eligible beneficiaries objects to the application of this
4398 section to the trust within 60 days after the date the statement
4399 pursuant to this subsection was served, s. 738.104 shall apply
4400 to the trust; and
4401 3. A statement that, if s. 738.104 applies to the trust,
4402 the trustee will have the power to adjust between income and
4403 principal and that such a power may have an effect on the
4404 distributions to such beneficiary from the trust.
4405 (d) For purposes of subsection (8) and this subsection,
4406 the term:
4407 1. "Eligible beneficiaries" means:
4408 a. If at the time the determination is made there is one
4409 or more beneficiaries described in s. 736.0103(14)(c), the
4410 beneficiaries described in s. 736.0103(14)(a) and (c); or
4411 b. If there is no beneficiary described in s.
4412 736.0103(14)(c), the beneficiaries described in s.
4413 736.0103(14)(a) and (b).
4414 2. ~~A~~ "Super majority of the eligible ~~trust~~ beneficiaries"
4415 means:
4416 a. If at the time the determination is made there is one
4417 or more beneficiaries described in s. 736.0103(14)(c), at least
4418 two-thirds in interest of the ~~reasonably ascertainable current~~
4419 beneficiaries described in s. 736.0103(14)(a) ~~737.303(4)(b)1.~~ or
4420 two-thirds in interest of the ~~reasonably ascertainable remainder~~

4421 beneficiaries described in s. 736.0103(14)(c) ~~737.303(4)(b)2.~~,
4422 if the interests of the beneficiaries are reasonably
4423 ascertainable; otherwise, it means two-thirds in number of
4424 either such class; or
4425 b. If there is no beneficiary described in s.
4426 736.0103(14)(c), at least two-thirds in interest of the
4427 beneficiaries described in s. 736.0103(14)(a) or two-thirds in
4428 interest of the beneficiaries described in s. 736.0103(14)(b),
4429 if the interests of the beneficiaries are reasonably
4430 ascertainable, otherwise, two-thirds in number of either such
4431 class.
4432 Section 42. Subsection (4) of section 738.1041, Florida
4433 Statutes, is amended to read:
4434 738.1041 Total return unitrust.--
4435 (4) All determinations made pursuant to sub-subparagraph
4436 (2)(b)2.b. shall be conclusive if reasonable and made in good
4437 faith. Such determination shall be conclusively presumed to have
4438 been made reasonably and in good faith unless proven otherwise
4439 in a proceeding commenced by or on behalf of a person interested
4440 in the trust within the time provided in s. 736.1008 ~~737.307~~.
4441 The burden will be on the objecting interested party to prove
4442 that the determinations were not made reasonably and in good
4443 faith.
4444 Section 43. Subsection (5) of section 738.202, Florida
4445 Statutes, is amended to read:
4446 738.202 Distribution to residuary and remainder
4447 beneficiaries.--

4448 (5) The value of trust assets shall be determined on an
4449 asset-by-asset basis and shall be conclusive if reasonable and
4450 determined in good faith. Determinations based on appraisals
4451 performed within 2 years before or after the valuation date
4452 shall be presumed reasonable. The value of trust assets shall be
4453 conclusively presumed to be reasonable and determined in good
4454 faith unless proven otherwise in a proceeding commenced by or on
4455 behalf of a person interested in the trust within the time
4456 provided in s. 736.1008 ~~737.307~~.
4457 Section 44. Paragraph (a) of subsection (12) of section
4458 739.102, Florida Statutes, is amended to read:
4459 739.102 Definitions.--As used in this chapter, the term:
4460 (12) "Trust" means:
4461 (a) An express trust (including an honorary trust or a
4462 trust under s. 736.0408 ~~737.116~~), charitable or noncharitable,
4463 with additions thereto, whenever and however created; and
4464
4465 As used in this chapter, the term "trust" does not include a
4466 constructive trust or a resulting trust.
4467 Section 45. Paragraphs (b) and (f) of subsection (6) of
4468 section 744.331, Florida Statutes, are amended to read:
4469 744.331 Procedures to determine incapacity.--
4470 (6) ORDER DETERMINING INCAPACITY.--If, after making
4471 findings of fact on the basis of clear and convincing evidence,
4472 the court finds that a person is incapacitated with respect to
4473 the exercise of a particular right, or all rights, the court
4474 shall enter a written order determining such incapacity. A

4475 person is determined to be incapacitated only with respect to
4476 those rights specified in the order.
4477 (b) When an order determines that a person is incapable of
4478 exercising delegable rights, the court must consider and find
4479 whether there is an alternative to guardianship which will
4480 sufficiently address the problems of the incapacitated person. A
4481 guardian must be appointed to exercise the incapacitated
4482 person's delegable rights unless the court finds there is an
4483 alternative. A guardian may not be appointed if the court finds
4484 there is an alternative to guardianship which will sufficiently
4485 address the problems of the incapacitated person. ~~In any order~~
4486 ~~declaring a person incapacitated the court must find that~~
4487 ~~alternatives to guardianship were considered and that no~~
4488 ~~alternative to guardianship will sufficiently address the~~
4489 ~~problems of the ward.~~
4490 (f) Upon the filing of a verified statement by an
4491 interested person stating:
4492 1. That he or she has a good faith belief that the alleged
4493 incapacitated person's trust, trust amendment, or durable power
4494 of attorney is invalid; and
4495 2. A reasonable factual basis for that belief,
4496
4497 the trust, trust amendment, or durable power of attorney shall
4498 not be deemed to be an alternative to the appointment of a
4499 guardian. The appointment of a guardian does not limit the
4500 court's power to determine that certain authority granted by a
4501 durable power of attorney is to remain exercisable by the
4502 attorney in fact. ~~When an order is entered which determines that~~

4503 ~~a person is incapable of exercising delegable rights, a guardian~~
4504 ~~must be appointed to exercise those rights.~~
4505 Section 46. Paragraph (a) of subsection (6) of section
4506 744.361, Florida Statutes, is amended to read:
4507 744.361 Powers and duties of guardian.--
4508 (6) A guardian who is given authority over any property of
4509 the ward shall:
4510 (a) Protect and preserve the property and invest it
4511 prudently as provided in chapter 518 ~~defined in s. 737.302~~,
4512 apply it as provided in s. 744.397, and account for it
4513 faithfully.
4514 Section 47. Subsections (11) and (18) of section 744.441,
4515 Florida Statutes, are amended to read:
4516 744.441 Powers of guardian upon court approval.--After
4517 obtaining approval of the court pursuant to a petition for
4518 authorization to act, a plenary guardian of the property, or a
4519 limited guardian of the property within the powers granted by
4520 the order appointing the guardian or an approved annual or
4521 amended guardianship report, may:
4522 (11) Prosecute or defend claims or proceedings in any
4523 jurisdiction for the protection of the estate and of the
4524 guardian in the performance of his or her duties. Before
4525 authorizing a guardian to bring an action described in s.
4526 736.0207, the court shall first find that the action appears to
4527 be in the ward's best interests during the ward's probable
4528 lifetime. If the court denies a request that a guardian be
4529 authorized to bring an action described in s. 736.0207, the

4530 court shall review the continued need for a guardian and the
4531 extent of the need for delegation of the ward's rights.
4532 (18) When the ward's will evinces an objective to obtain a
4533 United States estate tax charitable deduction by use of a split
4534 interest trust (as that term is defined in s. 736.1201 ~~737.501~~),
4535 but the maximum charitable deduction otherwise allowable will
4536 not be achieved in whole or in part, execute a codicil on the
4537 ward's behalf amending said will to obtain the maximum
4538 charitable deduction allowable without diminishing the aggregate
4539 value of the benefits of any beneficiary under such will.
4540 Section 48. Section 744.462, Florida Statutes, is created
4541 to read:
4542 744.462 Determination regarding alternatives to
4543 guardianship.--Any judicial determination concerning the
4544 validity of the ward's durable power of attorney, trust, or
4545 trust amendment shall be promptly reported in the guardianship
4546 proceeding by the guardian of the property. If the instrument
4547 has been judicially determined to be valid or if, after the
4548 appointment of a guardian, a petition is filed alleging that
4549 there is an alternative to guardianship which will sufficiently
4550 address the problems of the ward, the court shall review the
4551 continued need for a guardian and the extent of the need for
4552 delegation of the ward's rights.
4553 Section 49. Sections 737.101, 737.105, 737.106, 737.111,
4554 737.115, 737.116, 737.201, 737.202, 737.203, 737.2035, 737.204,
4555 737.2041, 737.205, 737.206, 737.2065, 737.207, 737.208, 737.209,
4556 737.301, 737.302, 737.303, 737.3035, 737.304, 737.305, 737.3053,
4557 737.3054, 737.3055, 737.306, 737.3061, 737.307, 737.308,

4558 737.309, 737.401, 737.402, 737.4025, 737.403, 737.4031,
4559 737.4032, 737.4033, 737.404, 737.405, 737.406, 737.501, 737.502,
4560 737.503, 737.504, 737.505, 737.506, 737.507, 737.508, 737.509,
4561 737.510, 737.511, 737.512, 737.6035, 737.621, 737.622, 737.623,
4562 737.624, 737.625, 737.626, and 737.627, Florida Statutes, are
4563 repealed.
4564 Section 50. This act shall take effect July 1, 2007.

HB 521

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 521 CS Probate
SPONSOR(S): Hukill; Stargel
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	7 Y, 0 N, w/CS	Blalock	Bond
2) Justice Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

Probate is the legal process for payment of the bills of the deceased, and distribution of the deceased's property to heirs. Current law pertaining to wills and estates is provided in the Florida Probate Code. The Probate Code provides filing deadlines for various actions and proceedings. This bill revises the time period for these deadlines from "within" to a time "on or before" a certain date. This change to the filing deadlines removes the provision requiring filing between certain time periods and allows for earlier filing of certain documents.

This bill modifies the Probate Code and the banking laws to: provide procedures for opening safe-deposit boxes leased or co-leased by a decedent, provide search procedures of safe-deposit boxes where the lessee has died and the decedent's safe-deposit box is co-leased, and provide for when access to safe-deposit boxes leased in two or more names will be granted.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Empower families -- This bill may serve or benefit families who might potentially otherwise lose the right to property in an estate proceeding.

Provide limited government -- This bill appears to both increase and decrease procedural requirements in probate proceedings.

B. EFFECT OF PROPOSED CHANGES:

Background

Probate is the legal process for payment of the bills of the deceased, and distribution of the deceased's property to heirs. In general, the assets of the deceased are used first to pay the cost of the probate proceeding, than are used to pay the outstanding debts of the deceased, and the remainder paid to the heirs. If the deceased left a valid will, the estate is "testate", and the assets are distributed according to the will. If the deceased did not, the estate is "intestate", and the assets are distributed according to statute. There are two significant exceptions to these general rules. The concepts of homestead and exempt property transfer property to certain surviving dependents before such property is subject to being sold to pay creditors; and the elective share may provide a different inheritance for a surviving spouse than the spouse would otherwise receive by operation of the will and of probate law.

Commencement of Probate, Notice of Administration

A probate case is commenced by the filing of a Petition for Administration.[1] The court must appoint a personal representative, who is the person responsible to the court for collecting the assets of the deceased and transferring those assets to the creditors and heirs entitled to those assets. One of the first duties of the personal representative is to give notice to creditors and heirs of the existence of the probate proceeding and the appointment of the personal representative. This is accomplished by the publication and service of a Notice to Creditors, and by the serving of a Notice of Administration on the surviving spouse and beneficiaries.

Section 733.212, F.S., requires the personal representative to promptly serve a copy of the notice of administration upon the decedent's surviving spouse, beneficiaries, the trustee of any trust and each trust beneficiary, and persons who may be entitled to exempt property. The notice must:

- Provide the name of the decedent;
- List the file number of the estate, the designation and address of the court in which the proceedings are pending;
- Provide the name and address of the personal representative and the personal representative's attorney; and
- State that interested persons are required to file with the court any objection by an interested person on whom the notice was served that challenges the validity of the will, the qualifications of the personal representative, venue, or jurisdiction of the court within 3 months after the date of service of a copy of the notice of administration on the objecting person.

[1] Section 733.202, F.S.

Exempt Property

The Florida Probate Code provides that if a decedent was domiciled in Florida at the time of death, the surviving spouse, or if there is no surviving spouse, the children of the decedent, have the right to take certain property, which property is not subject to being sold to pay the claims of creditors. Such property is known as "exempt property".[2] Exempt property consists of:

- Household furniture, furnishings, and appliances in the decedent's usual place of abode, up to a net value of $10,000 as of the date of death;[3]
- All automobiles held in the decedent's name and regularly used by the decedent or members of the decedent's immediate family as their personal automobiles;[4]
- Florida prepaid college program contracts purchased and Florida college savings agreements;[5]
- Death benefits for certain teachers and school administrators.[6]

Section 732.402, F.S., provides that persons entitled to exempt property are deemed to have waived their rights to such property unless (1) a petition for determination of exempt property is filed by or on behalf of the persons entitled to the exempt property within four months after the date of service of the notice of administration; or (2) within 40 days from the date of termination of any proceeding involving the construction, admission to probate, or validity of the will or involving any other matter affecting any part of the estate subject to the statute.[7]

Exempt property is in addition to protected homestead property. The entitlement to homestead property[8] is automatic and decedent's surviving spouse or children are not required to file a petition of determination to receive the homestead property.

Elective Share

The surviving spouse of a person who dies domiciled in Florida has the right to elect to take a share of the estate of the decedent, known as the elective share,[9] instead of the share of the estate provided for in the will or provided for in the laws of intestacy. The elective share is for the express purpose of caring for the surviving spouse.[10] The elective share is 30% of the elective estate.[11] The elective share is reduced by the value of any property passing to the spouse in the decedent's will, under intestacy, or as a pretermitted spouse. The elective share is in addition to the spouse's right to exempt property, a family allowance, and homestead.[12]

Section 732.2135, F.S. provides that the elective share election must be filed within the earlier of (1) six months after the service of a copy of the notice of administration on the surviving spouse or attorney-in-fact or guardian of the property of the surviving spouse; or (2) two years after the decedent's death. An election may be withdrawn within eight months after the decedent's death, but before the court's order of contribution.

Timing for Filing for Elective Share and Exempt Property

Because the current law provides that the timing requirements for making an election, withdrawing an election, and filing for a petition for determination of exempt property must be "within" a certain period,

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[2] Section 732.402(1), F.S.
[3] Section 732.402(2)(a), F.S.
[4] Section 732.402(2)(b), F.S.
[5] Section 732.402(2)(c), F.S.
[6] Section 732.402(2)(d), F.S.
[7] Section 732.402(6), F.S.
[8] Article X, s. 4, Fla. Const.
[9] Section 732.201, F.S.
[10] *In re Anderson's Estate*, 394 So.2d 1146 (Fla. 4th DCA 1981)
[11] Section 732.2065, F.S.
[12] Section 732.2105, F.S.

it is possible that a court may find that a spouse or child of a decedent has filed a notice too early. In such case, a spouse or child could lose their right to exempt property or to the elective share.

Timing of Objections to the Validity of the Will, the Personal Representative, the Venue, or the Jurisdiction of the Court

Section 733.212(3), F.S., provides that "the notice of administration shall state" that an interested person must object to the validity of the will, the qualifications of the personal representative, the venue, or the jurisdiction of the court by filing a petition or other pleading requesting relief within 3 months after the date of service of a copy of the notice of administration on the objecting person, or the objection is forever barred. The window of time for filing an objection under this section has the same possibility of penalizing people that file too early as the filing deadlines for the elective share and exempt property.

Access to Safe-Deposit Boxes

Part of the Probate Code revisions enacted by the Legislature in 2002 addressed procedures for granting access to safe-deposit boxes to personal representatives and other fiduciaries. These revisions caused there to be some inconsistencies between the Probate Code and the Banking Code. The procedures set forth in s. 655.935, F.S., addressing the search procedures upon the death of a lessee, are arguably in conflict with the provisions of s. 733.6065, F.S., which are procedures addressing the initial opening of the safe-deposit box with the personal representative of a decedent lessee. The procedures of s. 733.6065, F.S., and s. 655.935, F.S., are also arguably in conflict with 655.937, F.S., which provides that a bank must grant access to the box to a co-lessee, regardless of whether another lessee is competent or living. The conflict consists of one statute that sets forth access rights and procedures, which must be followed upon the death of one co-lessee, and the other statute that sets forth rights of the surviving co-lessee.

Effect of Bill

Timing for Filing for an Elective Share

This bill amends s. 732.2135, F.S., to provide that a surviving spouse must file for the elective share election "on or before" the earlier of the date that is 6 months after the date of service of a copy of the notice of administration or the date that is 2 years after the date of the decedent's death.

Section 732.2135, F.S. is also amended to provide that the surviving souse, guardian, or personal representative may withdraw an elective share election "on or before the earlier of the date that is" 8 months after the date of the decedent's death or the date of a court order of contribution. This bill removes the word "within", and allows people entitled to an elective share to file anytime before the time limit provided instead of having to file in between certain periods of time.

Timing for Filing for Exempt Property

This bill amends s. 732.402, F.S., relating to exempt property, by making the same changes to the word "within" as were made in the section relating to the elective share. This bill provides that a person entitled to exempt property is deemed to have waived his or her rights to exempt property unless a petition of determination of exempt property is filed "on or before the later of the date that is" 4 months after the date of service of the notice of administration or the date that is 40 days after the date of termination of any proceeding involving the estate.

Notice of Administration

This bill amends s. 733.212, F.S., to require that a notice of administration include notice to a surviving spouse and beneficiaries of the timing deadlines for filing for an elective share and exempt property.

Timing of Objections to Validity of the Will, the Personal Representative, the Venue, or the Jurisdiction of the Court

This bill also amends s. 733.212, F.S., to remove the "within" from the timing requirements, provided in the notice of administration, for filing a petition or other pleading objecting to the validity of the will, the qualifications of the personal representative, the venue, or the jurisdiction of the court. This bill extends the filing deadline to be "on or before the date that is" (instead of "within") 3 months after the date of service of a copy of the notice of administration on the objecting person, or those objections are forever barred. This change reflects the same revision to the filing deadlines made to exempt property and the elective share.

Timing of Service

This bill creates s. 733.212(8), F.S. to provide that, for determining deadlines established by reference to the date of the service of a copy of the notice of administration, service is deemed to occur on the date the waiver is filed.

Access to Safe-Deposit Boxes

This bill amends s. 655.935, F.S., of the banking laws, to provide that upon the death of a lessor, the lessee must allow a person qualified under this section to open and examine the contents of a safe-deposit box leased and co-leased by a decedent. Section 655.935, F.S., is also amended to provide that the access granted in this section is not to be considered the initial opening of the safe-deposit box pursuant to s. 733.6065, F.S., which is the section pertaining to the opening of a decedent's safe-deposit box.

This bill amends s. 655.937, F.S., to provide that when a safe-deposit box is leased in the names of two or more lessees, that access to the safe-deposit box will be granted to:

- Any one or more of the persons acting as personal representatives;
- Any one or more of the persons otherwise acting as fiduciaries if authorized in writing, which writing is signed by all other persons so acting;
- Any agent authorized in writing, which writing is signed by all persons acting as fiduciaries;
- The person named in a court order for the purpose, or if no order has been served upon the lessor, the spouse, a parent, an adult descendant, or a person named as a personal representative in a copy of a purported will produced by such person;
- The personal representative of the estate of either or any of such lessee who is deceased, or the guardian of the property of either or any of such lessees who is incapacitated.

This bill also provides that the right of access by a co-lessee is separate from the rights and responsibilities of other persons who may be granted access to a safe-deposit box after the death or incapacity of another co-lessee. This provision makes the distinction between this section that pertains to access to safe-deposit boxes leased in two or more names, and s. 655.935, F.S. and s. 733.6065, F.S., which also provide for when there is a co-lessee, and provide procedures for when a co-lessee of a safe-deposit box dies.

The co-lessee and any other person granted access to the safe-deposit box in s. 655.937, F.S., may make a written inventory of the box which will be conducted by the person making the request in the presence of one other person. Each person present shall verify the contents of the box by signing a copy of the inventory under penalties of perjury.

This bill also provides that if the person making the written inventory is not a surviving co-lessee, the other person may be a surviving co-lessee, an employee of the institution where the box is located, or an attorney licensed in Florida.

This bill amends s. 733.6065(1), F.S., of the probate code, to specify that the procedure for the initial opening of a safe-deposit box include safe-deposit boxes leased or co-leased by the decedent. Section 733.6065(2), F.S., is amended to provide that the right to open and examine the contents of a safe-deposit box leased by a decedent, or any documents delivered by a decedent for safekeeping, and to receive items as provided for in s. 655.935, F.S., is separate from the rights provided for in 733.6065(1), F.S.

Section 655.935, F.S., s. 655.937, F.S., and s. 733.6065, F.S., all pertain to access to safe-deposit boxes, whether they are leased or co-leased, and procedures for when a lessee or co-lessee is a decedent. This bill revises these provisions found in the probate code and the banking laws by removing possible conflicts and providing conformity between the similar provisions.

C. SECTION DIRECTORY:

Section 1 amends 655.935, F.S., revising search procedure on death of lessee.

Section 2 amends 655.936, F.S., removing words "foreign" and "resident" from the statute.

Section 3 amends 655.937, F.S., revising access to safe-deposit boxes leased in two or more names.

Section 4 amends s. 732.2135, F.S., revising the time-period for when an election must be filed and for an election withdrawal.

Section 5 amends s. 732.402, F.S., revising the time-period when a person entitled to exempt property must file a petition for determination of exempt property.

Section 6 amends 733.212, F.S., revising what must be included in a notice of administration, and extending the deadlines for filing petitions objecting to the validity of the will, qualifications of the personal representative, the venue, or the jurisdiction of the court or other pleadings requesting relief in accordance with the Florida Probate rules.

Section 7 amends 733.6065, F.S., revising procedures for opening a safe-deposit box.

Section 8 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Where the personal representative cannot find a person entitled to receive a copy of the notice of administration, the personal representative is required to publish the notice in a newspaper of general circulation. This bill increases the information required to be published in the notice of administration. The number of lines that the notice takes up on a page determines the cost to the estate. By increasing the amount of information in the notice, this bill adds to the length of the notice, and as a result, the cost of publication to the estate and heirs will likely increase.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This 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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 11, 2006, the Civil Justice Committee adopted one amendment to this bill. The amendment revises the statutes that provide for access to safe-deposit boxes following the death of the lessor and creating an optional inventory by someone other than the personal representative if the safe-deposit box is co-leased. The bill was then reported favorably with a committee substitute.

CHAMBER ACTION

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1 The Civil Justice Committee recommends the following:
2
3 **Council/Committee Substitute**
4 Remove the entire bill and insert:
5 A bill to be entitled
6 An act relating to probate; amending s. 655.935, F.S.;
7 revising procedures relating to opening a decedent's safe-
8 deposit box; amending s. 655.936, F.S.; revising
9 procedures relating to delivery of a decedent's safe-
10 deposit box by lessor; amending s. 655.937, F.S.; revising
11 procedures relating to granting access to safe-deposit
12 boxes leased in two or more names; amending s. 732.2135,
13 F.S.; revising provisions relating to time of filing or
14 withdrawing certain estate share elections; amending s.
15 732.402, F.S.; revising procedures relating to filing
16 petitions for determinations of exempt property; amending
17 s. 733.212, F.S.; revising procedures and requirements
18 relating to notices of administration and petitions for
19 relief; amending s. 733.6065, F.S.; revising procedures
20 relating to the opening of a safe-deposit box leased or
21 co-leased by decedent; providing an effective date.
22
23 Be It Enacted by the Legislature of the State of Florida:

24
25 Section 1. Section 655.935, Florida Statutes, is amended
26 to read:
27 655.935 Search procedure on death of lessee.--If
28 satisfactory proof of the death of the lessee is presented, a
29 lessor shall permit the person named in a court order for the
30 purpose, or if no order has been served upon the lessor, the
31 spouse, a parent, an adult descendant, or a person named as a
32 personal representative in a copy of a purported will produced
33 by such person, to open and examine the contents of a safe-
34 deposit box leased or co-leased by a decedent, or any documents
35 delivered by a decedent for safekeeping, in the presence of an
36 officer of the lessor; and the lessor, if so requested by such
37 person, shall deliver:
38 (1) Any writing purporting to be a will of the decedent,
39 to the court having probate jurisdiction in the county in which
40 the financial institution is located.~~;~~
41 (2) Any writing purporting to be a deed to a burial plot
42 or to give burial instructions, to the person making the request
43 for a search.~~; and~~
44 (3) Any document purporting to be an insurance policy on
45 the life of the decedent, to the beneficiary named therein.
46
47 No other contents may be removed pursuant to this section.
48 Access granted pursuant to this section shall not be considered
49 the initial opening of the safe-deposit box pursuant to s.
50 733.6065 by a personal representative appointed by a court in
51 this state.

52 Section 2. Subsections (1) and (2) of section 655.936,
53 Florida Statutes, are amended to read:
54 655.936 Delivery of safe-deposit box contents or property
55 held in safekeeping to personal representative.--
56 (1) Subject to the provisions of subsection (3), the
57 lessor shall immediately deliver to a ~~resident~~ personal
58 representative appointed by a court in this state, upon
59 presentation of a certified copy of his or her letters of
60 authority, all property deposited with it by the decedent for
61 safekeeping, and shall grant the ~~resident~~ personal
62 representative access to any safe-deposit box in the decedent's
63 name and permit him or her to remove from such box any part or
64 all of the contents thereof.
65 (2) If a ~~foreign~~ personal representative of a deceased
66 lessee has been appointed by a court of any other state, a
67 lessor may, at its discretion, after 3 months from the issuance
68 to such ~~foreign~~ personal representative of his or her letters of
69 authority, deliver to such ~~foreign~~ personal representative all
70 properties deposited with it for safekeeping and the contents of
71 any safe-deposit box in the name of the decedent if at such time
72 the lessor has not received written notice of the appointment of
73 a personal representative in this state, and such delivery is a
74 valid discharge of the lessor for all property or contents so
75 delivered. A ~~Such foreign~~ personal representative appointed by a
76 court of any other state shall furnish the lessor with an
77 affidavit setting forth facts showing the domicile of the
78 deceased lessee to be other than this state and stating that
79 there are no unpaid creditors of the deceased lessee in this

80 state, together with a certified copy of his or her letters of
81 authority. A lessor making delivery pursuant to this subsection
82 shall maintain in its files a receipt executed by such ~~foreign~~
83 personal representative which itemizes in detail all property so
84 delivered.
85 Section 3. Section 655.937, Florida Statutes, is amended
86 to read:
87 655.937 Access to safe-deposit boxes leased in two or more
88 names.--
89 (1) Unless ~~When~~ specifically provided in the lease or
90 rental agreement to the contrary, when ~~covering~~ a safe-deposit
91 box is heretofore or hereafter rented or leased in the names of
92 two or more lessees, ~~that access to the safe-deposit box will be~~
93 ~~granted to either lessee, or to either or the survivor,~~ access
94 to the safe-deposit box shall be granted to:
95 (a) Either or any of such lessees, regardless of whether
96 or not the other lessee or lessees or any of them are living or
97 competent.
98 (b) Subject to s. 655.933, those persons named in s.
99 655.933.
100 (c) Subject to s. 655.935, those persons named in s.
101 655.935.~~; or~~
102 (d) ~~(b)~~ Subject to s. 733.6065, the personal representative
103 of the estate of either or any of such lessees who is deceased,
104 or the guardian of the property of either or any of such lessees
105 who is incapacitated.~~; and,~~
106 (2) In all cases described in subsection (1), ~~either such~~
107 ~~case, the provisions of s. 655.933 apply, and~~ the signature on

108 the safe-deposit entry or access record (or the receipt or
109 acquittance, in the case of property or documents otherwise held
110 for safekeeping) is a valid and sufficient release and discharge
111 to the lessor for granting access to such safe-deposit box or
112 for the delivery of such property or documents otherwise held
113 for safekeeping.
114 (3) ~~(2)~~ A lessor may not be held liable for damages or
115 penalty by reason of any access granted or delivery made
116 pursuant to this section.
117 (4) The right of access by a co-lessee is separate from
118 the rights and responsibilities of other persons who may be
119 granted access to a safe-deposit box after the death or
120 incapacity of another co-lessee and such right of access is not
121 subject to the provisions of s. 655.935, s. 733.6065, or other
122 requirements imposed upon personal representatives, guardians,
123 or other fiduciaries.
124 (5) After the death of a co-lessee, the surviving co-
125 lessee or any other person who is granted access to the safe-
126 deposit box pursuant to this section may make a written
127 inventory of the box which shall be conducted by the person
128 making the request in the presence of one other person as
129 specified in this subsection. Each person present shall verify
130 the contents of the box by signing a copy of the inventory under
131 penalties of perjury.
132 (a) If the person making the written inventory is a
133 surviving co-lessee, the other person may be any other person
134 granted access pursuant to this section, an employee of the

135 institution at which the box is located, or an attorney licensed
136 in this state.
137 (b) If the person making the written inventory is not a
138 surviving co-lessee, the other person may be a surviving co-
139 lessee, an employee of the institution at which the box is
140 located, or an attorney licensed in this state.
141 Section 4. Subsections (1) and (3) of section 732.2135,
142 Florida Statutes, are amended to read:
143 732.2135 Time of election; extensions; withdrawal.--
144 (1) Except as provided in subsection (2), the election
145 must be filed on or before ~~within~~ the earlier of the date that
146 is 6 months after ~~of~~ the date of service of a copy of the notice
147 of administration on the surviving spouse, or an attorney in
148 fact or guardian of the property of the surviving spouse, or the
149 date that is 2 years after the date of the decedent's death.
150 (3) The surviving spouse or an attorney in fact, guardian
151 of the property, or personal representative of the surviving
152 spouse may withdraw an election on or before the earlier of the
153 date that is ~~at any time within~~ 8 months after the date of the
154 decedent's death or the date of a court ~~and before the court's~~
155 order of contribution. If an election is withdrawn, the court
156 may assess attorney's fees and costs against the surviving
157 spouse or the surviving spouse's estate.
158 Section 5. Subsection (6) of section 732.402, Florida
159 Statutes, is amended to read:
160 732.402 Exempt property.--
161 (6) Persons entitled to exempt property shall be deemed to
162 have waived their rights under this section unless a petition

163 for determination of exempt property is filed by or on behalf of
164 the persons entitled to the exempt property on or before the
165 later of the date that is ~~within~~ 4 months after the date of
166 service of the notice of administration or the date that is
167 ~~within~~ 40 days after ~~from~~ the date of termination of any
168 proceeding involving the construction, admission to probate, or
169 validity of the will or involving any other matter affecting any
170 part of the estate subject to this section.
171 Section 6. Section 733.212, Florida Statutes, is amended
172 to read:
173 733.212 Notice of administration; filing of objections.--
174 (1) The personal representative shall promptly serve a
175 copy of the notice of administration on the following persons
176 who are known to the personal representative:
177 (a) The decedent's surviving spouse;
178 (b) Beneficiaries;
179 (c) The trustee of any trust described in s. 733.707(3)
180 and each beneficiary of the trust as defined in s.
181 737.303(4)(b), if each trustee is also a personal representative
182 of the estate; and
183 (d) Persons who may be entitled to exempt property
184
185 in the manner provided for service of formal notice, unless
186 served under s. 733.2123. The personal representative may
187 similarly serve a copy of the notice on any devisees under a
188 known prior will or heirs or others who claim or may claim an
189 interest in the estate.
190 (2) The notice shall state:

191 (a) The name of the decedent, the file number of the
192 estate, the designation and address of the court in which the
193 proceedings are pending, whether the estate is testate or
194 intestate, and, if testate, the date of the will and any
195 codicils.~~,~~
196 (b) The name and address of the personal representative~~,~~
197 and the name and address of the personal representative's
198 attorney.
199 (c) ~~The notice shall state~~ That any interested person
200 ~~persons are required to file with the court any objection by an~~
201 ~~interested person~~ on whom a copy of the notice of administration
202 is ~~the notice was~~ served must file on or before the date that is
203 3 months after the date of service of a copy of the notice of
204 administration on that person any objection that challenges the
205 validity of the will, the qualifications of the personal
206 representative, the venue, or the jurisdiction of the court
207 ~~within 3 months after the date of service of a copy of the~~
208 ~~notice of administration on the objecting person~~.
209 (d) That persons who may be entitled to exempt property
210 under s. 732.402 will be deemed to have waived their rights to
211 claim that property as exempt property unless a petition for
212 determination of exempt property is filed by such persons or on
213 their behalf on or before the later of the date that is 4 months
214 after the date of service of a copy of the notice of
215 administration on such persons or the date that is 40 days after
216 the date of termination of any proceeding involving the
217 construction, admission to probate, or validity of the will or

218 involving any other matter affecting any part of the exempt
219 property.
220 (e) That an election to take an elective share must be
221 filed on or before the earlier of the date that is 6 months
222 after the date of service of a copy of the notice of
223 administration on the surviving spouse, or an attorney in fact
224 or a guardian of the property of the surviving spouse, or the
225 date that is 2 years after the date of the decedent's death.
226 (3) Any interested person on whom a copy of the notice of
227 administration is ~~was~~ served must object to the validity of the
228 will, the qualifications of the personal representative, the
229 venue, or the jurisdiction of the court by filing a petition or
230 other pleading requesting relief in accordance with the Florida
231 Probate Rules on or before the date that is ~~within~~ 3 months
232 after the date of service of a copy of the notice of
233 administration on the objecting person, or those objections are
234 forever barred.
235 (4) The appointment of a personal representative or a
236 successor personal representative shall not extend or renew the
237 period for filing objections under this section, unless a new
238 will or codicil is admitted.
239 (5) ~~(4)~~ The personal representative is not individually
240 liable to any person for giving notice under this section,
241 regardless of whether it is later determined that notice was not
242 required by this section. The service of notice in accordance
243 with this section shall not be construed as conferring any
244 right.

245 (6) ~~(5)~~ If the personal representative in good faith fails
246 to give notice required by this section, the personal
247 representative is not liable to any person for the failure.
248 Liability, if any, for the failure is on the estate.
249 (7) ~~(6)~~ If a will or codicil is subsequently admitted to
250 probate, the personal representative shall promptly serve a copy
251 of a new notice of administration as required for an initial
252 will admission.
253 (8) For the purpose of determining deadlines established
254 by reference to the date of service of a copy of the notice of
255 administration in cases in which such service has been waived,
256 service shall be deemed to occur on the date the waiver is
257 filed.
258 Section 7. Section 733.6065, Florida Statutes, is amended
259 to read:
260 733.6065 Opening safe-deposit box.--
261 (1) Subject to the provisions of s. 655.936(2), the
262 initial opening of a ~~the decedent's~~ safe-deposit box leased or
263 co-leased by the decedent shall be conducted in the presence of
264 any two of the following persons: an employee of the institution
265 where the box is located, the personal representative, or the
266 personal representative's attorney of record. Each person who is
267 present must verify the contents of the box by signing a copy of
268 the inventory under penalties of perjury. The personal
269 representative shall file the safe-deposit box inventory,
270 together with a copy of the box entry record from a date which
271 is 6 months prior to the date of death to the date of inventory,
272 with the court within 10 days after the box is opened. Unless

273 otherwise ordered by the court, this inventory and the attached
274 box entry record is subject to inspection only by persons
275 entitled to inspect an inventory under s. 733.604(1). The
276 personal representative may remove the contents of the box.
277 (2) The right to open and examine the contents of a safe-
278 deposit box leased by a decedent, or any documents delivered by
279 a decedent for safekeeping, and to receive items as provided for
280 in s. 655.935 are separate from ~~in addition to~~ the rights
281 provided for in subsection (1).
282 Section 8. This act shall take effect July 1, 2006.

HB 567

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 567 CS Notaries Public
SPONSOR(S): Kyle
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1312

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	6 Y, 0 N, w/CS	Shaddock	Bond
2) Governmental Operations Committee	5 Y, 0 N	Brown	Williamson
3) Transportation & Economic Development Appropriations Committee		McAuliffe	Gordon
4) Justice Council			
5)			

SUMMARY ANALYSIS

A notary public is an appointed public officer, commissioned by the Governor, whose function is to administer oaths, take acknowledgments of deeds and other instruments, attest to or certify photocopies of certain documents, and perform other duties.

This bill requires a notary to maintain a journal of notarial acts. The record in the journal must include the date, time, and type of notarial act; the title or name of the document or transaction; the printed name and signature of the signer; and the signer's complete address, telephone number, and specific type of identification presented by the signer. A notary who is either an attorney licensed in this state or who is employed by an attorney licensed in this state is not required to maintain a journal.

This bill also authorizes a notary public to charge $10 dollars for each signature notarized, rather than per document. However, the bill prohibits notaries public from charging fees for services to a U.S. military veteran, firefighter, or law enforcement officer applying for a pension, allotment, allowance, compensation, insurance policy, or other benefit resulting from public service.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill increases the regulation of notaries public.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

A notary public (hereinafter "notary" or "notaries") is a "public officer appointed and commissioned by the Governor whose function is to administer oaths; to take acknowledgments of deeds and other instruments; to attest to or certify photocopies of certain documents; and to perform other duties specified by law."[1]

Chapter 117, F.S.,[2] provides for notaries and directs that the Governor is authorized to appoint as many notaries as necessary.[3] A notary must be at least 18 years of age, maintain legal residence in the state throughout the commission, and possess the ability to read, write, and understand English.

Once appointed, a notary serves a four-year term.[4] During the term of office, a notary must post and maintain a $7,500 bond payable to any individual harmed as a result of a notaries breach of duty.[5] The bond must be approved and filed with the Department of State and executed by a surety company that is authorized to transact business in Florida.[6] If a surety pays an individual harmed by the notary for breach of duty, the company must notify the Governor of the payment and the underlying circumstances.[7]

Duties of a Notary

A notary is approved to perform six functions: administer oaths or affirmations;[8] take acknowledgements;[9] attest to photocopies of certain documents;[10] solemnize marriage;[11] verify vehicle identification numbers;[12] and certify contents of a safe-deposit box.[13] With the exception of solemnizing a marriage, a notary public cannot charge more than $10 for each notarial act.[14] Any person who unlawfully possesses a notary public official seal or any papers or copies relating to notarial acts is guilty of a misdemeanor of the second degree,[15] as anyone who impersonates a notary.[16]

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[1] *Governor's Reference Manual for Notaries*, State of Florida, November 2001 ed., pg. 6 (hereinafter "*Reference Manual*").
[2] *See* 1 Fla. Jur 2d Acknowledgments s. 42 stating, "[b]ecause a notary public is generally held to be a public officer, the eligibility of a person to be a notary public is largely regulated by statutory provisions," and citing *Smith v. McEwen*, 161 So. 68 (1935) (notaries public are recognized officers of Florida).
[3] Section 117.01(1), F.S.
[4] *Id.*
[5] Section 117.01(7)(a), F.S.
[6] *Id.*
[7] Section 117.01(8), F.S.
[8] Section 117.03, F.S.
[9] Section 117.04, F.S.
[10] Section 117.05(12)(a), F.S.
[11] Section 117.045, F.S.
[12] Section 319.23(3)(a)2., F.S.
[13] Section 655.94(1), F.S.
[14] Sections 117.05(2)(a) and 117.045, F.S.
[15] Section 117.05(3)(e), F.S.
[16] Section 117.05(7), F.S.

Suspension of a Notary

The Governor can suspend a notary for any of the grounds provided in Art. 4, s. 7, Fla. Const.[17] The Governor also may suspend a notary for grounds of malfeasance, misfeasance, or neglect of duty, as specified in s. 117.01(4), F.S.[18]

Effect of Bill

The bill requires a notary to maintain a journal of notarial acts.[19] The journal is to contain each notarial act in sequential order. The record in the journal must include the date, time, and type of notarial act; the title or name of the document or transaction; the printed name and signature of the signer; and the signer's complete address, telephone number, and specific type of identification presented by the signer.[20] Moreover, the notarial journal must be maintained by a notary for at least 5 years after the date of the last entry. Should a journal be stolen, lost, misplaced, destroyed, or rendered unusable, the notary is required to immediately notify the Executive Office of the Governor in writing of the circumstances of the incident. Finally, failure by a notary to comply with these requirements could result in the suspension or non-renewal of the notary's public commission by the Executive Office of the Governor.

A notary who is either an attorney licensed in this state or who is employed by an attorney licensed in this state is not required to maintain a journal of notarial acts.

Current law allows a notary to charge up to $10 per notarial act.[21] This bill permits a notary to charge $10 per signature notarized, rather than $10 per notarial act. However, a notary may not charge fees for services to a U.S. military veteran, firefighter, or law enforcement officer who is applying for a pension, allotment, allowance, compensation, insurance policy, or other benefit resulting from public service.

C. SECTION DIRECTORY:

Section 1 amends s. 117.05, F.S., regarding notary fees.

Section 2 creates s. 117.071, F.S., requiring a notary to maintain a journal of each notarial act.

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[17] The grounds for suspension by the Governor found in Art. 4, s. 7, Fla. Const. are: "malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony...."

[18] Grounds of malfeasance, misfeasance, or neglect of duty, specified in section 117.01(4), F.S., include, but are not limited to: a material false statement on the application; a complaint found to have merit by the Governor; failure to cooperate or respond to an investigation by the Governor's Office or the Department of State regarding a complaint; Official misconduct as defined in s. 838.022, F.S.; false or misleading advertising relating to notary public services; unauthorized practice of law; failure to report a change in address or telephone number within the required time or failure to request an amended commission following a name change; commission of fraud, misrepresentation, or any intentional violation of ch. 117, F.S.; charging fees in excess of fees authorized by law; or failure to maintain the required bond.

[19] In 1998, the Legislature enacted a law that required all electronic notarizations to be logged in a journal. *See*, ch. 98-246, L.O.F.; s. 117.20, F.S., (1998 Supp.). Each notarial act memorialized in the journal had to include certain information and be kept at least five years. If the journal was lost or stolen, the notary had to notify the Governor's Office or the Department of State. The notary public had to let the Governor's Office or the Department of State inspect the journal at any time it requested. In 1999, the law was repealed. *See*, s. 165, ch. 99-251, L.O.F. Although Florida law does not currently require the use of a notary journal, the *Governor's Reference Manual for Notaries* recommends that notaries voluntarily maintain a journal. *Reference Manual*, at 42.

[20] The National Notary Association ("NNA") compiled the Model Notary Act of 2002, which was an attempt to modernize the notary public office. The Act was the work of a drafting committee of individuals from the legal, business and governmental spheres. *See* http://www.nationalnotary.org/UserImages/Model_Notary_Act.pdf (last visited March 2, 2006). The Model Notary Act, in ss. 7-1 and 7-2, requires a notary to maintain a journal and suggests that the journal contain a list of information for each act performed; which would include the thumbprint of each principal and witness in a notarial act. The thumbprint requirement, along with several other requirements, was considered controversial by the committee. Comment, s. 7-2(a), Model Notary Act. The instant bill contains no such provision.

[21] Section 117.05(2)(b)2., F.S.

Section 3 provides an effective date of January 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

   The bill does not create, modify, amend, or eliminate a state expenditure.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

   The bill does not create, modify, amend, or eliminate a local expenditure.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

A notary public must purchase a journal for recording notarial acts.[22]

D. FISCAL COMMENTS:

Due to the new requirements of this bill, the amount of time necessary for a notary public to notarize a document may be increased, thereby potentially increasing the cost of businesses that rely on notary services.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This 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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

<u>Public Records Law</u>

Under s. 119.07(1)(a), F.S.:

[22] Journals of notarial acts can be purchased for between $11.95, with space for over 700 entries, to $34.99, which provides space for 775 notarizations.

> Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

As used in s. 119.07, F.S., the term "public records" means:

> all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.[23]

As used in s. 119.07, F.S., the term "agency" means:

> any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.[24]

Because a notary public is a public officer under the State Constitution, the notary journal required by this bill may be a public record that is available for inspection and copying pursuant to Art. I, s. 24(a), Fla. Const. and ch. 119, F.S.

Journal Requirement

The *Reference Manual* drafted by the Governor's Task Force on Notaries Public in 1989 suggested the mandatory use of journals.[25] Moreover, while notary journals are not required to maintain a journal under current law, the *Reference Manual* recommends "any notary who is concerned with liability may want to consider this protective measure to provide a permanent record of his or her notarial acts."[26] Furthermore, the National Notary Association maintains that the use of a notarial journal will assist in preventing real estate fraud. It appears that the NNA's chief tool in preventing real estate fraud is the requirement that each document signer place a thumbprint in the notarial journal; a requirement absent from this bill.

Detractors of the bill point to the increased responsibility a notary would have for each signature as being unduly cumbersome. Their concern revolves around the additional time needed for a notary need to comply with the new requirements.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On February 22, 2006, the Civil Justice Committee adopted an amendment removing everything after the enacting clause. The amendment modified the bill in the following manner:

- An exception to the journal requirement was created. A notary who is either an attorney licensed in this state or who is employed by an attorney licensed in this state is not required to maintain a journal of notarial acts.
- In the event a notary's journal is stolen, lost, misplaced, destroyed, or rendered unusable, the amendment requires the notary to notify solely the Executive Office of the Governor.

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[23] Section 119.011(11), F.S.
[24] Section 119.011(2), F.S.
[25] *Reference Manual*, at 42.
[26] *Id.*, at 43.

- The title was corrected.

The bill was then reported favorably with a committee substitute.

CHAMBER ACTION

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1 The Civil Justice Committee recommends the following:
2
3 **Council/Committee Substitute**
4 Remove the entire bill and insert:
5 A bill to be entitled
6 An act relating to notaries public; amending s. 117.05,
7 F.S.; authorizing notaries public to charge a fee per
8 notarized signature; requiring notaries public to provide
9 services without charge to certain persons; creating s.
10 117.071, F.S.; requiring notaries public to maintain a
11 journal and to record notarial acts; providing an
12 exception; providing requirements for journal entries;
13 requiring retention of the journal for a specified period
14 after the last entry and requiring certain notice upon
15 failure to do so; providing that failure to comply with
16 such requirements may constitute grounds for suspension or
17 nonrenewal of the notary public commission by the
18 Executive Office of the Governor; providing an effective
19 date.
20
21 Be It Enacted by the Legislature of the State of Florida:
22

23 Section 1. Subsection (2) of section 117.05, Florida
24 Statutes, is amended to read:
25 117.05 Use of notary commission; unlawful use; notary fee;
26 seal; duties; employer liability; name change; advertising;
27 photocopies; penalties.--
28 (2)(a) The fee of a notary public may not exceed $10 per
29 signature notarized for any one notarial act, except as provided
30 in s. 117.045.
31 (b) A notary public may not charge a fee:
32 1. For witnessing an absentee ballot in an election, and
33 must witness such a ballot upon the request of an elector,
34 provided the notarial act is in accordance with the provisions
35 of this chapter.
36 2. For any notarial act performed for a United States
37 military veteran or a firefighter or law enforcement officer
38 applying for a pension, allotment, allowance, compensation,
39 insurance policy, or other benefit resulting from public
40 service.
41 Section 2. Section 117.071, Florida Statutes, is created
42 to read:
43 117.071 Use of journal for notarial acts.--
44 (1) Each notarial act shall be recorded by the notary
45 public sequentially in a journal in accordance with the
46 provisions of this chapter. A notary who is either an attorney
47 at law licensed to practice in this state or who is employed by
48 an attorney at law licensed to practice in this state is exempt
49 from the requirement to keep a journal of notarial acts.

50 (a) For each notarial act, the notary public shall record
51 in the journal at the time of notarization:
52 1. The date and time of the notarial act.
53 2. The type of notarial act.
54 3. The title or name of the document or transaction.
55 4. The signer's printed name and signature.
56 5. The signer's complete address, telephone number, and
57 specific type of identification presented by the signer.
58 (b) The notary public must retain the journal for
59 safekeeping for at least 5 years after the date of the last
60 entry.
61 (c) If the notary public journal is stolen, lost,
62 misplaced, destroyed, or rendered unusable within the time
63 period specified in paragraph (b), the notary public must
64 immediately notify the Executive Office of the Governor in
65 writing of the circumstances of the incident.
66 (2) Failure of a notary public to comply with the
67 requirements of this section may constitute grounds for
68 suspension or nonrenewal of the notary public commission by the
69 Executive Office of the Governor.
70 Section 3. This act shall take effect January 1, 2007.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1089 Construction Contracting
SPONSOR(S): Galvano
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1940

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	4 Y, 0 N	Blalock	Bond
2) Justice Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

A statute of limitations establishes a fixed time period within which a lawsuit must be commenced after a cause of action has accrued. A statute of repose is similar to a statute of limitations, yet different in that a statute of repose bars a suit a fixed time after the defendant acts in some way. This bill reduces the 4-year statute of limitations for actions founded on the design, planning, or construction of an improvement to real property by changing when the statute will begin to run from the latest to the earliest occurrence of specified events. This bill also reduces the statute of repose for actions founded on the design, planning, or construction of an improvement to real property from 15 years to 10 years with the time running from the earliest occurrence of specified events.

Condominium contractors, subcontractors, and suppliers give condominium developers and unit owners warranties of fitness for the work done and supplies used. This bill provides that the warranty of fitness will only apply to work or materials specified in the construction contract, and to buildings designated as a condominium in the construction contract.

When existing improvements are converted to ownership as a residential condominium, the developer must establish reserve accounts for capital expenditures and deferred maintenance. This bill provides that this requirement applies only where the construction of the improvement was commenced prior to being designated as a condominium by the developer, and that in these circumstances warranties of fitness requirements do not apply.

This bill provides that the reductions in limitations periods in this bill apply to any action commenced on or after July 1, 2006, regardless of when the cause of action accrued. There is an exception providing that any action that would not have been barred prior to the changes made by this bill can be commenced before July 1, 2007. If the action is not commenced by this date and is barred by the changes made to the statute of limitations and repose in this bill, then it will be barred.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill reduces the length of the statute of limitations and repose for actions founded on the design, planning, or construction of an improvement to real property.

Promote personal responsibility -- This bill requires that litigants commence their cause of action in a more timely fashion from when the cause of action has accrued.

B. EFFECT OF PROPOSED CHANGES:

Statute of Limitations and Repose for Construction Defects

A statute of limitations establishes a fixed time period within which lawsuits must be commenced after a cause of action has accrued.[1] Once a claim has been extinguished by the applicable statute of limitations, the claim cannot be revived because a constitutionally protected property right to be free from the claim has vested in the defendant.[2] The statutes of limitation are primarily governed by ch. 95, F.S., although statutes of limitation are found in other parts of the statutes as well. Statutes of limitation are designed to encourage plaintiffs to assert their causes of action with reasonable diligence when evidence is fresh and available.[3] Statutes of limitation protect defendants against claims asserted when evidence is lost and after the facts have become obscure from the lapse of time, defective memory, or death and removal of witnesses.[4]

A statute of repose is similar to a statute of limitations. A statute of repose bars a suit after a fixed period of time after the defendant acts in some way, even if this period ends before the plaintiff has suffered any injury. Although phrased in similar language imposing time limits within which legal proceedings on a cause of action must be commenced, a statute of repose is not a true statute of limitations because it begins to run not from accrual of the cause of action, but from an established or fixed event, such as the delivery of a product or the completion of work, which is unrelated to accrual of the cause of action.[5] Moreover, unlike a statute of limitations, a statute of repose abolishes or completely eliminates the underlying substantive right of action, not just the remedy available to the plaintiff, upon expiration of the limitation period specified in the statute of repose.[6]

Section 95.11(3)(c), F.S. currently provides that actions founded on a deficiency in the design, planning, or construction of an improvement to real property, whether founded on contract or on negligence,[7] are subject to a 4-year statute of limitations. The 4-year time period of the statute of limitations begins to run from the latest date of the following events:

- Actual possession by the owner;
- The issuance of a certificate of occupancy;
- Abandonment of construction if not completed; or

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[1] Am. Jur. 2d, Limitation of Actions § 9.
[2] *Wood v. Eli Lilly & Co.*, 701 So. 2d 344 (Fla. 1997); *In re Estate of Smith*, 685 So. 2d 1206 (Fla. 1996); *Boyce v. Cluett*, 672 So. 2d 858 (Fla. 4th DCA 1996).
[3] *Thermo Air Contractors, Inc. v. Travelers Indem. Co.*, 277 So. 2d 47 (Fla. 3rd DCA 1973); *Foremost Properties, Inc. v. Gladman*, 100 So. 2d 669 (Fla. 1st DCA 1958).
[4] *Whaley v. Wotring, 225 So. 2d 177 (Fla. Dist. Ct. App. 1st Dist. 1969).*
[5] *Kush v. Lloyd,* 616 So. 2d 415 (Fla. 1992).
[6] *Beach v. Great Western Bank*, 692 So. 2d 146 (Fla. 1997)
[7] *Dubin v. Dow Corning Corp.*, 478 So. 2d 71 (Fla. 2nd DCA 1985).

- Completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.

An exception to the 4-year statute of limitations is provided for when an action involves a latent defect. A latent defect is a hidden flaw, weakness or imperfection in an article which a seller knows about, but the buyer cannot discover by a reasonable inspection. Under these circumstances the 4-year statute of limitation does not begin to run until the defect is discovered or should have been discovered through due diligence. However, whether the action is based on a latent defect or not the statute of repose for an action founded on the design, planning, or construction of an improvement to real property provides that the action must be commenced within 15 years after the date of the following, whichever is latest:

- Date of actual possession by the owner;
- The date of the issuance of a certificate of occupancy;
- The date of abandonment of construction if not completed; or
- The date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.

This bill amends s. 95.11(3)(c), F.S., to provide that the 4-year time period of the statute of limitations begins to run from the "earliest" of the following events (except when the action involves a latent defect):

- Actual possession by the owner;
- The issuance of a certificate of occupancy;
- Abandonment of construction if not completed; or
- Completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.

This bill also reduces the statute of repose from 15 years to 10 years for any action founded on the design, planning, or construction of an improvement to real property. The time will begin to run when the earliest of the following events occurs:

- Actual possession by the owner;
- The issuance of a certificate of occupancy;
- Abandonment of construction if not completed; or
- Completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.

Warranties of Fitness for Work and Materials Specified in a Condominium Construction Contract

Section 718.203, F.S. provides that the contractor, subcontractors, and suppliers grant to the developer and to the purchaser of each condominium unit an implied warranty of fitness as to the work performed or materials supplied by them.[8] Specifically, there is an implied warranty of fitness for three years from the completion of the construction of a building or improvement as to the roof and structural components of the building or improvement and as to mechanical and plumbing elements serving a building or an improvement, except for mechanical elements serving only one unit.[9] As to all other improvements and materials, there is an implied warranty of fitness for one year after all construction is completed.[10]

This bill amends s. 718.203(2), F.S., limiting the implied warranties of fitness that the contractor, subcontractors, and suppliers grant to the developer to only the work performed or materials supplied by them that are specified in their respective contracts. This bill also amends s. 718.203(6), F.S., to provide that the warranty provided in s. 718.203(2), F.S. applies only to a building or improvement that

[8] Section 718.203(2), F.S.
[9] Section 718.203(2)(a), F.S.
[10] Section 718.203(2)(b), F.S.

was designated as a condominium by the developer in its construction contract with the contractor or any amendment to the contract executed by the parties. This bill removes the language in current law which provides that nothing in this section affects condominiums where rights are established by contracts for the sale of 10% or more of the units in the condominium by the developer to prospective unit owners prior to July 1, 1974, or as to condominium buildings where construction has been commenced prior to July 1, 1974.

Condominium Conversion Reserve Accounts

A developer may create a condominium by converting existing, previously occupied improvements to condominium ownership. The developer must disclose the condition of the improvements and certain components, as well as the current estimated replacement costs.[11] Section 718.618, F.S. provides that when existing improvements are converted to ownership as a residential condominium, the developer must establish reserve accounts for capital expenditures and deferred maintenance.

This bill amends s. 718.618, F.S., creating subsection (9), which provides that s. 718.618, F.S. applies only to the conversion of existing improvements where construction of the improvement was commenced prior to its designation by the developer as a condominium. Therefore, reserve accounts will only have to be established for the purposes of conversion, where construction of the improvement started before it was designated as a condominium. When this occurs s. 718.203, F.S., which pertains to warranties, is not applicable.

Application of the Proposed Changes to s. 95.11(3)(c), F.S.

This bill provides that the proposed changes made by the bill to s. 95.11(3)(c), F.S. will apply to any action commenced on or after July 1, 2006, regardless of when the cause of action accrued. The changes made by this bill, shortening the statute of limitations for actions founded on the design, planning, or construction of an improvement to real property, would apply to any party whose action commenced on or after July 1, 2006, even if the cause of action accrued much earlier. Therefore, a party whose cause of action accrued prior to the changes in this bill, but the action commenced after July 1, 2006, could be barred from bringing the action by the shortening of the statute of repose from 15 years to 10 years. This bill does provide an exception, which deals with this issue, and provides that any action that would not have been barred under s. 95.11(3)(c), F.S., prior to the amendments made by this act may be commenced before July 1, 2007. If the action is not commenced by July 1, 2007 and is barred by the amendments to s. 95.11(3)(c), F.S., then the action will be barred. Therefore, people who would be barred from bringing a cause of action based on the new statute of limitations and repose, but not under the old statute have until July 1, 2007 to commence their cause of action or are forever barred.

C. SECTION DIRECTORY:

Section 1 amends s. 95.11(3)(c), F.S., shortening the statute of limitations and repose for actions founded on the design, planning, or construction of an improvement of real property.

Section 2 amends s. 718.203, F.S., to revise provisions related to when contractors, subcontractors, and suppliers must grant implied warranties of fitness to the developer and unit owners.

Section 3 amends s. 718.618(9), F.S., to provide for when provisions related to conversion reserve accounts and warranties are applicable.

Section 4 establishes specific provisions pertaining to the application of the changes to s. 95.11(3)(c), F.S. in this bill.

Section 5 provides an effective date of July 1, 2006.

[11] Section 718.614(1), (2), F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This 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:

   Although the right to commence an action is a valid and protected property interest,[12] a plaintiff has no vested right in a statute of limitations in effect when his or her cause of action accrues.[13] Thus, the time allowed for a suit may be either initially imposed or reduced by legislation enacted after the cause of action arose, provided the litigant still has a reasonable time left in which to enforce his or her right.[14] The changes to s. 95.11(3)(c), F.S., made in this bill do reduce the time allowed for a suit, after the cause of action arose, but the bill appears to give a litigant reasonable time to enforce his or her right before being completely barred.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

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[12] *Wiley v. Roof*, 641 So. 2d 66 (Fla. 1994).
[13] *Lamb By and Through Donaldson v. Volkswagenwerk Aktiengesellschaft*, 631 F. Supp. 1144 (S.D. Fla. 1986), judgment aff'd, 835 F.2d 1369 (11th Cir. 1988).
[14] McCloskey & Co. v. Eckart, 164 F.2d 257 (C.C.A. 5th Cir. 1947); Walter Denson & Son v. Nelson, 88 So. 2d 120 (Fla. 1956).

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

1 A bill to be entitled
2 An act relating to construction contracting; amending s.
3 95.11, F.S.; revising commencement periods for actions
4 founded on the design, planning, or construction of
5 improvements to real property; providing application;
6 amending s. 718.203, F.S.; requiring implied warranties of
7 fitness for certain materials and work with respect to
8 condominiums to be specified by contract; providing that
9 the warranty applies only to certain buildings or
10 improvements; amending s. 718.618, F.S., relating to
11 converter reserve accounts and warranties; limiting
12 applicability to certain improvements; providing an
13 effective date.
14
15 WHEREAS, architects, engineers, and contractors of an
16 improvement to real property may find themselves named as
17 defendants in a damage suit many years after the improvement was
18 completed and occupied, and
19 WHEREAS, to permit the bringing of such actions without an
20 appropriate limitation as to time places the defendant in an
21 unreasonable, if not impossible, position with respect to
22 asserting a defense, and
23 WHEREAS, architects, engineers, and contractors have no
24 control over an owner whose neglect in maintaining an
25 improvement may cause dangerous or unsafe conditions to develop
26 over a period of years, who uses an improvement for purposes for
27 which it was not designed, or who makes alterations or changes
28 that, years afterward, may be determined to be unsafe or

29 defective and that may appear to be a part of the original
30 improvement, and
31 WHEREAS, liability insurance for the engineer, architect,
32 or contractor is more difficult and more expensive to obtain the
33 longer he or she is exposed to potential liability after an
34 improvement to real property has been completed, and
35 WHEREAS, Florida currently limits the liability exposure of
36 architects, engineers, and contractors to a period of 15 years
37 after completion of an improvement to real property, and
38 WHEREAS, liability insurance coverage is increasingly
39 difficult and more expensive to acquire to cover a period of
40 more than 10 years after an improvement to real property is
41 completed, especially for small and medium-sized architecture,
42 engineering, and construction firms, and
43 WHEREAS, liability insurance coverage for work on
44 residential construction projects, such as condominiums, is
45 generally not available to cover a period of more than 10 years
46 after the improvement to real property is completed, and
47 WHEREAS, the increased cost of such insurance coverage and
48 liability exposure adds to the total cost of construction and is
49 ultimately borne by residential and commercial property owners,
50 and
51 WHEREAS, Florida's current 15-year limit on liability is
52 considerably longer than most other states, some of which have
53 adopted limits as low as 5 years and most of which have adopted
54 a 10-year limit, and
55 WHEREAS, the best interest of the people of the state will
56 be served by reducing the period of time an engineer, architect,

57 or contractor may be exposed to potential liability after an
58 improvement has been completed, and
59 WHEREAS, a recent increase in the conversion of completed
60 or partially completed buildings to condominiums has caused
61 confusion regarding the scope of the warranties specified in
62 sections 718.203 and 718.618, Florida Statutes, and necessitates
63 the clarification of these statutes, NOW, THEREFORE,
64
65 Be It Enacted by the Legislature of the State of Florida:
66
67 Section 1. Paragraph (c) of subsection (3) of section
68 95.11, Florida Statutes, is amended to read:
69 95.11 Limitations other than for the recovery of real
70 property.--Actions other than for recovery of real property
71 shall be commenced as follows:
72 (3) WITHIN FOUR YEARS.--
73 (c) An action founded on the design, planning, or
74 construction of an improvement to real property, with the time
75 running from the date of actual possession by the owner, the
76 date of the issuance of a certificate of occupancy, the date of
77 abandonment of construction if not completed, or the date of
78 completion or termination of the contract between the
79 professional engineer, registered architect, or licensed
80 contractor and his or her employer, whichever date is earliest
81 ~~latest~~; except that, when the action involves a latent defect,
82 the time runs from the time the defect is discovered or should
83 have been discovered with the exercise of due diligence. In any
84 event, the action must be commenced within 10 ~~15~~ years after the

85 date of actual possession by the owner, the date of the issuance
86 of a certificate of occupancy, the date of abandonment of
87 construction if not completed, or the date of completion or
88 termination of the contract between the professional engineer,
89 registered architect, or licensed contractor and his or her
90 employer, whichever date is earliest ~~latest~~.
91 Section 2. Subsections (2) and (6) of section 718.203,
92 Florida Statutes, are amended to read:
93 718.203 Warranties.--
94 (2) The contractor, and all subcontractors and suppliers,
95 grant to the developer and to the purchaser of each unit implied
96 warranties of fitness as to the work performed or materials
97 supplied by them, as such work or materials are specified in
98 their respective contracts and any amendments thereto, as
99 follows:
100 (a) For a period of 3 years from the date of completion of
101 construction of a building or improvement, a warranty as to the
102 roof and structural components of the building or improvement
103 and mechanical and plumbing elements serving a building or an
104 improvement, except mechanical elements serving only one unit.
105 (b) For a period of 1 year after completion of all
106 construction, a warranty as to all other improvements and
107 materials.
108 (6) The warranty provided for in subsection (2) applies
109 only to a building or improvement that was designated as a
110 condominium by the developer in its construction contract with
111 the contractor or any amendment thereto executed by the parties.
112 ~~Nothing in this section affects a condominium as to which rights~~

113 ~~are established by contracts for sale of 10 percent or more of~~
114 ~~the units in the condominium by the developer to prospective~~
115 ~~unit owners prior to July 1, 1974, or as to condominium~~
116 ~~buildings on which construction has been commenced prior to July~~
117 ~~1, 1974.~~
118 Section 3. Subsection (9) is added to section 718.618,
119 Florida Statutes, to read:
120 718.618 Converter reserve accounts; warranties.--
121 (9) This section applies only to the conversion of
122 existing improvements where construction of the improvement was
123 commenced prior to its designation by the developer as a
124 condominium. In such circumstances, s. 718.203 does not apply.
125 Section 4. The amendments to s. 95.11(3)(c), Florida
126 Statutes, made by this act shall apply to any action commenced
127 on or after July 1, 2006, regardless of when the cause of action
128 accrued, except that any action that would not have been barred
129 under s. 95.11(3)(c), Florida Statutes, prior to the amendments
130 made by this act may be commenced before July 1, 2007, and if it
131 is not commenced by that date and is barred by the amendments to
132 s. 95.11(3)(c), Florida Statutes, made by this act, it shall be
133 barred.
134 Section 5. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1167 CS Sexual Predators
SPONSOR(S): Bean and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1834

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	7 Y, 0 N, w/CS	Cunningham	Kramer
2) Justice Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

Section 775.21, F.S., provides that a person convicted of certain enumerated sexual offenses must be designated a "sexual predator." Currently, there do not appear to be any statutory provisions prohibiting sexual predators from possessing a prescription drug that is designed to treat erectile dysfunction.

This bill prohibits a sexual predator from possessing a prescription drug for the purpose of treating erectile dysfunction. A sexual predator who violates this provision once commits a second degree misdemeanor. Subsequent violations are first degree misdemeanors.

This bill takes effect October 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard Individual Liberty → This bill prohibits a sexual predator from possessing a prescription drug for the purpose of treating erectile dysfunction.

B. EFFECT OF PROPOSED CHANGES:

Sexual Predators

Section 775.21, F.S., provides that a person convicted of an enumerated sexual offense must be designated a "sexual predator." Specifically, a person must be designated a sexual predator if he or she has been convicted of:

1. A capital, life, or first-degree felony violation, or any attempt thereof, of one of the following offenses:
    a. kidnapping or false imprisonment[1] where the victim is a minor and the defendant is not the victim's parent;
    b. sexual battery;[2]
    c. lewd or lascivious offenses;[3]
    d. selling or buying a minors for child pornography;[4] or
    e. a violation of a similar law of another jurisdiction.
2. Any felony violation of one of the following offenses where the offender has previously been convicted of or found to have committed, or has pled nolo contendere or guilty to, regardless of adjudication one of the following offenses:
    a. kidnapping, false imprisonment or luring or enticing a child[5] where the victim is a minor and the defendant is not the victim's parent,
    b. sexual battery;[6]
    c. procuring a person under the age of 18 for prostitution;[7]
    d. lewd or lascivious offenses;
    e. lewd or lascivious battery on an elderly person;[8]
    f. promoting sexual performance by a child;[9]
    g. selling or buying a minors for child pornography; or
    h. a violation of a similar law of another jurisdiction.[10]

In order to be counted as a prior felony, the felony must have resulted in a conviction sentenced separately or an adjudication of delinquency entered separately, prior to the current offense and sentenced or adjudicated separately from any other felony conviction that is to be counted as a prior felony.

If the sexual predator is in the custody or control of, or under the supervision of, the Department of Corrections (DOC), or is in the custody of a private correctional facility, the predator must register with

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[1] s. 787.01, F.S. or s. 787.02, F.S.,
[2] See chapter 794. F.S.
[3] s. 800.04, F.S.
[4] s. 847.0145, F.S.
[5] s. 787.025, F.S.
[6] Excluded are offenses contained in ss. 794.011(10) and 794.0235, F.S.
[7] s. 796.03, F.S.
[8] s. 825.1025(2)(b), F.S.
[9] s. 827.071, F.S.
[10] Additionally, a person must be designated as a sexual predator if he or she committed one of the offenses listed in a. through h. above and has previously been convicted of the offense of selling or showing obscenity to a minor or using a computer to solicit sexual conduct of or with a minor [ss. 847.0133 or 847.0135, F.S.]

the DOC and provide specified information. Private correctional facilities are also governed by these requirements.

If the sexual predator is not in the custody or control of, or under the supervision of, the DOC, or is not in the custody of a private correctional facility, and the predator establishes or maintains a residence in this state, the predator must initially register in person at an Florida Department of Law Enforcement (FDLE) office, or at the sheriff's office in the county of residence within 48 hours after establishing permanent or temporary residence.

Within 48 hours of initial registration, a sexual predator who is not incarcerated and who resides in the community, including a predator under DOC supervision, must register at a driver's license office of the Department of Highway Safety and Motor Vehicles (DHSMV) and present proof of registration, provide specified information, and secure a driver's license, if qualified, or an identification card. Each time a sexual predator's driver's license or identification card is subject to renewal, and within 48 hours after any change in the predator's residence or name, he or she must report in person to a driver's license facility of the DHSMV and is subject to specified registration requirements. This information is provided to FDLE which maintains the statewide registry of all sexual predators and sexual offenders (discussed further below). The department maintains a searchable web-site containing the names and addresses of all sexual predators and offenders as well as a toll-free telephone number.

A sexual predator's failure to comply with registration requirements is a third degree felony.[11] A sexual predator is required to maintain registration for the duration of his or her life, unless the sexual predator has received a full pardon or has had a conviction set aside in a postconviction proceeding.

Erectile Dysfunction

The term erectile dysfunction (ED) covers a range of disorders, but usually refers to the inability to obtain an adequate erection for satisfactory sexual activity.[12] Approximately 30 million men in the United States have erectile dysfunction.[13] According to the Department of Health (DOH), some ED drugs must be obtained by prescription while others (e.g. herbal remedies, etc...) may be obtained over-the-counter without a prescription.

Currently, there do not appear to be any statutory provisions prohibiting a specific group of persons (e.g. sexual predators) from possessing an ED drug (prescription or otherwise).[14]

Effect of the Bill

This bill would prohibit a sexual predator from possessing a prescription drug, as defined in s. 499.003(25), F.S.[15], for the purpose of treating ED. A sexual predator who violates this provision once commits a second degree misdemeanor[16]. Subsequent violations are first degree misdemeanors[17].

C. SECTION DIRECTORY:

Section 1. Creates s. 794.075, F.S.; prohibiting a sexual predator from possessing a prescription drug for the purpose of treating erectile dysfunction.

Section 2. This act takes effect October 1, 2006.

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[11] s. 775.21(10), F.S.

[12] http://www.mayoclinic.com/health/erectile-dysfunction/DS00162

[13] http://www.mmhc-online.com/articles/impotency.html

[14] There is a statute that limits *how many doses* of ED drugs Medicaid recipients may receive. *See* s. 409.912(39), F.S.

[15] "Prescription drug" is defined in s. 499.003(25), F.S., as any drug, including, but not limited to, finished dosage forms, or active ingredients subject to, defined by, or described by s. 503(b) of the Federal Food, Drug, and Cosmetic Act or s. 465.003(8), s. 499.007(12), or s. 499.0122(1)(b) or (c).

[16] A second degree misdemeanor is punishable by a term of imprisonment not exceeding 60 days and a $500 fine. ss. 775.082 and 775.083.

[17] A first degree misdemeanor is punishable by a term of imprisonment not exceeding 1 year and a $1,000 fine. ss. 775.082 and 775.083.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The ED drug market may lose revenue in that sexual predators will no longer be able to possess prescription drugs for the purpose of treating ED.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution, because it is a criminal law.

2. Other:

   See "Drafting Issues or Other Comments".

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

There are a number of prescription and over-the-counter drugs that may cause erectile dysfunction.[18] Many people take such drugs to treat other medical conditions they may have (e.g. diuretics and antihypertensives, antidepressants, anti-anxiety drugs and antiepileptic drugs, antihistamines, Parkinson's disease medications, prostate cancer medications, and chemotherapy medications). Sexual predators who take have a medical condition which requires them to take a drug that, as a side effect, causes them to experience ED may challenge this bill.

[18] http://www.webmd.com/content/article/57/66229.htm

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On February 15, 2006, the Criminal Justice Committee adopted a strike-all amendment to the bill and reported the bill favorably with committee substitute. The strike-all amendment:

- Removes the portion of the bill defining the term "drug";
- Removes the portion of the bill that would make it a crime for a person to distribute a drug treating erectile dysfunction to a sexual predator; and
- Re-words the portion of the bill relating to sexual predators possessing erectile dysfunction drugs.

CHAMBER ACTION

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1 The Criminal Justice Committee recommends the following:
2
3 **Council/Committee Substitute**
4 Remove the entire bill and insert:
5 A bill to be entitled
6 An act relating to sexual predators; creating s. 794.075,
7 F.S.; prohibiting a sexual predator from possessing
8 prescription erectile dysfunction drugs in certain
9 circumstances; providing criminal penalties; providing an
10 effective date.
11
12 Be It Enacted by the Legislature of the State of Florida:
13
14 Section 1. Section 794.075, Florida Statutes, is created
15 to read:
16 794.075 Sexual predators; erectile dysfunction drugs.--
17 (1) A person may not possess a prescription drug, as
18 defined in s. 499.003(25), for the purpose of treating erectile
19 dysfunction if the person is designated as a sexual predator
20 under s. 775.21.
21 (2) A person who violates a provision of this section for
22 the first time commits a misdemeanor of the second degree,
23 punishable as provided in s. 775.082 or s. 775.083. A person who

24 violates a provision of this section a second or subsequent time
25 commits a misdemeanor of the first degree, punishable as
26 provided in s. 775.082 or s. 775.083.
27 Section 2. This act shall take effect October 1, 2006.