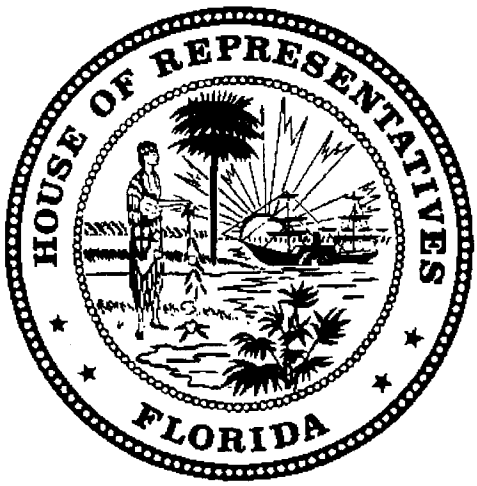

Civil Justice Committee Meeting

January 11, 2006
11:00 AM
24 House Office Building

Allan G. Bense
Speaker

Mark Mahon
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

Civil Justice Committee

Start Date and Time:	Wednesday, January 11, 2006 11:00 am
End Date and Time:	Wednesday, January 11, 2006 11:45 am
Location:	24 HOB
Duration:	0.75 hrs

Consideration of the following proposed committee bill(s):

PCB CJ 06-01 -- Mediation

Consideration of the following bill(s):

HB 65 Residential Foreclosure Proceedings by Porth
HB 73 Unlawful Taking of Personal Property or Equipment by Farkas
HB 201 Nonjudicial Sale of Vessels by Poppell
HB 425 Florida Trust Code by Mahon
HB 455 Change of a Name by Sands
HB 521 Probate by Hukill

NOTICE FINALIZED on 12/30/2005 15:01 by Hay.Tracey

PCB CJ 06-01

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB CJ 06-01 Mediation
SPONSOR(S): Civil Justice Committee
TIED BILLS: none **IDEN./SIM. BILLS:** none

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Civil Justice Committee		Blalock	Bond
1)			
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

In mediation, a trained intermediary assists parties to a dispute in reaching agreement. Courts often refer cases to mediation in order to assist the parties and to relieve docket congestion. In 2005, family court references in the statutes were changed to references to the unified family court model; however, mediation law was not correspondingly changed.

This PCB amends mediation law to conform to the unified family court model. This PCB also makes other technical and corrective changes to mediation law.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

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

B. EFFECT OF PROPOSED CHANGES:

Background

Mediation is a type of alternative dispute resolution used to resolve legal conflict between parties. Family law is one area where mediation has been widely used by the courts to assist parties in reaching agreement prior to trial. In mediation, parties involved in a dispute meet to work out their differences with the help of a mediator. The mediator assists and guides the parties toward their own solution by helping them to define the important issues and understand each other's interests. The mediator focuses each side on the crucial factors necessary for settlement and on the consequences of not settling. The mediator does not decide the outcome of the case and cannot compel the parties to settle.

In 2005, the Florida Legislature passed SB 348, which in part created s. 25.375, F.S. Section 25.375, F.S., authorizes the Supreme Court to adopt a unified family court model. The unified family court model utilizes a unified system of judicial case coordination in the state to identify cases relating to individuals and families. Individuals and families are assigned to a single circuit court judge that handles all of their cases dealing with family law matters. This model alleviates the problem of having different judges presiding over one family's various family law cases. The purpose is to reduce confusion and avoid conflicting court orders.

The act creating the unified family court system did not make corresponding changes to related statutes pertaining to mediation.

Effect of the PCB

This PCB redefines mediation in chapter 44, F.S., to provide for mediation in the unified family court. This PCB reflects the changes created by the passage in 2005 of s. 25.375, F.S., which created the unified family court system.

This PCB amends s. 44.1011, F.S., to create a definition for "unified family court mediation". "Unified family court mediation" means mediation of any of the following circuit court matters:

- Dissolution of marriage.
- Division and distribution of property arising out of a dissolution of marriage.
- Annulment.
- Support unconnected with dissolution of marriage.
- Paternity.
- Child support.
- The Uniform Reciprocal Enforcement of Support Act and the Uniform Interstate Family Support Act.
- Custodial care of and access to children.
- Adoption.
- Name changes.
- Declaratory judgment actions related to premarital, marital, or postmarital agreements.
- Civil domestic, repeat, sexual, or dating violence injunctions.
- Juvenile dependency.

- Termination of parental rights.
- Juvenile delinquency.
- Emancipation of a minor.
- Children in need of services.
- Families in need of services.
- Truancy.
- Modification and enforcement of orders entered in these cases.

This PCB also amends s. 44.1011, F.S., to remove the definitions for "family mediation" and "dependency or in need of service mediation".

This PCB creates s. 44.1015, F.S. The new section contains substantive law regarding the scope and content of mediation currently in s. 44.1011, F.S. (definitions applicable to ch. 44, F.S.).

This PCB amends s. 44.102, F.S., to provide that a court must refer to mediation matters that involve disputed custody, visitation, or other parental responsibility issues. However, a court must not refer to mediation, regardless of any other law, any case dealing with domestic violence, dating violence, or sexual violence injunctions, except pursuant to rules adopted by the Supreme Court of Florida. This PCB also provides that a court must not refer to mediation any case where the court finds that there has been a history of violence which would compromise the mediation process or endanger any person's safety.

This PCB provides that the Supreme Court is responsible for maintaining a list of certified mediators instead of the chief judge of each judicial circuit. This change reflects current practice.

This PCB amends s. 44.108, F.S., related to fees for mediation services. The PCB changes responsibility for payment from each "person" in a case to each "party".

Section 61.183(1), F.S., provides that a court may refer to mediation any proceeding in which the issues of parental responsibility, primary residence, visitation, or support of a child are contested. However, s. 44.102, F.S., provides that a court must refer to mediation disputed custody, visitation, or other parental responsibility issues. This PCB amends s. 61.183, F.S., to conform to s. 44.102, F.S., requiring that a court refer to mediation cases where the issue of parental responsibility, primary residence, visitation, or support of a child is contested.

C. SECTION DIRECTORY:

Section 1 amends s. 44.1011, F.S., to revise definitions applicable to mediation.

Section 2 creates s. 44.1015, F.S., to provide for conduct of mediation.

Section 3 amends s. 44.102, F.S., to provide when a court must refer cases to mediation and when the courts must not refer cases to mediation.

Section 4 amends s. 44.108, F.S., to provide fee provisions related to mediation.

Section 5 amends s. 61.183, F.S., to require mediation in certain family law cases and provide conformity with section 44.102(c), F.S.

Section 6 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:

The Dispute Resolution Center provided the following fiscal comment:

> "Under current law, the only mediation cases for which fees can be charged are county court cases above small claims and "family" cases as currently defined in 44.1011(c). Dependency cases (and other cases which would be under the umbrella of the unified family court) currently are exempt from mediation fees. Thus, the changes as proposed would continue existing law and is only necessitated because of redefining "family" and "dependency" mediation in terms of "unified family court" in section 44.1011."[1]

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This PCB 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

n/a

[1] Correspondence from Sharon Press, Director of the Florida Dispute Resolution Center, dated December 12, 2005.

1 A bill to be entitled
2 An act relating to mediation; amending s. 44.1011, F.S.;
3 creating definitions; deleting definitions; creating s.
4 44.1015, F.S.; providing standards for conduct of
5 mediations; amending s. 44.102, F.S.; requiring referral
6 of certain cases to mediation; prohibiting certain cases
7 from being referred to mediation; amending s. 44.108,
8 F.S.; providing that no mediation fee is required in
9 certain cases; amending s. 61.183, F.S.; requiring
10 mediation in certain family law cases; providing an
11 effective date.
12
13 Be It Enacted by the Legislature of the State of Florida:
14
15 Section 1. Subsection (2) of section 44.1011, Florida
16 Statutes, is amended to read:
17 44.1011 Definitions.--As used in this chapter:
18 (2) "Mediation" means a process whereby a neutral third
19 person called a mediator acts to encourage and facilitate the
20 resolution of a dispute between two or more parties. It is an
21 informal and nonadversarial process, in which decisionmaking
22 authority rests with the parties, with the objective of helping
23 the disputing parties reach a mutually acceptable and voluntary
24 agreement. ~~In mediation, decisionmaking authority rests with the~~
25 ~~parties. The role of the mediator includes, but is not limited~~
26 ~~to, assisting the parties in identifying issues, fostering joint~~
27 ~~problem solving, and exploring settlement alternatives.~~
28 "Mediation" includes:

29 (a) "Appellate court mediation," ~~which~~ means mediation that
30 occurs during the pendency of an appeal of a civil case.
31 (b) "Circuit court mediation," ~~which~~ means mediation of
32 civil cases, other than unified family court matters, in circuit
33 court. ~~If a party is represented by counsel, the counsel of~~
34 ~~record must appear unless stipulated to by the parties or~~
35 ~~otherwise ordered by the court.~~
36 (c) "Unified family court mediation," means mediation of any
37 of the following circuit matters, or any combination thereof:
38 1. Dissolution of marriage.
39 2. Division and distribution of property arising out of a
40 dissolution of marriage.
41 3. Annulment.
42 4. Support unconnected with dissolution of marriage.
43 5. Paternity.
44 6. Child support.
45 7. The Uniform Reciprocal Enforcement of Support Act and the
46 Uniform Interstate Family Support Act.
47 8. Custodial care of and access to children.
48 9. Adoption.
49 10. Name changes.
50 11. Declaratory judgment actions related to premarital,
51 marital, or postmarital agreements.
52 12. Civil domestic, repeat, sexual, or dating violence
53 injunctions.
54 13. Juvenile dependency.
55 14. Termination of parental rights.
56 15. Juvenile delinquency.
57 16. Emancipation of a minor.

58 17. Children in need of services.
59 18. Families in need of services.
60 19. Truancy.
61 20. Modification and enforcement of orders entered in these
62 cases.
63 (d) ~~(c)~~ "County court mediation," ~~which~~ means mediation of
64 civil cases within the jurisdiction of county courts, including
65 small claims. ~~Negotiations in county court mediation are~~
66 ~~primarily conducted by the parties. Counsel for each party may~~
67 ~~participate. However, presence of counsel is not required.~~
68 ~~(d) "Family mediation" which means mediation of family~~
69 ~~matters, including married and unmarried persons, before and~~
70 ~~after judgments involving dissolution of marriage; property~~
71 ~~division; shared or sole parental responsibility; or child~~
72 ~~support, custody, and visitation involving emotional or financial~~
73 ~~considerations not usually present in other circuit civil cases.~~
74 ~~Negotiations in family mediation are primarily conducted by the~~
75 ~~parties. Counsel for each party may attend the mediation~~
76 ~~conference and privately communicate with their clients. However,~~
77 ~~presence of counsel is not required, and, in the discretion of~~
78 ~~the mediator, and with the agreement of the parties, mediation~~
79 ~~may proceed in the absence of counsel unless otherwise ordered by~~
80 ~~the court.~~
81 ~~(e) "Dependency or in need of services mediation," which~~
82 ~~means mediation of dependency, child in need of services, or~~
83 ~~family in need of services matters. Negotiations in dependency or~~
84 ~~in need of services mediation are primarily conducted by the~~
85 ~~parties. Counsel for each party may attend the mediation~~
86 ~~conference and privately communicate with their clients. However,~~

87 ~~presence of counsel is not required and, in the discretion of the~~
88 ~~mediator and with the agreement of the parties, mediation may~~
89 ~~proceed in the absence of counsel unless otherwise ordered by the~~
90 ~~court.~~
91 Section 2. Section 44.1015, Florida Statutes, is created to
92 read:
93 44.1015 Conduct of Mediation.--The role of the mediator
94 includes, but is not limited to, assisting the parties in
95 identifying issues, fostering joint problem solving, and
96 exploring settlement alternatives.
97 (a) In circuit court mediation, if a party is represented
98 by counsel, the counsel of record must appear unless stipulated
99 to by the parties or otherwise ordered by the court.
100 (b) Negotiations in unified family court mediations are
101 primarily conducted by the parties. Counsel for each party may
102 attend the mediation conference and privately communicate with
103 their clients. However, in the discretion of the mediator, and
104 with the agreement of the parties, mediation may proceed in the
105 absence of counsel unless otherwise ordered by the court.
106 (c) Negotiations in county court mediation are primarily
107 conducted by the parties. Counsel for each party may
108 participate. However, presence of counsel is not required in
109 actions under the Florida Small Claims Rules.
110 Section 3. Subsections (2), (3) and (4) of section 44.102,
111 Florida Statutes, are amended to read:
112 44.102 Court-ordered mediation.--
113 (2) A court, under rules adopted by the Supreme Court:
114 (a) Shall ~~Must~~, upon request of one party, refer to
115 mediation any filed civil action for monetary damages, provided

116 the requesting party is willing and able to pay the costs of the
117 mediation or the costs can be equitably divided between the
118 parties, unless:
119 1. The action is a landlord and tenant dispute that does
120 not include a claim for personal injury.
121 2. The action is filed for the purpose of collecting a
122 debt.
123 3. The action is a claim of medical malpractice.
124 4. The action is governed by the Florida Small Claims
125 Rules.
126 5. The court determines that the action is proper for
127 referral to nonbinding arbitration under this chapter.
128 6. The parties have agreed to binding arbitration.
129 7. The parties have agreed to an expedited trial pursuant
130 to s. 45.075.
131 8. The parties have agreed to voluntary trial resolution
132 pursuant to s. 44.104.
133 (b) Shall, in circuits in which a mediation program has been
134 established, refer to mediation all or part of disputed custody,
135 visitation, or other parental responsibility issues.
136 (c) ~~(b)~~ May refer to mediation all or ~~any~~ part of any ~~a~~
137 filed case ~~civil action~~ for which mediation is not required under
138 this section.
139 (d) Shall not refer to mediation, regardless of any other
140 law requiring mediation:
141 1. Any case regarding issuance of domestic, repeat, dating,
142 or sexual violence injunctions, except to the extent authorized
143 by rules adopted by the Supreme Court of Florida; or

144 2. Any case in which the court finds, upon motion or request
145 of a party, there has been a history of violence, including, but
146 not limited to domestic violence, that would compromise the
147 mediation process or endanger any person's safety.
148 ~~(c) In circuits in which a family mediation program has~~
149 ~~been established and upon a court finding of a dispute, shall~~
150 ~~refer to mediation all or part of custody, visitation, or other~~
151 ~~parental responsibility issues as defined in s. 61.13. Upon~~
152 ~~motion or request of a party, a court shall not refer any case to~~
153 ~~mediation if it finds there has been a history of domestic~~
154 ~~violence that would compromise the mediation process.~~
155 ~~(d) In circuits in which a dependency or in need of~~
156 ~~services mediation program has been established, may refer to~~
157 ~~mediation all or any portion of a matter relating to dependency~~
158 ~~or to a child in need of services or a family in need of~~
159 ~~services.~~
160 (3) All written communications in a mediation proceeding,
161 other than an executed settlement agreement, shall be exempt from
162 the requirements of chapter 119.
163 (4) The ~~chief judge of each judicial circuit~~ Supreme Court
164 shall maintain a list of mediators who have been certified by the
165 Supreme Court and who have registered for appointment in that
166 circuit.
167 (a) Whenever possible, qualified individuals who have
168 volunteered their time to serve as mediators shall be appointed.
169 If a mediation program is funded pursuant to s. 44.108, volunteer
170 mediators shall be entitled to reimbursement pursuant to s.
171 112.061 for all actual expenses necessitated by service as a
172 mediator.

173 (b) Nonvolunteer mediators shall be compensated according
174 to rules adopted by the Supreme Court. If a mediation program is
175 funded pursuant to s. 44.108, a mediator may be compensated by
176 the state, the county, or ~~by~~ the parties.
177 Section 4. Subsection (2) of section 44.108, Florida
178 Statutes, is amended to read:
179 44.108 Funding of mediation and arbitration.--
180 (2) When court-ordered mediation services are provided by a
181 circuit court's mediation program, the following fees, unless
182 otherwise established in the General Appropriations Act, shall be
183 collected by the clerk of court:
184 (a) Eighty dollars per party ~~person~~ per scheduled session
185 in unified family court mediation when the parties' combined
186 income is greater than $50,000, but less than $100,000 per year;
187 (b) Forty dollars per party ~~person~~ per scheduled session in
188 unified family court mediation when the parties' combined income
189 is less than $50,000; or
190 (c) Forty dollars per party ~~person~~ per scheduled session in
191 county court cases.
192
193 No mediation fees shall be assessed under this subsection in
194 residential eviction cases, against a party found to be indigent,
195 or for any small claims action. No mediation fees shall be
196 assessed under this subsection in unified family court cases
197 which are limited to one or more of the following issues:
198 juvenile dependency, children in need of services, families in
199 need of services, juvenile delinquency, or issues arising out of
200 judicial findings in relation to injunctions for protection
201 against domestic violence. Fees collected by the clerk of court

202 pursuant to this section shall be remitted to the Department of
203 Revenue for deposit into the state courts' Mediation and
204 Arbitration Trust Fund to fund court-ordered mediation. The clerk
205 of court may deduct $1 per fee assessment for processing this
206 fee. The clerk of the court shall submit to the chief judge of
207 the circuit, no later than 30 days after the end of each quarter,
208 a report specifying the amount of funds collected under this
209 section during each quarter of the fiscal year.
210 Section 5. Subsection (1) of section 61.183, Florida
211 Statutes, is amended to read:
212 61.183 Mediation of certain contested issues.--
213 (1) In any proceeding in which the issues of parental
214 responsibility, primary residence, visitation, or support of a
215 child are contested, the court shall ~~may~~ refer the parties to
216 mediation in accordance with s. 44.102 ~~rules promulgated by the~~
217 ~~Supreme Court~~. In Title IV-D cases, any costs, including filing
218 fees, recording fees, mediation costs, service of process fees,
219 and other expenses incurred by the clerk of the circuit court,
220 shall be assessed only against the nonprevailing obligor after
221 the court makes a determination of the nonprevailing obligor's
222 ability to pay such costs and fees.
223 Section 6. This act shall take effect July 1, 2006.

HB 65

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 65 Residential Foreclosure Proceedings
SPONSOR(S): Porth
TIED BILLS: None **IDEN./SIM. BILLS:** SB 166

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Bond	Bond
2) Economic Development, Trade & Banking Committee			
3) Justice Appropriations Committee			
4) Justice Council			
5)			

SUMMARY ANALYSIS

Foreclosure is the legal process for enforcing a lien or mortgage encumbering real property. The foreclosure process results in forced sale of the property. In some foreclosure cases, the sale price exceeds the amount owed to pay off the lien or mortgage, and therefore the property owner is entitled to proceeds from the sale.

This bill requires a lender who files a foreclosure case against a borrower to notify the borrower that the clerk of the court may have funds due to the borrower following the foreclosure sale. The bill also requires detailed disclosures in any legal transfer of the right to collect funds that may be owed to the borrower after the foreclosure sale. This bill also provides that it is deceptive and unfair trade practice to victimize a person whose home is in foreclosure, creating a civil cause of action for such persons.

This bill significantly increases the procedural requirements in foreclosure actions, and may have an adverse title insurance consequence that could complicate real estate transactions in general. See "Drafting Issues or Other Comments" herein.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government -- This bill complicates foreclosure actions, and creates a new cause of action.

Ensure Lower Taxes -- This bill creates a fee.

Promote Personal Responsibility -- This bill increases personal responsibility for injurious behavior by creating a cause of action for deceptive and unfair trade practices.

B. EFFECT OF PROPOSED CHANGES:

Background

Foreclosure is the legal process for enforcement of a security interest in real property. Subject to the owner's right to redemption[1], property subject to foreclosure is sold and the proceeds of the sale are applied against the debt. In most foreclosures, the debt exceeds the net proceeds of the sale.[2] However, due to recent economic forces that have led to substantial inflation in real property values, a growing number of properties are being sold at foreclosure for more than the debt owed on the property. The proceeds of a sale in excess of the debt owed is referred to as the surplus from the sale. In general, the property owner is entitled to the surplus.

A property owner facing foreclosure can seek help from numerous sources. The property owner can negotiate with the foreclosing lender. A different lender may be willing to refinance the property, or offer a second mortgage. The property owner can seek bankruptcy protection. The property owner can sell the property prior to the foreclosure sale. The property owner can borrow from friends and family. Most foreclosure cases are resolved by agreement or redemption of the property.

It has been reported that, with the growing number of foreclosures that may result in a surplus, there is a growing number of entrepreneurs who are offering services to property owners subject to foreclosure. Some of these entrepreneurs are receiving significant profits while the property owners they contract with receive little of their equity in the property. Some of the common means are:

- A lawyer, or a person claiming to be a lawyer, will offer to file the legal papers required to obtain the court order required for the clerk to distribute the surplus to the now (or soon to be) former property owner. The fee arrangement may be a contingency fee. The property owner does not realize that the paperwork is basic enough that most lay persons could easily complete it.[3]

- The entrepreneur offers the property owner a small sum of cash in exchange for an assignment of the surplus.

---

[1] Redemption is the right of any property owner to pay the debt at any time prior to the sale, and thereby stop the sale and keep the property. See generally, s. 45.0315, F.S.

[2] Where the debt exceeds the sale proceeds, the lender can usually sue for the difference, known as a deficiency. See generally s. 702.06, F.S.

[3] In a related scheme, the Florida Bar has suspended the license of an attorney who was allegedly filing the paperwork necessary to obtain the surplus funds, but without receiving the owner's authority. The lawyer would deduct a 40% fee from the proceeds, and prepare a check payable to the former owner for the remainder. In some cases, the partners would intercept and cash the owner's check. Daily Business Review, *South Florida lawyer accused in mortgage scam is suspended*, Vol. 46, No. 45 (Feb. 11, 2005).

- The entrepreneur offers the property owner a small sum of cash for a quitclaim deed to the property, thereby obtaining the legal right to the surplus.

The procedure for judicial foreclosure sales is set forth in s. 45.031, F.S. The section does not specify how the clerk is to handle a surplus, thus requiring a court order for distribution of the surplus. The section also does not restrict any sale or transfer of the real property, or the right to the surplus, prior to foreclosure.

Effect of Bill

Notification

This bill requires that a homeowner involved in a residential foreclosure proceeding be notified:

- in a newspaper, either by an advertisement, publication, or notice,
- in the summons and complaint to the homeowner, and
- in the copy of the order to show cause why the home should not be foreclosed on,

that the clerk of the court may have funds due to the homeowner following the foreclosure sale and how the homeowner may learn of the procedure to collect such funds, if any.

The bill provides a standard notice form that must be served on the homeowner and provides that the return of service must indicate whether the notice was included. The standard notice form also informs the homeowner that he or she may want to contact their local Legal Aid office for assistance. If the notice is not included, a court or clerk may not enter a default against the homeowner. A clerk of court may collect a $25 fee for each attempt of service on a homeowner from the registry of the court following the foreclosure sale, which funds are to be used to educate the public about the rights of homeowners in foreclosure proceedings.

Transfer of Interest

The bill also provides procedures that must be followed if a person wishes to transfer a homeowner's interest in any funds remaining from a foreclosure sale. Any document, other than a deed in lieu of foreclosure, that transfers an interest must disclose:

- the assessed value of the property;
- that the assessed value may be lower than the actual value of the property;
- the approximate amount of any debt encumbering the property;
- the approximate amount of any equity in the property; and
- any and all forms of consideration paid for the rights to the property or the assignment of the rights to any surplus funds.

The bill provides a procedure for a seller to void a transfer that does not meet the above requirements.

Disbursement of Surplus Funds

The bill defines surplus funds and provides a procedure for the disbursement of any surplus funds. The bill provides that any person claiming a right to disbursement of proceeds from a judicial sale, other than the original mortgagor, must produce a deed or assignment that discloses the following:

- the assessed value of the property;
- that the assessed value may be lower than the actual value of the property;
- the approximate amount of any debt encumbering the property;
- the approximate amount of any equity in the property;

- a statement that the assignor does not need an attorney or other representative to recover the surplus funds;
- any and all forms of consideration paid for the rights to the property or the assignment of the rights to any surplus funds.

The bill also provides how a person my set aside a deed or assignment that does not meet the above requirements, and that the person may be entitled to fees and costs in an action to set aside a nonconforming deed or assignment if he or she is the prevailing party.

Victimization of a Homeowner

The bill provides a civil penalty of up to $15,000 for victimizing a homeowner during a residential foreclosure proceeding. Further, the bill provides that a person may not contact the homeowner to offer to help the homeowner collect any surplus funds, to help with a foreclosure by buying the house, lend the homeowner money, or take an assignment until after 30 days after the homeowner receives the notice of foreclosure. A person may be subject to the civil penalty provided for in the bill for violating the no-contact provision. The bill also provides that it is not a violation if the dwelling subject to the foreclosure is encumbered with a substitute or additional lien.

C. SECTION DIRECTORY:

Section 1. Creates s. 45.0311, F.S., to define "surplus funds," and to provide a procedure for the transfer of an interest in the proceeds of a judicial sale. This section also provides a procedure for the rescinding of an assignment of an interest, and also provides that the court shall determine any attorney's fees for a motion to disburse surplus funds. This section also provides that in any proceeding to set aside an assignment of an interest in the proceeds of a judicial sale, if the homeowner is the prevailing party, then the homeowner is entitled to collect all fees and costs in such a proceeding. A court will determine reasonable attorney fees in such a proceeding.

Section 2. Creates s. 48.184, F.S., to provide an additional notice to be included with a residential foreclosure summons and complaint to a homeowner which informs the homeowner that surplus funds may be due to the homeowner following the foreclosure and to contact the clerk of court about any surplus funds following the foreclosure sale. The notice also informs the homeowner that the homeowner does not need an attorney to collect any surplus funds, and that companies or attorneys may not contact the homeowner until after 30 days after the homeowner receives this notice. This notice also informs the homeowner that he or she may contact their local Legal Aid office for assistance.

Section 3. Amends s. 48.21, F.S., to provide that any return of service for a foreclosure of an interest in a mortgager's primary dwelling must include a confirmation that the notice described in section 3 of the bill was included in the service. This section allows a clerk to collect a fee of $25 for each attempt of service from the court's registry following a foreclosure sale but after any valid liens have been paid. Any funds collected must be used to educate the public about the rights of homeowners in foreclosure proceedings.

Section 4. Amends s. 49.08, F.S., to provide that the notice of action issued by a clerk or judge in a residential foreclosure proceeding must include a statement that the homeowner may be due surplus funds following the foreclosure sale, who to contact about any surplus funds, and that an attorney is not needed to collect any surplus funds.

Section 5. Creates s. 501.2078, F.S., to provide a civil penalty of not more than $15,000 to victimize or attempt to victimize a homeowner during a residential foreclosure proceeding. This section also prohibits a person from contacting a homeowner in a residential foreclosure proceeding until after 30 days after the homeowner receives notice. Any violation of this prohibition is subject to the civil penalty. This section also provides priority to any order of restitution or reimbursement to a homeowner over a civil penalty for a violation of this section. This section also provides that any civil penalty collected must be deposited into the Legal Affairs Revolving Trust Fund to be used for consumer education of

homeowners regarding residential foreclosure proceedings. The bill also provides that it is not a violation if the dwelling subject to the foreclosure is encumbered with a substitute or additional lien.

Section 6. Creates s. 689.251, F.S., to establish the requirements of any document, other than a deed in lieu of foreclosure, used to transfer an interest in the proceeds of a judicial sale of a mortgagor's primary dwelling. This section also provides that if the document does not meet the requirements established in this section, that the seller may void the transaction.

Section 7. Amends s. 702.035, F.S., to provide that any advertisement, publication, or notice in a newspaper relating to a foreclosure proceeding must state the procedure for collecting surplus funds, if any, or list a telephone number or website at which the procedure will be explained.

Section 8. Amends s. 702.065, F.S., to provide that a court or clerk may not enter a default or default judgment against a mortgagor if the return of service does not indicate that the required notice was served on the mortgagor.

Section 9. Amends s. 702.10, F.S., to provide that the copy of the notice to show cause provided by a mortgagee to a mortgagor must include the notice that the mortgagor may be due surplus funds following the foreclosure sale.

Section 10. Provides that the bill takes effect July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill allows the clerk of court to collect a $25 fee in any foreclosure case in which there are surplus funds. It is unknown how many foreclosure cases have surplus funds.

2. Expenditures:

   This bill requires clerks of court to create an education program regarding foreclosures. The cost of such program is unknown.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill will require additional court costs payable by lenders. This bill will require additional work by attorneys representing lenders, the cost of which will be charged to lenders.

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:

   The United State Supreme Court has addressed the issue of placing restrictions on commercial speech raised by this bill. The bill prohibits a person from contacting a homeowner until after 30 days have passed since the homeowner has received a notice of foreclosure. In *Florida Bar v. WENT FOR IT, INC.*, 515 U.S. 618 (1995), the U.S. Supreme Court reviewed whether the Florida Bar, under the First and Fourteenth Amendments of the Constitution, could restrict an attorney from contacting a potential personal injury client within 30 days of an accident.[4] The Court used the *Central Hudson* test for commercial speech which requires that: (1) the government assert a substantial interest in support of its regulation; (2) the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and (3) the regulation must be narrowly drawn.[5] The court found that: (1) the Florida Bar had a substantial interest in the restriction on direct mail solicitation in order to help bolster the reputation of Florida lawyers; (2) the restriction directly and materially advanced that interest because it prevented direct mail solicitation which, according to a Bar study, was found by the public to be intrusive on victim's and their families; and (3) the Bar's rule was reasonably well-tailored to meet its objective. The court did note that untargeted solicitation was different because the "untargeted letter involves no willful or knowing affront to or invasion of the tranquility or bereaved or injured individuals and simply does not cause the same kind of reputational harm to the profession."[6] It could be argued that the restriction in this bill is similarly designed to prevent intrusion by an attorney into a difficult time for a homeowner.

   However, the bill uses the term "person" and does not limit the restriction to attorneys. Arguably, persons other than attorneys who seek to assist homeowners during a foreclosure do not face the same perceived reputational difficulties as attorneys. In considering a claim by a person that the bill's provisions are an unconstitutional restriction on commercial speech, a court would consider whether: (1) the government asserted a substantial interest in support of its regulation; (2) the government demonstrated that the restriction on commercial speech directly and materially advanced that interest; and (3) the regulation was narrowly drawn.

B. RULE-MAKING AUTHORITY:

   None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

   This bill places significant burdens upon all foreclosure cases. A lender that fails to properly give the required notification in the proper form and at the proper time could be significantly delayed in the foreclosure action.

   This bill requires that a deed for a property whose mortgage is in default must contain significant disclosures. This requirement may cause significant problems with title insurance. The condition that requires the disclosure, a default in the mortgage, is not apparent in the public records, and thus may not be easily discoverable. The condition is also common, as a mortgage can be in default not only if a payment is one day or one penny short, but may also be in default if any one of the numerous conditions of the note or mortgage is not being adhered to at the time of the sale. Significantly, if the disclosures are not made, the deed is void. The effect of a void deed is that it can be challenged at any time in the future, up through the running of the statute of limitations years later. The net effect is that lawyers and title insurance companies conducting real estate closings would, in order to protect

---

[4] *Florida Bar v. WENT FOR IT, INC.*, 515 U.S. 618, 620 (1995).
[5] *Id.* at 624.
[6] *Id.* at 630.

themselves, impose the significant disclosure requirements in every future real estate closing in the state.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

n/a

1 A bill to be entitled
2 An act relating to residential foreclosure proceedings;
3 creating s. 45.0311, F.S.; providing a definition;
4 providing requirements and procedures for disbursement of
5 surplus funds from a judicial sale; authorizing a court to
6 determine reasonable attorney's fees for motions to
7 disburse surplus funds; providing a right of certain
8 parties to petition a court to set aside certain deeds or
9 assignments under certain circumstances; entitling certain
10 parties to recover all fees and costs incurred in certain
11 surplus funds proceedings; providing for the court to
12 determine reasonable attorney's fees in such proceedings;
13 creating s. 48.184, F.S.; specifying a required notice
14 form to be served with a summons and complaint in actions
15 to foreclose an interest in a mortgagor's primary
16 dwelling; requiring the notice to be included in the
17 service of process; requiring certain verification of
18 service; amending s. 48.21, F.S.; specifying an additional
19 notice requirement for return of service of process forms
20 made for foreclosures of a mortgagor's primary dwelling;
21 authorizing a clerk of court to collect a fee for attempts
22 of service of process; requiring the clerk of court to use
23 fee proceeds for certain public education purposes;
24 amending s. 49.08, F.S.; requiring certain notices of
25 action to contain an additional notice of potential
26 surplus and application procedures information; creating
27 s. 501.2078, F.S.; providing definitions; providing a
28 civil penalty for knowingly using unfair or deceptive

29 homeowner victimization methods, acts, or practices in
30 residential foreclosure proceedings; specifying a time
31 period during which a person may not contact a homeowner
32 for certain purposes; specifying higher priority of an
33 order of restitution or reimbursement over imposition of a
34 civil penalty; providing for deposit of civil penalties
35 into the Legal Affairs Revolving Trust Fund of the
36 Department of Legal Affairs; allocating such funds for
37 certain purposes; creating s. 689.251, F.S.; requiring
38 documents transferring a mortgagor's primary dwelling to
39 disclose certain information; authorizing a seller to void
40 a transaction under certain circumstances; requiring the
41 seller to repay certain amounts to a purchaser, minus
42 certain amounts, under such circumstances; amending s.
43 702.035, F.S.; providing that certain advertisements,
44 publications, or notices relating to foreclosure
45 proceedings must include the procedure for collecting
46 surplus funds or list a telephone number or website at
47 which the procedure will be explained; amending s.
48 702.065, F.S.; prohibiting a court or clerk of court from
49 entering a default or default judgment against a mortgagor
50 in a proceeding to foreclose a mortgagor's primary
51 dwelling if a return of service does not contain a
52 required notice; amending s. 702.10, F.S.; including a
53 reference to a required notice for proceedings to
54 foreclose a mortgagor's primary dwelling in certain orders
55 to show cause in final judgment of foreclosure entries;
56 providing an effective date.

57

58 Be It Enacted by the Legislature of the State of Florida:

59

60 Section 1. Section 45.0311, Florida Statutes, is created
61 to read:
62 45.0311 Disbursement of surplus funds.--
63 (1) As used in this subsection, the term "surplus funds"
64 means all funds existing after all valid liens have been paid.
65 Any person claiming a right to disbursement of proceeds from a
66 judicial sale, other than the original mortgagor, shall produce
67 a deed satisfying the requirements of s. 689.251, if applicable,
68 or an assignment of the proceeds from the original mortgagor, or
69 homeowner if not the original mortgagor, executed with the
70 formality of a deed and acknowledged and conspicuously including
71 the assessed value of the property, a disclosure that the
72 assessed value may be lower than the actual value of the
73 property, the approximate amount of any debt encumbering the
74 property, the approximate amount of any equity in the property,
75 and a statement that the assignor does not need an attorney or
76 other representative to recover the surplus funds. The deed or
77 assignment shall conspicuously set forth all forms of
78 consideration paid for the rights to the property or the
79 assignment of the rights to any surplus funds.
80 (2) The court shall determine reasonable attorney's fees
81 charged for a motion to disburse surplus funds.
82 (3) A party who has executed an assignment or deed that
83 does not conform to the requirements of this section or s.
84 689.251 has the right to petition the court presiding over the

85 foreclosure proceeding to set aside the nonconforming deed or
86 assignment. In any such proceeding in which the mortgagor, or
87 original homeowner if not the same as the mortgagor, is the
88 prevailing party, he or she is entitled to recover all fees and
89 costs incurred in connection with such proceeding. The court
90 shall determine reasonable attorney's fees in such proceedings.
91 Section 2. Section 48.184, Florida Statutes, is created to
92 read:
93 48.184 Notice form for actions to foreclose an interest in
94 a mortgagor's primary dwelling.--In any action to foreclose an
95 interest in a mortgagor's primary dwelling, a notice, in
96 substantially the following form and printed on orange paper,
97 shall be served with the summons and complaint and shall be
98 included in the service of process. The return of service shall
99 verify that such notice was served with the summons and the
100 complaint:
101
102 (Caption of Action)
103 ATTENTION
104 TO ALL NAMED PARTIES LISTED
105 IN THIS FORECLOSURE LAWSUIT:
106
107 A FORECLOSURE ACTION HAS BEEN FILED AGAINST YOU FOR FAILURE TO
108 MAKE TIMELY MORTGAGE PAYMENTS ON YOUR RESIDENCE. IF A JUDGMENT
109 OF FORECLOSURE IS ENTERED AND YOUR PROPERTY IS SOLD AT PUBLIC
110 AUCTION, THERE MAY BE ADDITIONAL MONEY FROM THE SALE THAT
111 BELONGS TO YOU AFTER PAYMENT OF LIENHOLDERS.
112

113 YOU MAY CLAIM THESE FUNDS YOURSELF. YOU ARE NOT REQUIRED TO HAVE
114 A LAWYER OR ANY OTHER REPRESENTATION AND YOU DO NOT HAVE TO
115 ASSIGN YOUR RIGHTS TO ANYONE ELSE IN ORDER FOR YOU TO CLAIM ANY
116 MONEY TO WHICH YOU ARE ENTITLED.
117
118 PLEASE CHECK WITH THE CLERK OF THE COURT, [INSERT INFORMATION
119 FOR APPLICABLE COURT] WITHIN TEN (10) DAYS AFTER THE SALE TO SEE
120 IF THERE IS ADDITIONAL MONEY FROM THE FORECLOSURE SALE THAT THE
121 CLERK HAS IN THE REGISTRY OF THE COURT.
122
123 IF THERE IS ADDITIONAL MONEY, YOU MAY ASK THE COURT TO INSTRUCT
124 THE CLERK TO GIVE YOU THE MONEY THAT BELONGS TO YOU.
125
126 IT IS POSSIBLE THAT YOU WILL BE CONTACTED BY COMPANIES OR
127 LAWYERS OFFERING TO HELP YOU COLLECT THIS MONEY OR OFFERING TO
128 HELP YOU WITH THE FORECLOSURE BY BUYING YOUR HOUSE, LENDING YOU
129 MONEY, OR TAKING AN ASSIGNMENT. THESE COMPANIES OR LAWYERS MAY
130 NOT CONTACT YOU UNTIL AFTER 30 DAYS AFTER YOU RECEIVED THIS
131 NOTICE. IF YOU WANT TO CHECK WHETHER THE PERSON OR COMPANY
132 CALLING YOU HAS A COMPLAINT HISTORY WITH THE STATE, YOU MAY CALL
133 [INSERT CONTACT INFORMATION, INCLUDING ANY HOT OR WEBSITE].
134 [PLEASE CALL THE ATTORNEY GENERAL'S HOTLINE AT 1-866-9-NO-SCAM
135 (966-7226) OR GO TO WWW.MYFLORIDALEGAL.COM.]
136
137 IF YOU DECIDE TO SELL YOUR HOME OR HIRE SOMEONE TO HELP YOU
138 CLAIM THE ADDITIONAL MONEY, YOU SHOULD READ VERY CAREFULLY ALL
139 PAPERS YOU ARE REQUIRED TO SIGN, ASK SOMEONE ELSE, PREFERABLY AN
140 ATTORNEY WHO IS NOT RELATED TO THE PERSON OFFERING TO HELP YOU,

141 TO MAKE SURE THAT YOU UNDERSTAND WHAT YOU ARE SIGNING AND THAT
142 YOU ARE NOT TRANSFERRING YOUR PROPERTY OR THE EQUITY IN YOUR
143 PROPERTY WITHOUT THE PROPER INFORMATION. IF YOU CANNOT AFFORD TO
144 PAY AN ATTORNEY, YOU MAY CONTACT (INSERT LOCAL OR NEAREST LEGAL
145 AID OFFICE AND TELEPHONE PHONE NUMBER) TO SEE IF YOU QUALIFY
146 FINANCIALLY FOR THEIR SERVICES. IF THEY CANNOT ASSIST YOU, THEY
147 MAY BE ABLE TO REFER YOU TO A LOCAL BAR REFERRAL AGENCY OR
148 SUGGEST OTHER OPTIONS. THEIR MAILING ADDRESS IS: (INSERT
149 ADDRESS). IF YOU CHOOSE TO CONTACT (NAME OF LOCAL OR NEAREST
150 LEGAL AID OFFICE) FOR ASSISTANCE, YOU SHOULD DO SO AS SOON AS
151 POSSIBLE AFTER RECEIPT OF THIS NOTICE.
152 Section 3. Section 48.21, Florida Statutes, is amended to
153 read:
154 48.21 Return of execution of process.--Each person who
155 effects service of process shall note on a return-of-service
156 form attached thereto, the date and time when it comes to hand,
157 the date and time when it is served, the manner of service, the
158 name of the person on whom it was served and, if the person is
159 served in a representative capacity, the position occupied by
160 the person. A failure to state the foregoing facts invalidates
161 the service, but the return is amendable to state the truth at
162 any time on application to the court from which the process
163 issued. On amendment, service is as effective as if the return
164 had originally stated the omitted facts. A failure to state all
165 the facts in the return shall subject the person effecting
166 service to a fine not exceeding $10, in the court's discretion.
167 When service of process is made for foreclosure of an interest
168 in a mortgagor's primary dwelling, the return of service form

169 shall include a confirmation that the notice required by s.
170 48.184 is included in the service of process. The clerk of court
171 may collect a fee of $25 from any surplus funds remaining in the
172 court registry following a foreclosure sale for each attempt of
173 service upon the mortgagor. The fee may be collected after all
174 valid liens have been paid but before any surplus funds have
175 been distributed to a mortgagor. The clerk shall use the
176 proceeds of such fee solely for purposes of educating the public
177 as to the rights of homeowners regarding foreclosure
178 proceedings.
179 Section 4. Subsection (5) is added to section 49.08,
180 Florida Statutes, to read:
181 49.08 Notice of action, form.--On filing the sworn
182 statement, and otherwise complying with the foregoing
183 requirements, the plaintiff is entitled to have issued by the
184 clerk or judge, not later than 60 days after filing the sworn
185 statement, a notice of action which notice shall set forth:
186 (5) Notice of a potential surplus and information advising
187 the defendant of the procedures to apply for the surplus, in
188 substantially the following form:
189
190 If you are the owner of real estate that is being
191 foreclosed, there may be money owed to you after the
192 sale. You may contact [insert contact information for
193 clerk's office until hotline and website are set up]
194 for information on what you need to do to get the
195 funds. You do not need to hire an attorney or other
196 representative to get this money.

197
198 Section 5. Section 501.2078, Florida Statutes, is created
199 to read:
200 501.2078 Violations involving individual homeowners during
201 the course of residential foreclosure proceedings; civil
202 penalties.--
203 (1) As used in this section:
204 (a) "Residential foreclosure proceeding" means any action
205 in a circuit court of this state in which a party seeks to
206 foreclose on a mortgage encumbering the mortgagor's primary
207 dwelling.
208 (b) "Homeowner" means any individual who is the owner of
209 the property subject to a residential foreclosure proceeding.
210 (2)(a) Any person who willfully uses, or has willfully
211 used, a method, act, or practice in violation of this part,
212 which method, act, or practice victimizes or attempts to
213 victimize homeowners during the course of a residential
214 foreclosure proceeding, and in committing such violation knew or
215 should have known that such conduct was unfair or deceptive, is
216 liable for a civil penalty of not more than $15,000 for each
217 such violation. The act of encumbering the dwelling subject to a
218 residential foreclosure proceeding with a substitute or
219 additional lien shall not constitute a violation of this
220 section.
221 (b) Any person desiring to contact a homeowner to offer to
222 help the homeowner collect any surplus money or to help with a
223 foreclosure by buying the homeowner's house, lend the homeowner
224 money, or take an assignment may not contact the homeowner until

225 after 30 days after the homeowner receives the notice provided
226 in s. 48.184. Any such contact before such 30-day period has
227 elapsed constitutes a violation of this part, subject to the
228 penalty provided in paragraph (a).
229 (3) Any order of restitution or reimbursement based on a
230 violation of this part committed against a homeowner in a
231 residential foreclosure proceeding has priority over the
232 imposition of any civil penalty for such violation pursuant to
233 this section.
234 (4) Civil penalties collected pursuant to this section
235 shall be deposited into the Legal Affairs Revolving Trust Fund
236 of the Department of Legal Affairs and allocated solely to the
237 Department of Legal Affairs for the purpose of preparing and
238 distributing consumer education materials, programs, and
239 seminars to benefit homeowners in residential foreclosure
240 proceedings or to further enforcement efforts.
241 Section 6. Section 689.251, Florida Statutes, is created
242 to read:
243 689.251 Transfer of mortgagor's primary dwelling subject
244 to default.--
245 (1) Any document other than a deed in lieu of foreclosure
246 prepared by or on behalf of a purchaser of legal or equitable
247 title to a mortgagor's primary dwelling when the mortgagor is in
248 default of his or her obligations must disclose, in the
249 instrument itself or in a separate writing executed by the
250 seller and the purchaser with the formality of a deed and
251 acknowledged by a notary public or civil notary of this state,
252 the assessed value of the property, that the assessed value may

253 be lower than the actual value of the property, the approximate
254 amount of any debt encumbering the property, and the approximate
255 amount of any equity in the property. The deed or assignment
256 shall conspicuously set forth any and all forms of consideration
257 paid for the rights to the property or the assignment of the
258 rights to any surplus funds.
259 (2) If such document fails to comply with the requirements
260 of subsection (1), the seller may void the transaction. If the
261 seller voids the transaction, the seller shall repay any
262 consideration paid by the purchaser to the seller, less,
263 however, all costs incurred by the seller as a result of the
264 purchaser's failure to comply with subsection (1), including
265 attorney's fees and costs.
266 Section 7. Section 702.035, Florida Statutes, is amended
267 to read:
268 702.035 Legal notice concerning foreclosure proceedings;
269 procedure for collection of surplus funds.--Whenever a legal
270 advertisement, publication, or notice relating to a foreclosure
271 proceeding is required to be placed in a newspaper, it is the
272 responsibility of the petitioner or petitioner's attorney to
273 place such advertisement, publication, or notice. The
274 advertisement, publication, or notice shall be placed directly
275 by the attorney for the petitioner, by the petitioner if acting
276 pro se, or by the clerk of the court. The advertisement,
277 publication, or notice must state the procedure for collecting
278 surplus funds, if any, or list a telephone number or website at
279 which the procedure will be explained.
280 Section 8. Subsection (3) is added to section 702.065,

281 Florida Statutes, to read:
282 702.065 Final judgment in uncontested proceedings where
283 deficiency judgment waived; attorney's fees when default
284 judgment entered.--
285 (3) In a proceeding to foreclose a mortgage encumbering a
286 mortgagor's primary dwelling, a court or a clerk of the court
287 may not enter a default or default judgment against the
288 mortgagor if the return of service does not include evidence
289 that the notice required by s. 48.184 was served on the
290 mortgagor.
291 Section 9. Paragraph (a) of subsection (1) of section
292 702.10, Florida Statutes, is amended to read:
293 702.10 Order to show cause; entry of final judgment of
294 foreclosure; payment during foreclosure.--
295 (1) After a complaint in a foreclosure proceeding has been
296 filed, the mortgagee may request an order to show cause for the
297 entry of final judgment and the court shall immediately review
298 the complaint. If, upon examination of the complaint, the court
299 finds that the complaint is verified and alleges a cause of
300 action to foreclose on real property, the court shall promptly
301 issue an order directed to the defendant to show cause why a
302 final judgment of foreclosure should not be entered.
303 (a) The order shall:
304 1. Set the date and time for hearing on the order to show
305 cause. However, the date for the hearing may not be set sooner
306 than 20 days after the service of the order. When service is
307 obtained by publication, the date for the hearing may not be set
308 sooner than 30 days after the first publication. The hearing

309 must be held within 60 days after the date of service. Failure
310 to hold the hearing within such time does not affect the
311 validity of the order to show cause or the jurisdiction of the
312 court to issue subsequent orders.
313 2. Direct the time within which service of the order to
314 show cause and the complaint must be made upon the defendant.
315 3. State that the filing of defenses by a motion or by a
316 verified or sworn answer at or before the hearing to show cause
317 constitutes cause for the court not to enter the attached final
318 judgment.
319 4. State that the defendant has the right to file
320 affidavits or other papers at the time of the hearing and may
321 appear personally or by way of an attorney at the hearing.
322 5. State that, if the defendant files defenses by a
323 motion, the hearing time may be used to hear the defendant's
324 motion.
325 6. State that, if the defendant fails to appear at the
326 hearing to show cause or fails to file defenses by a motion or
327 by a verified or sworn answer or files an answer not contesting
328 the foreclosure, the defendant may be considered to have waived
329 the right to a hearing and in such case the court may enter a
330 final judgment of foreclosure ordering the clerk of the court to
331 conduct a foreclosure sale.
332 7. State that if the mortgage provides for reasonable
333 attorney's fees and the requested attorney's fees do not exceed
334 3 percent of the principal amount owed at the time of filing the
335 complaint, it is unnecessary for the court to hold a hearing or
336 adjudge the requested attorney's fees to be reasonable.

337 8. Attach the final judgment of foreclosure the court will
338 enter, if the defendant waives the right to be heard at the
339 hearing on the order to show cause.
340 9. Require the mortgagee to serve a copy of the order to
341 show cause on the mortgagor in the following manner:
342 a. If the mortgagor has been served with the complaint and
343 original process, service of the order may be made in the manner
344 provided in the Florida Rules of Civil Procedure.
345 b. If the mortgagor has not been served with the complaint
346 and original process, the order to show cause, together with the
347 summons and a copy of the complaint and, in the case of a
348 proceeding to foreclose a mortgagor's primary dwelling, the
349 notice required by s. 48.184, shall be served on the mortgagor
350 in the same manner as provided by law for original process.
351
352 Any final judgment of foreclosure entered under this subsection
353 is for in rem relief only. Nothing in this subsection shall
354 preclude the entry of a deficiency judgment where otherwise
355 allowed by law.
356 Section 10. This act shall take effect July 1, 2006.

Bill No. **HB 0065**

1

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

---

1 Council/Committee hearing bill: Civil Justice Committee
2 Representative(s) Porth offered the following:
3
4 **Amendment (with title amendment)**
5 Remove everything after the enacting clause and insert:
6 Section 1. Subsection (7) of section 45.031, Florida
7 Statutes, is amended to read:
8 45.031 Judicial sales procedure.--In any sale of real or
9 personal property under an order or judgment, the following
10 procedure may be followed as an alternative to any other sale
11 procedure if so ordered by the court:
12 (7) DISBURSEMENTS OF PROCEEDS.--
13 (a) On filing a certificate of title, the clerk shall
14 disburse the proceeds of the sale in accordance with the order
15 or final judgment and shall file a report of such disbursements
16 and serve a copy of it on each party not in default, and on the
17 Department of Revenue if the department was named as a defendant
18 in the action or if the Agency for Workforce Innovation or the
19 former Department of Labor and Employment Security was named as
20 a defendant while the Department of Revenue was providing
21 unemployment tax collection services under contract with the

22 Agency for Workforce Innovation through an interagency agreement
23 pursuant to s. 443.1316.
24 (b) The certificate of disbursements shall be, in
25 substantially the following form:
26
27 (Caption of Action)
28
29 CERTIFICATE OF DISBURSEMENTS
30
31 The undersigned clerk of the court certifies that he or she
32 disbursed the proceeds received from the sale of the property as
33 provided in the order or final judgment to the persons and in
34 the amounts as follows:
35 Name Amount
36
37 Total
38
39 WITNESS my hand and the seal of the court on _____, (year) .
40 (Clerk)
41 By (Deputy Clerk)
42
43 (c) If no objections to the report are served within 10
44 days after it is filed, the disbursements by the clerk shall
45 stand approved as reported. If timely objections to the report
46 are served, they shall be heard by the court. Service of
47 objections to the report does not affect or cloud the title of
48 the purchaser of the property in any manner.
49 (d) If there are funds remaining after payment of all
50 disbursements required by the final judgment of foreclosure and

51 shown on the certificate of disbursements, the provisions of ss.
52 45.032 and 45.033 apply.
53 Section 2. Section 45.032, Florida Statutes, is created to
54 read:
55 45.032 Disbursement of surplus funds after judicial
56 sale.--
57 (1) For purposes of this section and s. 45.033, the term:
58 (a) "Owner of record" means the person or persons who
59 appear to be the owner of the property on the date of the filing
60 of the lis pendens. The clerk need not perform a title search
61 and examination, but may rely on the plaintiff's allegation of
62 ownership in the complaint when determining the owner of record.
63 (b) "Notice of surplus funds" means a document in
64 substantially the following form:
65
66 (Caption of Action)
67
68 NOTICE OF SURPLUS FUNDS
69
70 The undersigned clerk of the court certifies that he or she
71 disbursed the proceeds received from the sale of the property as
72 provided in the order or final judgment to the persons named in
73 the certificate of disbursements, and that surplus funds of
74 $_____ remain and are subject to disbursement by the
75 court.
76 It appears that _____, as owner(s) of the property
77 at the time that the foreclosure was filed, (is/are) entitled to
78 payment of the surplus funds. The clerk of court will pay the
79 surplus funds to the owner(s) unless an objection to payment of
80 the surplus funds is filed with the court on or before

81 _____. If an objection is timely filed, a
82 hearing will be set in order for the court to determine who is
83 entitled to receive the surplus funds.
84 IF YOU ARE AN INDIVIDUAL AND ARE THE OWNER OF THE PROPERTY,
85 YOU MAY CLAIM THESE FUNDS YOURSELF. YOU ARE NOT REQUIRED TO
86 HAVE A LAWYER OR ANY OTHER REPRESENTATION AND YOU DO NOT HAVE TO
87 ASSIGN YOUR RIGHTS TO ANYONE ELSE IN ORDER FOR YOU TO CLAIM ANY
88 MONEY TO WHICH YOU ARE ENTITLED.
89
90 WITNESS my hand and the seal of the court on _____, (year) .
91 (Clerk)
92 By (Deputy Clerk)
93
94 (c) "Surplus funds" means the funds remaining after payment
95 of all disbursements required by the final judgment of
96 foreclosure and shown on the certificate of disbursements.
97 (2) There is hereby established a legal presumption that
98 the owner of record on the date of the filing of a lis pendens
99 is the person entitled to surplus funds. The surplus funds
100 shall be paid to the owner of record on the date of the filing
101 of the lis pendens unless a court rules otherwise.
102 (3) If the surplus funds are less than $200, the clerk
103 shall, after deducting a $5 service charge, pay the surplus
104 funds to the owner of record. The payment instrument may be
105 furnished by regular mail to the last known address of the owner
106 of record. If the surplus funds are $200 or more, the following
107 provisions of this section apply.
108 (4) The clerk shall furnish a notice of surplus funds by
109 certified mail to the following persons:
110 (a) The owner of record.

111 (b) All defendants in the action listed on the final
112 judgment of foreclosure, except that:
113 1. A defendant whose claim was paid in full as shown on the
114 certificate of disbursements need not be furnished a notice of
115 surplus funds.
116 2. Any defendant named by position and not by actual name
117 need not be furnished a notice of surplus funds. Examples of
118 such defendants include, but are not limited to, defendants such
119 as "unknown tenant" or "unknown heir."
120 (c) If a suggestion of bankruptcy was filed in the action,
121 the bankruptcy trustee.
122 (d) Any other person who appears from the record to be a
123 person who may be entitled to the surplus funds. The plaintiff
124 need not be given a notice of surplus funds.
125 (e) If the clerk is unsure as to whom the owner of record
126 is, the clerk may write "unknown" on the form, and send the
127 notice of surplus funds with a notice of hearing. The clerk may
128 only receive one service charge for the mailing.
129 (4) The clerk shall be entitled to a service charge of $5
130 for each notice of surplus funds. The clerk may draw the
131 service charge from the surplus funds upon mailing.
132 (5) Unless an objection is filed within 30 days of the
133 mailing of the notice of surplus funds, the clerk shall pay the
134 surplus funds to the owner of record. If the location of the
135 owner of record is unknown, the clerk may expend up to $250 of
136 the surplus funds to conduct or contract for a search for the
137 owner of record. If the search is unsuccessful, and more than
138 90 days has elapsed, the clerk shall treat the funds as
139 unclaimed property, to be deposited with the Chief Financial
140 Officer pursuant to ch. 717.

141 (6) If an objection is filed or if the clerk is unable to
142 determine the owner of record, the court shall set a hearing to
143 determine the disposition of the surplus funds. The clerk shall
144 prepare a notice of the hearing and shall furnish the same by
145 certified mail to all persons who received a notice of surplus
146 funds and to any other person who has requested notice of the
147 hearing on surplus funds. The clerk shall be entitled to an
148 additional service charge of $5 per notice of hearing, which may
149 be drawn from the surplus funds.
150 (7) At the hearing, any person other than the owner of
151 record has the burden of proving that he or she is entitled to
152 some or all of the surplus funds. The court shall consider the
153 factors in s. 45.033 when hearing a claim that a person other
154 than the owner of record is entitled to the surplus funds.
155 (8) The clerk of court may additionally collect a fee of
156 $25 from any surplus funds remaining in the court registry
157 following a foreclosure sale. The clerk shall use the proceeds
158 of such fee solely for purposes of educating the public as to
159 the rights of homeowners regarding foreclosure proceedings.
160 Section 3. Section 45.033, Florida Statutes, is created to
161 read:
162 45.033.--Sale or assignment of rights to surplus proceeds
163 in a property subject to foreclosure.
164 (1) There is hereby created a rebuttable presumption that
165 the owner of real property as of the date of the filing of a lis
166 pendens is entitled to surplus funds available in a foreclosure
167 of that real property.
168 (2) Another person may rebut that presumption only by
169 proving that a transfer or assignment of the right to collect

170 the surplus funds or any portion or percentage of the surplus
171 funds, has been executed as required by this section.
172 (3) For a transfer or assignment to qualify as one
173 entitling the transferee or assignee to the surplus funds, or
174 any portion or percentage thereof, the instrument must:
175 (a) Be executed with the formality of a deed.
176 (b) Include a financial disclosure that specifies the
177 assessed value of the property, a statement that the assessed
178 value may be lower than the actual value of the property, the
179 approximate amount of any debt encumbering the property, the
180 approximate amount of any equity in the property.
181 (c) A statement that the owner does not need an attorney or
182 other representative to recover surplus funds in a foreclosure.
183 (d) Specify all forms of consideration paid for the rights
184 to the property or the assignment of the rights to any surplus
185 funds.
186 (4) A transfer or assignment that does not qualify under
187 subsection (3) may nevertheless qualify if the court finds that
188 the instrument was procured in good faith and with no intent to
189 defraud the transferee or assignee.
190 (5) A party who has executed a transfer or assignment that
191 does not conform to the requirements of this section has the
192 right to petition the court presiding over the foreclosure
193 proceeding to set aside the nonconforming transfer or
194 assignment. If the transfer or assignment is set aside, the
195 owner of record shall be entitled to the surplus funds; but the
196 other party may, in a separate proceeding, seek rescission of
197 contract and appropriate damages therein. The prevailing party
198 in any proceeding under this subsection is entitled to recover

199 all fees and costs incurred in connection with such proceeding,
200 including a reasonable attorney's fee.
201 (6) This section does not apply to a deed, a mortgage, or a
202 deed in lieu of foreclosure, unless a person other than the
203 owner of record is claiming that a deed or mortgage entitles the
204 person to surplus proceeds. Nothing in this section shall
205 affect the title or marketability of the real property that is
206 the subject of the deed or other instrument. Nothing in this
207 section shall affect the validity of a lien evidenced by a
208 mortgage.
209 Section 4. Section 501.2078, Florida Statutes, is created
210 to read:
211 501.2078 Violations involving individual homeowners during
212 the course of residential foreclosure proceedings; civil
213 penalties.--
214 (1) As used in this section:
215 (a) "Residential foreclosure proceeding" means any action
216 in a circuit court of this state in which a party seeks to
217 foreclose on a mortgage encumbering the mortgagor's primary
218 dwelling.
219 (b) "Homeowner" means any individual who is the owner of
220 the property subject to a residential foreclosure proceeding.
221 (2) Any person, other than a financial institution as
222 defined by s. 655.005, who willfully uses, or has willfully
223 used, a method, act, or practice in violation of this part,
224 which method, act, or practice victimizes or attempts to
225 victimize homeowners during the course of a residential
226 foreclosure proceeding, and in committing such violation knew or
227 should have known that such conduct was unfair or deceptive, is

228 liable for a civil penalty of not more than $15,000 for each
229 such violation.
230 (3) Any order of restitution or reimbursement based on a
231 violation of this part committed against a homeowner in a
232 residential foreclosure proceeding has priority over the
233 imposition of any civil penalty for such violation pursuant to
234 this section.
235 (4) Civil penalties collected pursuant to this section
236 shall be deposited into the Legal Affairs Revolving Trust Fund
237 of the Department of Legal Affairs and allocated solely to the
238 Department of Legal Affairs for the purpose of preparing and
239 distributing consumer education materials, programs, and
240 seminars to benefit homeowners in residential foreclosure
241 proceedings or to further enforcement efforts.
242 (5) This section does not apply to the act of encumbering
243 the dwelling subject to a residential foreclosure proceeding
244 with a substitute or additional lien.
245 Section 5. Section 702.035, Florida Statutes, is amended
246 to read:
247 702.035 Legal notice concerning foreclosure
248 proceedings.--Whenever a legal advertisement, publication, or
249 notice relating to a foreclosure proceeding is required to be
250 placed in a newspaper, it is the responsibility of the
251 petitioner or petitioner's attorney to place such advertisement,
252 publication, or notice. The advertisement, publication, or
253 notice shall be placed directly by the attorney for the
254 petitioner, by the petitioner if acting pro se, or by the clerk
255 of the court. Only the actual costs charged by the newspaper
256 for the advertisement, publication or notice may be charged as
257 costs in the action.

258 Section 6. This act shall take effect July 1, 2006.
259
260 ========== T I T L E A M E N D M E N T ==========
261 Remove the entire title and insert:
262 An act relating to foreclosure proceedings; amending s. 45.031,
263 F.S.; providing for distribution of surplus funds from a
264 judicial sale; creating s. 45.032, F.S.; providing definitions;
265 creating a form; creating a presumption that the owner of record
266 on the date of the filing of a lis pendens is the person
267 entitled to any surplus proceeds from a judicial sale of that
268 property; providing for disbursement of surplus funds by the
269 clerk of court; requiring notice to potential claimants;
270 providing for service charges to the clerk; requiring a hearing
271 in certain circumstances; creating s. 45.033, F.S.; providing
272 criteria for a sale or assignment of rights to surplus funds in
273 a foreclosure proceeding; providing for attorney's fees;
274 providing exceptions; creating s. 501.2078, F.S.; providing
275 definitions; providing a civil penalty for knowingly using
276 unfair or deceptive homeowner victimization methods, acts, or
277 practices in residential foreclosure proceedings; providing an
278 exception; specifying higher priority of an order of restitution
279 or reimbursement over imposition of a civil penalty; providing
280 for deposit of civil penalties into the Legal Affairs Revolving
281 Trust Fund of the Department of Legal Affairs; allocating such
282 funds for certain purposes; providing an exception; amending s.
283 702.035, F.S.; limiting costs chargeable in a foreclosure
284 proceeding to the actual cost of a required legal advertisement;
285 providing an effective date.

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 158

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Blalock	Bond
2) Business Regulation Committee			
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; and that the rental

---

[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.

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

n/a

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 201

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 201 Nonjudicial Sale of Vessels
SPONSOR(S): Poppell
TIED BILLS: None **IDEN./SIM. BILLS:** SB 648

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Transportation Committee	13 Y, 1 N	Rousseau	Miller
2) Civil Justice Committee		Blalock	Bond
3) State Infrastructure Council			
4)			
5)			

SUMMARY ANALYSIS

Current law provides that a marina has a possessory lien against any vessel in the marina for storage fees, dockage fees, repairs, improvements, or other work related storage charges, and for expenses necessary for preservation of the vessel or expenses reasonably incurred in the sale or other disposition of the vessel. Current law also provides a mechanism for nonjudicial sale of a vessel when the owner does not pay the charges due. This bill:

- Adds that a vessel abandoned at the marina may be subject to the possessory lien.
- Revises the notice requirements that a marina with a lien must follow before the sale of a vessel.
- Reduces the number of days, from 120 to 60, which a vessel's owner has to pay the fees and costs owed to a marina before the marina may sell the vessel.
- Gives the marina the option, in certain circumstances, of removing the vessel, at the owner's expense, instead of selling it.
- Revises provisions relating to priority over other liens.

The 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 procedural requirements related to a nonjudicial sale of a vessel.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

A marina is a facility which provides secured slip docking or dry storage of vessels for which the vessel owner pays rent.[1] A vessel is any type of watercraft, barge, and air boat, other than a seaplane on the water, used or capable of being used as a means of transportation on water.[2] An owner of a vessel typically pays the marina for docking, storage, repairs, and other services. An owner of a vessel that does not pay a marina is subject to having the vessel sold by the marina. Section 328.17, F.S., provides procedures for the nonjudicial sale of a vessel to pay for the costs and fees owed to a marina by the owner of a vessel.

Section 328.17, F.S., provides that a marina "shall have a possessory lien upon any vessel for storage fees, dockage fees, repairs, improvements, or other work related storage charges, and for expenses necessary for preservation of the vessel or expenses reasonably incurred in the sale or other disposition of the vessel".[3] The lien attaches on the date the vessel is brought to the marina or first occupies rental space there. Upon default, the marina has to give notice to those who hold perfected security interests against the vessel under the UCC.[4]

Before a marina can utilize the nonjudicial sales procedure, the marina must give written notice to the vessel's owner. The notice must be delivered in person or by certified mail to the owner's last known address and be clearly posted at the marina and on the vessel. The marina must also provide written notice to each recorded lienholder of the vessel registered with this state as shown by the records of the Department of Highway Safety and Motor Vehicles at least 30 days prior to the sale.[5]

The notice must include an itemized statement of the claim containing the amount due at the time of notice and the date that amount became due, a description of the vessel, a demand for payment, a clear statement warning that the vessel will be advertised for sale and sold at a particular time and place, and a name, address, and phone number of the marina that the owner may contact regarding the notice.[6]

If the fees and costs that give rise to the lien are due and unpaid 120 days after the vessel owner is given notice, the marina may sell the vessel, including its machinery, rigging, and accessories.[7]

---

[1] Section 327.02(19), F.S.
[2] Section 327.02(37), F.S.
[3] Section 328.17(4), F.S.
[4] Section 328.17(4), F.S.
[5] Current law does not require a marina to give notice to lienholders that hold a security interest filed with the United States Coast Guard Vessel Documentation Center, and does not require marinas to obtain an abstract from the United States Coast Guard for these "documented vessels". By not having these requirements in the current law, a number of lienholders are given no notice that the marina is in the process of selling a vessel that the lienholders have a security interest in. The U.S. Coast Guard states that most vessels weighing more than 25 feet meet the statutory tonnage requirement to be eligible for documentation, encompassing a large number of vessels. This bill requires notice be given to these lienholders.
[6] Section 328.17(5)(b), F.S.
[7] Section 328.17(7), F.S.

Before any sale of the vessel the owner may pay the amount of the lien and redeem the vessel. The marina will then have no liability to any person with respect to the vessel.[8] If sold, a good faith purchaser takes the vessel free of any claims except a prior lien perfected under the UCC even if the marina does not comply with the law relating to nonjudicial sale of vessels.[9]

The marina may satisfy its lien from the proceeds of the sale if the marina's lien has priority over all other liens on the vessel other than a prior lien perfected under the UCC. The balance remaining, if any, must be held by the marina for delivery on demand to the owner. A notice of any balance must be delivered by the marina to the owner in person or by certified mail to the last known address of the owner. If the owner does not claim the balance of the proceeds within 1 year after the date of the sale, the proceeds are deemed abandoned, and the marina will have no further obligation with regard to the payment of the balance.[10]

If the marina's lien does not have priority over all other liens, the sale proceeds will be held for the benefit of the holders of those liens having priority. A notice of the amount of the sale proceeds must be delivered by the marina to the owner or lienholder in person or by certified mail to the owner's or the lienholder's last known address. If the owner or lienholder does not claim the sale proceeds within 1 year after the date of the sale, the proceeds will be deemed abandoned, and the owner or lienholder will have no further obligation with regard to the payment of the proceeds.[11]

Effect of Bill

This bill amends s. 328.17, F.S., regarding the nonjudicial sale of vessels by: expanding which vessels a marina can attach a possessory lien; revising the notice requirements a marina with a lien must follow before the sale of a vessel; reducing the number of days, from 120 to 60, that a vessel owner has from the time the fees and costs giving rise to the lien are due and unpaid to when the marina can sell the vessel; giving the marina the option, in certain circumstances, of removing the vessel, at the owner's expense, instead of selling it; and by revising provisions relating to the priority over other liens.

Applicability

This bill amends s. 328.17(4), F.S., to add that a marina may attach a possesory lien for expenses incurred in the removal and disposal of any vessel in a wrecked, junked, or substantially dismantled condition, which has been left docked, grounded, beached, or abandoned at a marina without the consent of the marina owner. The lien attaches on the date the vessel is discovered at the marina. If the proceeds of a sale of the vessel, or the scrap value of the vessel, do not cover the removal and disposal costs of the vessel, the marina will be able to recover those excess costs from the vessel's owner.

This bill also provides that a marina may, at its option, remove the vessel from the marina or from the waters of the state, at the owner's expense, rather than proceed to sell the vessel if the vessel is one that is wrecked, junked, or substantially dismantled and has been left docked, grounded, beached, or abandoned at a marina without the consent of the marina owner. This provision does not apply to vessels that are at the marina with the consent of the marina owner, and that owe storage, docking, or repair fees.

Notice Requirements

This bill amends s. 328.17(5), F.S., to revise the notice requirements of a marina, by requiring a marina to give notice to each person or entity that: holds a security interest on the vessel as shown in the records of the Department of Highway Safety and Motor Vehicles (DHSMV); holds a preferred ship

[8] Section 328.17(10), F.S.
[9] Section 328.17(11), F.S.
[10] Section 328.17(12), F.S.
[11] Section 328.17(12), F.S.

mortgage or has filed a claim of lien with the United States Coast Guard Vessel Documentation Center; holds a security interest against the vessel under the UCC; or has filed a judgment lien certificate in order to perfect a lien against the vessel.[12] This change only applies to a vessel registered in Florida.

This bill amends s. 328.17(5), F.S., to provide notice procedures a marina must follow when a vessel displays either foreign country identification or a registration from a state other than Florida. A marina is required to conduct a reasonable lien search of the vessel registration records in the jurisdiction where the vessel is registered in order to determine if there is a lienholder entitled to notice. If the result of the search shows that there is no foreign or non-Florida lienholder, the vessel may be sold or removed and a purchaser of the vessel takes title of the vessel.

Lien Search Requirements

This bill amends s. 328.17(5), F.S., to provide search requirements that must be satisfied for the marina to fulfill the notice requirements above. The notice requirements are satisfied if the marina shows that it has:

- obtained ownership documentation for the vessel and trailer, if applicable, from the Department of Highway Safety and Motor Vehicles or other agency with which the vessel is registered;
- obtained an abstract from the United States Coast Guard for a vessel that is documented as defined in 46 U.S.C. § 30101[13];
- performed a current Uniform Commercial Code lien search;
- performed a current Florida judgment lien certificate search; and
- complied with the requirement relating to vessels registered in a foreign country or in a state other than Florida.

Notice Before Sale

This bill amends s. 328.17(5), F.S., to require that written notice be made to both the vessel's owner and the lienholders 60 days prior to the sale of the vessel. This changes the time provision, which currently pertains to only lienholders, from 30 days prior to any sale of the vessel to 60 days prior to the sale.

This bill amends s. 328.17(7), F.S., to include both the vessel's owner and lienholders in this section, and decreases the time provision in this section from 120 days to 60 days. Section 328.17(7), F.S., currently pertains only to the vessel's owner, and gives the vessel's owner 120 days, after notice, to pay for the fees and costs giving rise to the lien before the marina may sell the vessel. This bill provides that both the vessel's owner and lienholders have 60 days after notice to pay the marina the fees, costs, and late payment interest giving rise to the lien, once they becomes due and are unpaid, before the marina may sell the vessel. After the 60 day time period, if the fees, costs, and late payment interest are still due and unpaid, the marina may sell the vessel, including its machinery, rigging, and accessories. This section also adds the requirement that owners and lienholders pay interest to the marina on late payments.

---

[12] A judgment lien certificate is a document that records a judgment lien with the Department of State.

[13] The citation in the bill, to 46 U.S.C. s. 30101 appears incorrect: 46 U.S.C. s. 30101(1) defines "documented vessel" as a vessel documented under chapter 121 of Title 46. 46 U.S.C. § 12102 says that a vessel is eligible for documentation if the vessel is at least 5 net tons, not registered under the laws of a foreign country, and is owned by: an individual who is a citizen of the United States; an association, trust, joint venture, or other entity all of whose members are citizens of the United States and capable of holding title to a vessel under the laws of the United States or of a State; a partnership whose general partners are citizens of the United States, and the controlling interest in the partnership is owned by citizens of the United States; a corporation established under the laws of the United States or of a State, whose chief executive officer, by whatever title, and chairman of its board of directors are citizens of the United States and no more of its directors are noncitizens than a minority of the number necessary to constitute a quorum; the United States Government; or the government of a State. Also, a vessel is eligible for documentation only if it has been measured under part J of this subtitle, which regulates how vessels are measured. However, the Secretary of Transportation may issue a temporary certificate of documentation for a vessel before it is measured.

Priority of Liens

This bill amends s. 328.17(12), F.S., to provide that a marina may satisfy its lien from the proceeds of a sale, "if the marina's lien has priority over all other liens on the vessel". This bill removes the phrase "other than a prior lien perfected under the UCC", and as a result, requires the marina to have priority over all liens on the vessel including prior liens perfected under the UCC. Current law does not require a marina's lien to have priority over a UCC lien before the marina can satisfy its lien against a vessel. By taking out the phrase, "other than a prior lien perfected under the UCC"; this bill requires the marina's lien to have priority over a UCC lien and all other liens on the vessel.

C. SECTION DIRECTORY:

Section 1 amends s. 328.17, F.S., regarding the nonjudicial sale of vessels.

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:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill does not specify who receives proceeds of a sale that are abandoned pursuant to s. 328.17(12), F.S., should an owner fail to collect such funds within one year of the sale.

This bill is unclear as to whether or not the marina would be able to satisfy their lien from the proceeds of the sale where the marina does not have priority, but lienholders have claimed their proceeds within 1 year.

Section 328.17(5)(a)4.b., F.S., as amended by this bill, appears to have an incorrect cite to the United States Code at lines 82-83. The section of the code that the bill is referring to should perhaps be cited as 46 U.S.C. § 30101. 46 U.S.C. § 30101(1) provides that "documented vessel" is a vessel documented under chapter 121 of title 46. Chapter 121 of Title 46 provides a complete definition for what a documented vessel is, what vessels are eligible, and the procedure for vessel documentation.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

1 A bill to be entitled
2 An act relating to nonjudicial sale of vessels; amending
3 s. 328.17, F.S.; revising notice requirements of a marina
4 having a possessory lien on a vessel for unpaid costs,
5 charges, or fees prior to nonjudicial sale of the vessel,
6 including expenses for the removal and disposal of certain
7 vessels in a wrecked, junked, or substantially dismantled
8 condition; reducing the time allowed to pay the fees,
9 charges, and costs giving rise to the lien prior to sale
10 of the vessel; revising requirements with respect to
11 perfection of and priority over prior or other liens;
12 providing an effective date.
13
14 Be It Enacted by the Legislature of the State of Florida:
15
16 Section 1. Subsections (4), (5), (7), (10), (11), and (12)
17 of section 328.17, Florida Statutes, are amended to read:
18 328.17 Nonjudicial sale of vessels.--
19 (4) A marina, as defined in s. 327.02(19), shall have:
20 (a) A possessory lien upon any vessel for storage fees,
21 dockage fees, repairs, improvements, or other work-related
22 storage charges, and for expenses necessary for preservation of
23 the vessel or expenses reasonably incurred in the sale or other
24 disposition of the vessel. The possessory lien shall attach as
25 of the date the vessel is brought to the marina~~,~~ or as of the
26 date the vessel first occupies rental space at the marina
27 facility. ~~However, in the event of default, the marina must give~~
28 ~~notice to persons who hold perfected security interests against~~

29 ~~the vessel under the Uniform Commercial Code in which the owner~~
30 ~~is named as the debtor.~~
31 (b) A possessory lien upon any vessel in a wrecked,
32 junked, or substantially dismantled condition, which has been
33 left docked, grounded, beached, or otherwise abandoned at a
34 marina without consent of the marina owner, for expenses
35 reasonably incurred in the removal and disposal of the vessel.
36 The possessory lien shall attach as of the date the vessel is
37 discovered at the marina facility. If the funds recovered from
38 the sale of such a vessel, or from the scrap or salvage value of
39 such a vessel, are insufficient to cover the expenses reasonably
40 incurred by the marina in removing and disposing of the vessel,
41 all costs in excess of recovery shall be recoverable against the
42 owner of the vessel.
43 (5) A marina's possessory lien may be satisfied as
44 follows:
45 (a)1. The marina shall provide written notice to the
46 vessel's owner, delivered in person or by certified mail to the
47 owner's last known address. The notice shall also be ~~and~~
48 conspicuously posted at the marina and on the vessel.
49 2. In addition to notice provided to the vessel owner
50 under subparagraph 1., the marina shall provide written notice
51 to each person or entity that:
52 a. Holds a security interest on the vessel as shown in the
53 records of the Department of Highway Safety and Motor Vehicles
54 with respect to state-titled vessels.
55 b. Holds a preferred ship mortgage or has filed a claim of
56 lien with the United States Coast Guard Vessel Documentation

57 Center.
58 c. Holds a security interest against the vessel under the
59 Uniform Commercial Code.
60 d. Has perfected a lien against the subject vessel by
61 filing a judgment lien certificate pursuant to ss. 55.201-
62 55.209.
63 3. When a vessel displays a foreign country identification
64 or displays registration numbers from a state other than
65 Florida, the marina shall conduct a reasonable lien search of
66 the vessel registration records in the jurisdiction of registry
67 to determine if there is a lienholder who is entitled to notice
68 pursuant to subparagraph 2. Failure to discover a foreign
69 national or non-Florida United States lienholder after a good
70 faith effort to conduct such a lien search shall not prevent the
71 sale or removal of a vessel from the marina to satisfy the
72 marina's possessory lien or a purchaser, in good faith, from
73 taking title of the vessel, pursuant to subsections (7) and
74 (11).
75 4. The requirements of subparagraph 2. shall be satisfied
76 if the marina:
77 a. Obtains ownership documentation for the vessel and
78 trailer, if applicable, from the Department of Highway Safety
79 and Motor Vehicles or other agency with which the vessel is
80 registered;
81 b. Obtains an abstract from the United States Coast Guard
82 for a vessel that is documented as defined in 46 U.S.C. s.
83 301.01;
84 c. Performs a current Uniform Commercial Code lien search;

85 d. Performs a current Florida judgment lien certificate
86 search; and
87 e. Complies with subparagraph 3. with regard to vessels
88 registered in a foreign country or in a state other than
89 Florida.
90 5. The written notice to the vessel owner and lienholders
91 required by this paragraph shall be made at least 60 days prior
92 to any sale of the vessel under this section ~~recorded lienholder~~
93 ~~of such vessel registered with this state as shown by the~~
94 ~~records of the Department of Highway Safety and Motor Vehicles,~~
95 ~~at least 30 days prior to the proposed sale~~.
96 (b) The notice shall include:
97 1. An itemized statement of the marina's claim, showing
98 the sum due at the time of the notice and the date upon which
99 the sum became due.
100 2. A description of the vessel.
101 3. A demand for payment.
102 4. A conspicuous statement that, unless the claim is paid
103 within the time stated in the notice, the vessel will be
104 advertised for sale or other disposition and will be sold or
105 otherwise disposed of at a specified time and place.
106 5. The name, street address, and telephone number of the
107 marina that the owner may contact to respond to the notice.
108 (7) If the fees, ~~and~~ costs, and late payment interest that
109 give rise to such a lien are due and unpaid 60 ~~120~~ days after
110 the vessel owner and lienholder are ~~is~~ given written notice, the
111 marina may sell the vessel, including its machinery, rigging,
112 and accessories as provided for in subsection (8); or the marina

113 may, at its option, remove the vessel from the marina or from
114 the waters of the state at the owner's expense pursuant to
115 paragraph (4)(b).
116 (10) Before any sale or other disposition of the vessel
117 pursuant to this section, the owner or the lienholder may pay
118 the amount necessary to satisfy the lien and the reasonable
119 expenses and late payment interest incurred under this section
120 and thereby redeem and take possession of the vessel. Upon
121 receipt of such payment, the marina shall return the property to
122 the owner or lienholder making such payment and thereafter shall
123 have no liability to any person with respect to such vessel.
124 (11) Unless otherwise provided by law, a purchaser in good
125 faith of a vessel sold to satisfy a lien provided for in this
126 section takes the property free of any claims other than a prior
127 lien perfected under state or federal law ~~the Uniform Commercial~~
128 ~~Code, despite noncompliance by the marina with the requirements~~
129 ~~of this section~~.
130 (12) In the event of a sale under this section, the marina
131 may satisfy its lien from the proceeds of the sale, provided the
132 marina's lien has priority over all other liens on the vessel
133 ~~other than a prior lien perfected under the Uniform Commercial~~
134 ~~Code~~. The lien rights of secured lienholders ~~are~~ automatically
135 also attach ~~transferred~~ to the remaining proceeds of the sale.
136 The balance, if any, shall be held by the marina for delivery on
137 demand to the owner. A notice of any balance shall be delivered
138 by the marina to the owner in person or by certified mail to the
139 last known address of the owner. If the owner does not claim the
140 balance of the proceeds within 1 year after the date of sale,

141 the proceeds shall be deemed abandoned, and the marina shall
142 have no further obligation with regard to the payment of the
143 balance. In the event that the marina's lien does not have
144 priority over all other liens, the sale proceeds shall be held
145 for the benefit of the holders of those liens having priority. A
146 notice of the amount of the sale proceeds shall be delivered by
147 the marina to the owner or secured lienholder in person or by
148 certified mail to the owner's or the secured lienholder's last
149 known address. If the owner or the secured lienholder does not
150 claim the sale proceeds within 1 year after the date of sale,
151 the proceeds shall be deemed abandoned, and the owner or the
152 secured lienholder shall have no further obligation with regard
153 to the payment of the proceeds.
154 Section 2. This act shall take effect July 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. **HB 201**

1

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

---

1 Council/Committee hearing bill: Civil Justice Committee
2 Representative(s) Poppell offered the following:
3
4 **Amendment**
5 Remove line 83 and insert:
6 30101;
7
8

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Shaddock	Bond
2) Elder & Long-Term Care Committee			
3) Economic Development, Trade & Banking Committee			
4) Justice Council			
5)			

SUMMARY ANALYSIS

The Trust Code is that portion of the Florida Statutes which pertains to the administration of trusts. This bill creates 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. This bill seeks to include 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.

Significant changes to current law include:

- 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 court may select one or more charitable purposes for a charitable trust when the terms of the trust do not do so;
- 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; and
- Trust modifications that currently require court approval may be effective upon agreement of the parties to the trust without court approval.

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 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.

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 and constructive, in that the latter are respectively founded on an intention of the parties

---

[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 prepared 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.

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. This chapter sets forth the default rules for trust administration which can generally be limited or altered by the settlor.

WHAT IS DIFFERENT UNDER HB 425?[8]

By way of preview, the following is a brief catalogue of some of the more important changes Chapter 736, referenced herein as the Florida Trust Code ("FTC" or the "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]

- **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

---

[7] *Id.* at s.8
[8] The Committee estimated that Florida Trust Code is comprised about forty percent of provisions found in prior Florida law and about sixty 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, discussed infra at p. 14.
[10] See s. 736.0306, discussed infra at p. 15.
[11] See s. 736.0403, discussed infra at p. 18.
[12] See s. 736.0601, discussed infra at p. 28.
[13] See s. 736.4113 - .412, discussed infra beginning at p. 19.
[14] See s. 736.0110(3).
[15] See s. 736.0405(3).
[16] See s. 736.0110(1).
[17] See s. 736.0502(1), discussed infra at p. 26.
[18] See s. 736.0503(2), discussed infra at p. 26.

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]

- **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;[23] the Worthier Title Doctrine is abolished;[24] sections 731.103 (evidence of death or status) and 731.201 (definitions) now apply to chapter 736; a new definition for "power of appointment" has been added to section 731.201; section 731.303 (representation) no longer applies to proceedings involving trusts; and section 732.603 (antilapse) now applies only to outright devises and appointments.[25]

What Is the Same?

The short answer is quite a lot. As was mentioned previously, almost forty 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 dealing with the employment of agents and the review of compensation.[26]

- Section 737.206 dealing with the effect of fraud, duress, mistake and undue influence.[27]

- Sections 737.4031 and 737.4032 dealing with judicial and nonjudicial modification of trusts.[28]

- Sections 737.3054 and 737.308 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.[29]

- Section 737.306(6) dealing with the protection of successor trustees.[30]

- Section 737.3035 dealing with the contents of a trust accounting.[31]

- Section 737.402(4) dealing with certain powers involving a conflict of interest.[32]

---

[19] See s. 736.0602(1), discussed infra at p. 29.
[20] See s. 736.0602(3)(b), discussed infra at p.29 .
[21] See s. 736.0603(1), discussed infra at p. 28.
[22] See s. 736.0603(2), discussed infra at p. 28.
[23] See s. 736.0926, discussed infra at p. 56.
[24] See s. 689.175, discussed infra at p. 61. 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).
[25] See s. 732.603, discussed infra at p. 55.
[26] See s. 736.0206, discussed infra at p. 12.
[27] See s. 736.0406, discussed infra at p. 16.
[28] See ss. 736.04113 through .0412, discussed infra beginning at p. 19.
[29] See ss. 736.0505 and .05055, discussed infra at p. 28.
[30] See s. 736.08125, discussed infra at p. 40.
[31] See s. 736.08135, discussed infra at p. 41.
[32] See s. 736.0814(2) and (3), discussed infra at p. 44.

- Section 737.4025 dealing with powers relating to environmental and human health and contaminated property.[33]

- Section 737.208 dealing with administration pending the outcome of a contest or other proceeding.[34]

- Sections 737.727, 737.2035, and 737.2041 dealing with costs and fees.[35]

- Sections 737.307 and 737.3061 dealing with limitations on actions against trustees in general and against a revocable trust, its beneficiaries and its trustees after the settlor's death.[36]

- Section 737.209 dealing with liability for improper distributions.[37]

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 In-Depth 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.[38] It is anticipated that the Code will be enacted as a separate chapter and that chapter 736 will be used for this purpose. The Code consists of thirteen 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,[39] the several sections of Part I of the FTC address the scope and applicability of the Code;[40] the meaning of important terms;[41] and the relative weight to be given to the Code, common law, and the terms of a trust.[42] Also covered are the rules defining when a person or an organization is considered to have knowledge of a fact;[43] the methods of giving and waiving

---

[33] See s. 736.08163, discussed infra at p. 42.
[34] See s. 736.08165, discussed infra at p. 37.
[35] See s. 736.0904 through .09047, discussed infra at p.48.
[36] See s. 736.0905 and .09103, discussed infra at pp. 49.
[37] See s. 736.0914, discussed infra at p. 46.
[38] 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 section 736.0102 the same as UTC section 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.
[39] Sections 736.0101 and 736.0112 are not discussed in this summary. The former merely specifies a citation form and internal title for the Florida Trust Code. Section 736.0112 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.
[40] See s. 736.0102.
[41] See s. 736.0103.
[42] See s. 736.0105 and .0106.
[43] See s. 736.0104.

notice;[44] the rules for determining and changing a trust's principal place of administration;[45] and the validity and permissible scope of nonjudicial settlement agreements.[46]

Scope and Applicability

The "scope" of the Code is identical to that of chapter 737, F.S. which it will eventually replace. 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,[47] 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.[48] 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.[49]

For express trusts having contacts in more than one jurisdiction, the Code applies if the terms of the trust designate Florida as the controlling jurisdiction[50] or, in the absence of such a designation, if Florida is the jurisdiction with the most significant relationship to the matter at issue.[51]

Important Definitions

Section 736.0103 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.

Beneficiaries and Qualified Beneficiaries

Most of the definitions in section 736.0103 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.[52] 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.[53]

> **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

---

[44] See s. 736.0109.
[45] See s. 736.0108.
[46] See s. 736.0111.
[47] *I.e.*, resulting and constructive trusts.
[48] See s. 736.0102.
[49] On the retroactive application of the Code, see "*Effective date*", infra p. 60.
[50] The designation is ineffective if it is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue. See s. 736.0107(1).
[51] For trusts with contacts in more than one jurisdiction, the law of the jurisdiction having the most significant relationship to the particular matter will control, although within broad limits, the terms of the trust may designate a different jurisdiction. S. 736.0107(2). With respect to any particular matter, the designation is not effective if it is contrary to a strong public policy of the jurisdiction having the most significant relationship to that matter. S. 736.0107(1).
[52] See s. 736.0103(3).
[53] 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.

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.[54]

Qualified Beneficiary: The term "beneficiary" is to be contrasted with "qualified beneficiary."[55] 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.[56] 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.[57] 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).[58] 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).[59] 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.[60] To address this concern:

---

[54] 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.

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

[56] 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).

[57] S. 736.0105(14)(a).

[58] S. 736.0105(14)(b).

[59] S. 736.0105(14)(c).

[60] 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 (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).

- 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.[61]

- In addition, the Code authorizes the Attorney General[62] to assert the rights of a qualified beneficiary with respect to charitable trusts.[63]

Other Important Terms

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

- The term "settlor" includes anyone who either creates or transfers property to a trust, including a testator;[64]

- The term "trustee" includes additional, successor, and cotrustees;[65]

- A trust is "revocable" if it is revocable by the settlor without the consent of either the trustee or an adverse person;[66]

- A power of appointment[67] is a "general power" if it is exercisable in favor of it's holder, the holder's estate, or the creditors of either the holder or the holder's estate;[68]

- 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;[69]

- 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;[70]

- The term "trust instrument" refers to a written instrument executed by a settlor which contains the original or amended terms of a trust.[71] This should be contrasted with the more expansive "terms of a trust" 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[72]

---

[61] See s. 736.0110(1). 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.
[62] 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.
[63] See s. 736.0110(3).
[64] See s. 736.0103(16).
[65] See s. 736.0103(21).
[66] See s. 736.0103(15).
[67] 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).
[68] See s. 736.0103(6).
[69] See s. 736.0103(12).
[70] See s. 736.0103(2).
[71] See s. 736.0103(20).
[72] See s. 736.0103(19). 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.

- 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.[73]

Sources of Trust Law; Default and Mandatory Rules

Although it is more comprehensive than ch. 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 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.[74] 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 section 736.0105(2). 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[75] and the requirement that the purpose of a trust be lawful, possible to achieve, and not contrary to public policy.[76]

- Those containing public policy restrictions on the designation of a principal place of administration[77] and the effect of penalty,[78] spendthrift,[79] and exculpatory clauses.[80]

- Those covering procedural matters including jurisdiction,[81] venue,[82] and limitations on commencing judicial actions.[83]

- Those dealing with court powers, including the power to adjust a trustee's compensation;[84] to act in the interests of justice;[85] to require, dispense with, modify, or terminate a trustee's bond;[86] and, except as otherwise provided elsewhere in the Code, the power to modify or terminate a private or charitable trust.[87]

- 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;[88] the duty to notify, account to[89], and respond to

---

[73] See s. 737.0103(9).
[74] See s. 736.0105(1).
[75] See s. 736.0105(2)(a).
[76] See s. 736.0105(2)(c).
[77] See s. 736.0105(2)(p).
[78] See s. 736.0105(2)(u).
[79] See s. 736.0105(2)(e).
[80] See s. 736.0105(2)(k).
[81] See s. 736.0105(2)(o).
[82] *Id.*
[83] See s. 736.0105(2)(m).
[84] See s. 736.0105(2)(g).
[85] See s. 736.0105(2)(n).
[86] See s. 736.0105(2)(f).
[87] See s. 736.0105(2)(d).
[88] See s. 736.0105(2)(b).
[89] 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 keen interest and discussion. This is understandable because these provisions involve a necessary

requests for information by qualified beneficiaries;[90] and with respect to a revocable trust, the duty to file a notice of trust at the death of the settlor[91] and to pay the expenses and obligations of the settlor's estate.[92]

- Certain miscellaneous provisions including one giving qualified beneficiaries and the trustee of a dynasty trust the power to amend or terminate the trust[93] and another specifying the rights of third parties who interact with the trust, such as bona fide purchasers, tort or contractual claimants.[94]

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, administration, and the beneficial interests of the beneficiaries.[95] 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.[96]

In the absence of a valid designation in the trust instrument, Section 736.0108 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.[97] 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.[98]

Factual Knowledge

Section 736.0104 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.[99] 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

---

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.16. 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). 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, discussed infra p. 41. 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 s. 736.0302 and 736.0306, discussed infra at pp. 14 and 15, respectively.

[90] See s. 736.0105(2)(h) – (j).

[91] See s. 736.0105(2)(t).

[92] See s. 736.0105(2)(s).

[93] See s. 736.0105(2)(r).

[94] See s. 736.0105(2)(l).

[95] S. 736.0108(4).

[96] See s. 736.0108(5). The contents of the required notice is set out in s. 736.0108(6).

[97] 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 s. 736.0108(2) and (3) with s. 737.101(1)-(3), F.S.

[98] The nexus requirement is mandatory. See s. 736.0105(2)(f). 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).

[99] S. 736.0104(1).

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.[100]

Methods and Waiver of Notice

Section 736.0109 provides that notice of judicial proceedings is to be given as provided in the Florida Rules of Civil Procedure.[101] Other notices and the sending of required documents must be accomplished in a reasonably suitable manner that is likely to result in receipt.[102] Notice and the sending of documents are not required for persons whose identity or location is not reasonably ascertainable by the trustee[103] or who have waived the sending of the notice or document.[104]

Nonjudicial Settlement Agreements

Under the Code, interested persons[105] may enter into a binding nonjudicial settlement agreement[106] 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;[107] and
- The agreement does not produce a result that is not authorized under other provisions of the Code.[108]

Qualifications of Foreign Trustee

The Code dispenses with local qualifications for certain foreign trustees who receive distributions from a local estate.[109]

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.[110] Among these are provisions that affirm that, in the absence of a court order, trusts are not subject to continuing judicial supervision;[111] that proceedings involving the validity, administration, or distribution of trusts are commenced by complaint and are

---

[100] S. 736.0104(2). 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).
[101] S. 736.0108(4).
[102] 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.
[103] S. 736.0108(2).
[104] S. 736.0108(3).
[105] In this context, interested persons is defined to be those persons whose interest would be affected by the settlement. S. 736.0111(1).
[106] 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). 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."
[107] Court approval may be requested by any interested person. S. 736.0111(5).
[108] See s. 736.0111(2) and (3).
[109] S. 737.105, F.S., is essentially identical to s. 736.0112.
[110] For a nonexclusive list of possible judicial proceedings, see s. 736.0201(4). 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).
[111] See s. 736.0201(3).

governed by the Florida Rules of Civil Procedure;[112] and that the circuit court has original jurisdiction with respect to all matters arising under the Code.[113]

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

- Section 736.0204 dealing with venue for actions and proceedings concerning trusts.[114] The section is identical to s. 737.202, F.S.[115]

- Section 736.0205 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, 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 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, section 736.0207 includes a new exception for court approved actions by the guardian of the property of an incompetent settlor.

Lastly, section 736.0202[116] 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.[117] With respect to a trust having its principal place of administration in Florida, section 736.0202 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.[118]

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.

---

[112] See s. 736.0201(1).
[113] See s. 736.0203. This is a mandatory provision. See s. 736.0105(2)(o).
[114] This is a mandatory provision. See s. 736.0105(2)(o).
[115] 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.
[116] Chapter 737, F.S. has no provision corresponding to section 736.0602. Jurisdiction under existing law is obtained under the general long arm statutes found in chapter 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.
[117] S. 736.0202(3)
[118] Section 736.0202 is a mandatory provision. See s. 736.0105(2)(o).

Background

In the context in which it is used here, "representation" refers to the authority of one person to act on behalf of another.[119] Under the Code, notice, information, accountings and reports sent to a representative have the 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.[120]

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;[121] an attorney-in-fact to represent a principal;[122] and a trustee or personal representative to represent the beneficiaries of a trust or estate, as the case may be.[123] The Code also provides that a parent may represent an unborn or minor child if no guardian of the property has been appointed.[124]

- **Virtual**: If not otherwise represented, a minor, incapacitated, unborn, unascertainable or unlocatable person may be represented by another person having a substantially identical interest.[125] 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.[126] 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.[127]

---

[119] The concept of representation is not new to Florida law. S. 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 beneficiaries. See e.g., s. 736.0301(3) providing that notice or consent given to or by a representative of an incapacitated settlor is binding of the settlor's behalf.

[120] See s. 736.0301(1) and (2). 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 130 infra p. 14. The Committee omitted the explicit limitation because it did not wish to preempt the issue.

[121] See s. 736.0303(1) and (2).

[122] See s. 736.0303(3).

[123] See s. 736.0303(4) and (5).

[124] See s. 736.0303(6).

[125] See s. 736.0304.

[126] See s. 736.0305(1).

[127] See s. 736.0305(3).

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

Section 736.0302 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,[128] but unlike the corresponding provision in the Uniform Trust Code[129] section 736.0302 makes no distinction between general and nongeneral powers.[130] Representation applies to the holders of either.[131]

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.[132] The case against including a conflict limitation is found in the shared view of many on the Committee that the limitation

---

[128] See s. 731.303(1).
[129] Compare UTC s. 302.
[130] 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[130] that a trust settlor should be able to designate persons to serve as representatives of trust beneficiaries.
[131] Nor does section 736.0302 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.
[132] 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.

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.[133]

Powers held by trustees

Section 736.0302 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 actions and accountings. Thus, section 736.0302 does not apply to the distribution powers of a trustee.[134] Nor may a beneficiary with a power represent others while the beneficiary is serving as sole trustee.[135]

Designated Representatives

Within limits discussed below, section 736.0306 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 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.[136] This is a mandatory restriction that cannot be waived in the trust instrument.[137]

Certain beneficiaries serving as designated representatives

The second restriction, which is also mandatory,[138] 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.[139]

---

[133] In a conforming amendment, a fraud and bad faith restriction was also added to s. 731.301(1), F.S.
[134] S. 736.0302(2)(b).
[135] S. 736.0302(2)(c).
[136] S. 736.0306(2).
[137] See s. 736.0105(2)(h).
[138] See Id.
[139] See s. 736.0306(3)(a) and (b).

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.[140]

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.[141] In broad outline and subject to further refinement below, to create a trust a settlor having the capacity to do so[142] must intend to create a trust[143] for a purpose that is lawful, consistent with public policy and possible to achieve.[144] The trust must not be passive, meaning that the trustee must have enforceable duties to perform.[145] 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.[146]

Ascertainable Beneficiaries

In addition to the above, a private trust must have ascertainable beneficiaries.[147] 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.[148] If a class of beneficiaries is ascertainable (such as descendants), the shares of each may be left to the discretion of the trustee.[149]

---

[140] 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. S. 736.0301(5).
[141] S. 736.0401.
[142] S. 736.0402(1)(a).
[143] S. 736.0402(1)(b).
[144] S. 736.0404.
[145] S. 736.0402(1)(d). 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. S. 736.0402(1)(e). Accord, *Wiley v. Hoggson*, 90 Fla. 343, 106 So. 408 (1925).
[146] S. 736.0406.
[147] S. 736.0402(1)(c). 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.
[148] S. 736.0402(2).
[149] 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. S. 736.0402(3). Accord, Restatement (Third) of Trusts s. 46 (Tentative Draft No. 2, approved

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).[150] The ascertainable beneficiary requirement does not apply to such trusts[151] because the enforcement of charitable trusts is provided by other mechanisms.[152]

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.[153] 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.[154]

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.[155] 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.[156] Like animal trusts, trusts for a noncharitable purpose are enforced by a person designated by the settlor in the terms of the trust, or,

---

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).

[150] S. 736.0405(1). 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. S. 736.0405(3).

[151] S. 736.0402(1)(c)1.

[152] 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) 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). Finally, in a departure from common law, the Code gives settlors standing to enforce the charitable trusts they create. S. 736.0405(3).

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

[154] See s. 736.0408(1) and (3). 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.

[155] 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. S. 736.0408(2).

[156] S. 736.0409(1). 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 section 736.0409 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.

in the absence of such a designee, by a person appointed by the court.[157] Hence, this type of trust need not have ascertainable beneficiaries either.[158]

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.[159] 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.[160]

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[161] provided only that their terms can be established by clear and convincing evidence.[162] Trusts containing Florida real property, however, must be evidenced by a signed writing.[163]

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[164] are void unless the trusts are executed with the formalities required for a will.[165] Similar requirements are imposed by section 736.0403(2)(b) of the Code, but only with respect to revocable trusts[166] created by Florida domiciliaries[167] on or after

---

[157] S. 736.0409(2). 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. S. 736.0409(3).

[158] S. 736.0402(1)(c)3.

[159] S. 736.0403(1).

[160] 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).

[161] S. 736.0407. 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).

[162] Florida cases state the standard of evidentiary proof somewhat differently from s. 736.0407. 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 section 736.0407.

[163] See s. 736.0403(2)(a) providing that trusts containing land must comply with section 689.05.

[164] 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. See s. 737.111(5), F.S. An identical exclusion is included in section 736.0402(3).

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

[166] 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. S. 736.0103(15).

The decision to restrict section 736.0403(2) 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.

the effective date of the Code.[168] 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) 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.[169]

- 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."[170]

- 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.[171]

- 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.[172]

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 – sections 736.1113, 736.1115 and 736.0412 – are all in addition to and not in derogation of common law rights to modify, amend, terminate trusts.[173] Although they apply in different contexts and with different prerequisites, none is applicable while a

---

[167] The change from "resident" in s. 737.111, F.S. to "domiciliary" in section 736.0403(2) has no substantive effect as the two terms are defined to be synonymous in s. 731.201(11), F.S.
[168] Section 737.111, F.S. continues to apply to trust created before that date. S. 736.0402(4).
[169] Unlike s. 737.111, section 736.0403(2) 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).
[170] See s. 736.0403(2), final sentence.
[171] 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.
[172] Because of the differences between s. 737.111, F.S. and new section 736.0403(2)(b), the latter applies only to trusts created on or after the effective date of the Code. S. 736.0403(4). *F.S.* 737.111 continues to apply to trusts created before that date.
[173] See ss. 736.04113(4), 736.04115(5) and 736.0412(6).

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.[174]

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.[175]

Judicial modification consistent with settlor's intent

Section 736.04113 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.[176] Section 736.04113 is identical in effect to s. 737.4031(1), F.S. The only real difference is that section 736.04113 clarifies who may apply for modification under the section. The application may be made by a trustee or any qualified beneficiary.[177]

An important characteristic of section 736.04113 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.[178] Importantly, modification under section 736.04113 is not precluded by the presence of a spendthrift provision.[179]

The court's authority to modify a trust under section 736.04113 is included on the list of mandatory provisions.[180] 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.

---

[174] See ss. 736.04113(2), 736.04115(1), and 736.0412(1).
[175] 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.
[176] See s. 736.04113(1).
[177] S. 736.04113(1).
[178] S. 736.04113(3)(a).
[179] S. 736.04113(3)(b)
[180] See s. 736.0105(2)(j).

Judicial modification in the best interest of the beneficiaries

Under Code section 736.04115, 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.[181] As with section 736.04113 discussed above, modification under section 736.04115 is not precluded by the presence of a spendthrift provision[182] 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.[183]

Nonjudicial modification of irrevocable trusts

Section 736.0412 provides for the nonjudical 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,[184] although neither a spendthrift clause nor a provision in a trust instrument prohibiting amendment or revocation of a trust prevents modifications under the section.[185] 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 section 736.0412 modification could be detrimental to the interests of other beneficiaries. To protect against that, Code section 736.0410(2) allows any beneficiary to commence a judicial proceeding to have a court review a proposed nonjudical modification.

Qualification criteria

Section 736.0412 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.[186]
- 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.[187]

---

[181] 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.[181] Under both, it is the best interest of the beneficiaries that is the controlling criteria for modification. Consequently, it is possible that section 736.04115 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). But a provision in a trust instrument that expressly prohibits judicial modification under section 736.04115 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 section 736.04115. The trust instrument must also expressly prohibit judicial modifications under the section. See s. 736.04112(3)(b). Accord, s.737.4031(2)(c)2, F.S.
[182] S. 736.04115(2)(c).
[183] S. 736.04115(2)(b).
[184] S. 736.0412(1).
[185] S. 736.0412(2).
[186] S. 736.0412(4)(a).
[187] S. 736.0412(4)(b). This restriction is intended to preserved deductibility of charitable trusts for federal tax purposes.

- Finally, there can be no nonjudicial modification of any trust while the trust settlor is still alive.[188] 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.[189]

Other Modification and Termination Provisions

The three sections discussed above have their roots in the existing modification provisions of ch. 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 section 736.0414 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.[190] Assuming no such provision:

- A trustee of a trust with property worth less then $100,000 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 administration.[191] Before proceeding, notice must be given to the qualified beneficiaries.[192] If one or more of them object, they may commence a judicial proceeding to disapprove the trustee's termination.[193]

- 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.[194]

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.[195]

Modification to achieve settlor's tax objectives

In another section derived from the Uniform Code, section 736.0416 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.[196]

---

[188] See s. 736.0412(1).
[189] Assuming the above criteria are met, a final consideration involves the applicable Rule Against Perpetuities associated with the trust. Section 736.0412 involves a tradeoff with the Rule Against Perpetuities similar to that detailed above for section 736.04113. That is, nonjudicial modification is not only permissible, it's availability is mandatory for trusts having a perpetuities period in excess of the common law and 90-year statutory periods.[189] 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 section 736.0412. The governing instrument, may however, provide to the contrary. See s. 736.0412(4)(b).
[190] Although the existence of a spendthrift clause is not itself sufficient to preclude applicability of the section. S. 736.0414(4).
[191] S. 736.0414(1).
[192] *Id.*
[193] See s. 736.0414(3).
[194] S. 736.0414(2).
[195] 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. S. 736.0414(3).

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 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 section 736.0413 is discretionary with a court. In that regard, the section differs from the corresponding Uniform Code provision. Under Uniform Code section 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.[197] This limitation is not present in section 736.0413.

Reformation to Correct Mistakes

Under section 736.0415, 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.[198]

Trust Division and Combination

The final section of Part IV of the Code -- section 736.0417 -- gives trustees the power to sever or combine trusts. The section is derived from Uniform Code section 417. It replaces provisions in chapter 737, F.S. which also permit trust combinations and severances.[199] 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.[200]

By contrast, under section 736.0417 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 caveats, 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.

---

[196] Code section 736.0416 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.

[197] This aspect of the Uniform Code is discussed further in the comments to UTC s. 413.

[198] 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 is broader, however, as it allows reformation for mistakes both in the expression and in the inducement.

[199] See s.737.403, F.S.

[200] See s. 737.403(b), F.S.

- Second, notice must be given to qualified beneficiaries and any beneficiary may commence a proceeding to disapprove a proposed severance or combination.[201]

- Lastly, the types of actions permitted under section 736.0417 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, section 736.0501 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."[202] Importantly, the rights given to creditors under the section are limited to those cases where a beneficiary has a right to distributions. If distributions are discretionary, a beneficiary has no "attachable" trust interest. Thus, section 736.0504(1) 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.[203] In addition, section 736.0504(2) 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.[204]

---

[201] S. 736.0410(2).

[202] Although chapter 737, F.S. contains nothing similar, section 736.0501 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.")

[203] Existing Florida case law does not permit the garnishment of interests in wholly discretionary trust interests. See *Bacardi v. White*, supra note 202. 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.

[204] 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 s. 736.0814(2) and (3) 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. Section 736.0504(2) 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 736.0504 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.[205]

Spendthrift Trusts

Code section 736.0502 gives statutory recognition to spendthrift provisions.[206] Assuming a trust has a valid spendthrift provision:

- 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.[207]

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.[208] That is not allowable under the Code. Under section 736.0502(1), 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.[209]

> 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 cestuis 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.

[205] S. 736.0504(3).

[206] 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).

[207] S. 736.0502(3).

[208] 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.

[209] S. 736.0502(1).

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, section 736.0503(2) 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;[210] they can not compel distributions from or otherwise reach beneficial interests in discretionary trusts.[211]

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*[212] 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.[213] 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.

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 section 736.0506 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.[214] 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.[215]

---

[210] See s. 736.0503(3). This subsection also preserves the existing procedures available under the Uniform Interstate Family Support Act. See Ch. 88, F.S.
[211] See s. 736.0504(1), discussed supra, p. 24, which applies whether or not a trust contains a spendthrift provision.
[212] 463 So. 2d 218 (Fla. 1885).
[213] Accord, *Mason v. Mason*, 789 So. 2d 895 (Fla. 3d DCA 2001).
[214] S. 736.0506(2).
[215] It is immaterial for this purpose that the discretion is subject to a standard or that it is coupled with language of direction. S. 736.0506(1).

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 section 736.0505(1), 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;[216] 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.[217] [218]

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 section 736.0505 that may be. Under section 736.0505(2)(a), 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.[219] Hence, the power holder's creditors may reach the property subject to the power.

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,[220] the rule in section 736.0505(2)(a) appears consistent with the supreme court's decision in *Croom v. Ocala Plumbing & Electric Co.*[221] which subjected trust property to the reach of creditors when the trust beneficiaries had an unrestricted right to access trust property. Under section 736.0505(2)(b), 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.[222] 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 section 736.0505(2)(b) to be a change in existing law.[223]

---

[216] S. 736.0505(1)(a). 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.

[217] S. 736.0505(1)(b). 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).

[218] Neither of these rules is surprising. As both are consistent with accepted general principles of law, the Committee believed that section 736.0505(1) 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.

[219] S. 736.0505(2)(a).

[220] See s. 736.0103(12).

[221] 62 Fla. 460 (1911). *Croom* is discussed further at note 204.

[222] See s. 736.0505(2)(b).

[223] 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 s. 736.0505(b)(1) and (2). For powers drafted

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, section 736.05053 obligates a trustee of a trust described in s.733.707(3), F.S.[224] 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 section 736.05055 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.[225] In an initial mandatory provision, section 736.0601 clarifies that the capacity required to create a revocable trust is the same as that needed to execute a will.[226] 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.[227]

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.[228] As a consequence:

- No other person is entitled to notices, information, accountings, or reports;[229] and
- A trustee may follow a direction of the settlor that is contrary to the trust instrument.[230]

---

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).

[224] Section 736.05053 and 736.05055 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.

[225] S. 736.0103(15).

[226] As a section dealing with the requirements for creating a trust, section 736.0601 is made mandatory by section 736.0105(2)(a).

[227] 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 intervivos gift.

[228] S. 736.0603(1).

[229] 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).

The situations where a trustee's duties are restricted by section 736.0603 are not limited to traditional revocable trusts. Under section 736.0603(2), 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.[231] 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.[232]

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.[233]

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.[234]

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.[235]

- If the instrument does not specify a method, any clear and convincing manifestation of the settlor's intent to revoke is sufficient,[236] 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.[237]

Both principles, however, are subject to the possible overriding application of section 736.0403(2)(b) 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.

---

[230] See s. 736.0808(1) discussed infra at p. 43.
[231] Accord UTC s. 603(b).
[232] Section 736.0603(2) 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 section 736.0602(2) 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.
[233] S. 736.0602(1). 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).
[234] 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.
[235] S. 736.0602(3)(a). 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).
[236] S. 736.0602(3)(b)2. Accord *Macfarlane v. First National Bank of Miami*, 203 So. 257 Fla. 3d DCA 1967).
[237] S. 736.0602(3)(b)1.

Interrelationship with section 736.0403(2)(b)

Recall that under section 736.0403(2)(b), 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.[238] Hence, notwithstanding the principles set out above, *amendments* to the testamentary provisions of a revocable trust must comply with section 736.0403(2)(b).

The question of whether trust *revocations* must also comply with section 736.0403(2)(b) 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.[239] It is an unnecessary stretch to say that such a result is a trust "amendment" to which section 736.0403(2)(b) would apply. Nevertheless, there is sufficient uncertainty on the issue that compliance with section 736.0403(2)(b) 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.;[240] or
- A guardian of the property, but only as authorized in s. 744.441, F.S.[241]

Trusts with more than one settlor

As defined in the Code, "settlor" includes anyone who transfers property to a new or existing trust.[242] Under this definition, a trust can have more than one settlor. In such cases, section 736.0602(2) 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.[243]

Protection of Trustees

If a trust is revoked, the Code directs the trustee to deliver the trust property as the settlor directs.[244] 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

---

[238] S. 736.0103(20).
[239] 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 to the comments to UTC s. 602.
[240] S. 736.0602(5).
[241] S. 736.0602(6).
[242] S. 736.0103(16).
[243] See s. 736.0602(2). 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 section 602.
[244] S. 736.0602(4).

distributions made and other actions taken on the assumption that the trust has not been amended or revoked.[245]

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.[246] 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.[247] Part VI's contribution to this area is section 736.0604. 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 section 736.0604.[248]

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.[249] 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.[250]

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:

- 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

---

[245] S. 736.0602(7).
[246] See s. 736.0406.
[247] See s. 736.0207.
[248] 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.
[249] S. 736.0701(2).
[250] S. 736.0701(1)(a) and (b).

- Inspect or investigate trust property for any purpose including to determine potential liability under environmental or other law.[251]

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.[252] 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.[253]

Resignations and Removals
Resignations

A trustee may resign with court approval.[254] 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.[255] In either case, a trustee's resignation does not discharge any liability of the resigning trustee or any sureties on the trustee's bond.[256]

The ability of a trustee to resign without court intervention was new. There was no counterpart under prior law.[257] 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.[258]

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.[259] 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.[260] In lieu of (or in addition to) removing a trustee, the court may grant appropriate relief for any breaches of trust that have occurred.[261]

---

[251] S. 736.0701(3)(a) and (b).
[252] S. 736.0702(1).
[253] S. 736.0702(2). 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.
[254] S. 736.0705(1)(b). The court may impose conditions and enter orders reasonable necessary to protect trust property. S. 736.0705(2).
[255] S. 736.0505(1)(a).
[256] S. 736.0705(3).
[257] 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).
[258] See s. 736.0105(2)(o).
[259] S. 736.0706(1).
[260] S. 736.0706(2)(a) – (c).
[261] See s. 736.0706(3). On the remedies generally available for a breach of trust, see s. 736.1001(2) discussed infra at p. 46.

The Code's provision giving a settlor the right to seek removal of a trustee is probably an expansion of existing law.[262] So to is the "unfitness" criteria at least if and to the extent it permits removal in anticipation of an actual breach.[263]

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.[264]

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.[265] 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.[266]

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.[267] In addition, the court has residual authority to appoint a successor trustee if an otherwise unfilled vacancy in the trusteeship occurs.[268] 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.[269] 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.[270] 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

---

[262] 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.

[263] 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).

[264] S. 736.0706(2)(d). 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 sections 736.04113 or 736.04115 to remove a trustee without meeting the requirements of section 736.0706(2)(d).

[265] S. 736.0707(2). 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).

[266] S. 736.0706(3).

[267] S. 736.0704(5).

[268] See s. 736.0704(3)(c) and (4)(c).

[269] These reasons are detailed in section 736.0704(1).

[270] S. 736.0704(2). If a vacancy in a cotrusteeship occurs, the remaining trustees (or a majority of the remaining trustees) may act for the trust. S. 736.0703(2). Accord s. 737.404(2), F.S.

qualified 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.[271]

Cotrustees
Duty to participate

With some exceptions noted below, the Code imposes upon cotrustees a duty to participate in the administration of the trust.[272] 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.[273]

Failure to participate

A cotrustee's participation is excused if the cotrustee is unavailable because of absence, illness, disqualification or other temporary incapacity,[274] 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.[275] 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.[276]

Delegation among cotrustees

Delegation is permitted under the Code only of those functions the settlor did not reasonably expect the trustees to perform jointly.[277] 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.[278]

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.[279] 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.[280]

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

---

[271] S. 736.0704(3) and (4). 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).
[272] S. 736.0703(3).
[273] S. 736.0703(1).
[274] S. 736.0703(3).
[275] S. 736.0703(4).
[276] S. 736.0703(3).
[277] S. 736.0703(5). Irrevocable delegations are not permitted under this subsection. A trustee may revoke a delegation previously made. Compare UTC s. 703(e).
[278] On this, see s. 518.112, F.S.
[279] S. 736.0703(6).
[280] S. 736.0703(7)(a) and (b). 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.

an action at the 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.[281]

Compensation and Reimbursement of Trustees

A trustee is entitled to reasonable compensation,[282] including reasonable additional compensation for other services the trustee renders in connection with the administration of the trust.[283] 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.[284]

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.[285]

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.

---

[281] S. 736.0703(8). Unlike the similar provision in existing law, section 736.0703(8) does not require the notice of the dissent to be in writing. Compare s. 737.404, F.S.

[282] S. 736.0708(1). 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.

[283] S. 736.0708(3). 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.

[284] S. 736.0708(2). The authority of the Court to adjust a trustee's compensation in this manner under existing law is unsettled.

[285] S. 736.0709(1) and (2). 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).

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.[286] This is a mandatory duty which may not be relaxed or curtailed in the trust instrument.[287]

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 Summary.

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.[288]

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.[289]

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.[290]

Duty to use special skills

A trustee with special skills or expertise has a duty to use those special skills.[291]

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.[292]

Duty to keep accurate records

A trustee must keep clear, distinct, and accurate records.[293]

---

[286] S. 736.0801. 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).
[287] S. 736.0105(2)(b).
[288] S. 736.0803.
[289] S. 736.0804. 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.
[290] S. 736.0805.
[291] 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. This duty also appears in the Florida Prudent Investor Act. See s. 518.11(1)(a), F.S.
[292] See s. 736.0809 and 736.0812.
[293] S. 736.0810(1).

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.[294] 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.[295]

Duty to ascertain marketable title

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.[296]

Duty to enforce and defend claims

A trustee must take reasonable steps to enforce claims of and to defend claims against the trust.[297]

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.[298] 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.[299] 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.[300]

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.[301]

---

[294] S. 736.0810(2) and (3).
[295] S. 736.0810(4).
[296] S. 736.08105.
[297] S. 736.0811.
[298] See s. 736.0812.
[299] See s. 732.813.
[300] See s. 736.08165. This section is identical to s. 737.208, F.S.
[301] S. 736.0817. 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).

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.[302] 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;[303]
- A trustee may not usurp an opportunity properly belonging to the trust;[304] 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.[305] 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.[306]

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.[307]

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.[308]

The fact that an offending transaction is voidable rather than void is a change in Florida law.[309] 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.[310]
- A beneficiary's action can be precluded by an effective consent, ratification, or release[311] or by a failure to commence an action within the applicable limitations period.[312]

---

[302] See generally, s. 736.0802.
[303] S. 736.0802(2). This rule does not apply to contracts entered into or a claims acquired by the trustee prior to the time the person became or contemplated becoming trustee. S. 736.0802(e). However, while the contract or claim itself does not create a problem, subsequent steps necessary to complete or pursue the contract or claim can. See the comments under UTC s. 802.
[304] See s. 736.0802(4).
[305] S. 736.0802(6).
[306] 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.
[307] S. 736.0802(9).
[308] S. 736.0802(2). 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. See the comments to UTC s. 802 upon which section 736.0802 is based.
[309] 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).
[310] See s. 736.0802(2), introductory clause. On the protection of persons dealing with a trustee, see s. 736.1016, discussed infra at p. 51.

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[313] or personal ties[314] to the trustee. Such transactions are only presumed to be affected by a conflict between the personal and fiduciary interests of the trustee.[315] Accordingly, the transactions are not voidable per se; they are voidable only if the presumption is not rebutted.[316]

In a limited exception to the presumptively voidable rule, the Code provides that the presumption does not apply to an investment by a trustee in a mutual fund to which the trustee or its affiliate provides services in a capacity other than as trustee provided:

- The investment otherwise complies with the requirements of ch. 518, F.S.;[317] and
- If the trustee receives compensation from the mutual fund for its services, the trustee notifies the qualified beneficiaries of that fact at least annually.[318]

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;[319]
- 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;[320]
- A deposit of trust money in a regulated financial-service institution operated by the trustee;[321]
- An advance by the trustee of money for the protection of the trust;[322] or

---

[311] S. 736.0802(2)(d). On the effectiveness of consents, ratifications and releases, see s. 736.1012. See also the representation provisions of Part III of the Code.
[312] S. 736.0802(2)(c). On the statute of limitations on proceedings against trustees, see s. 736.1005, discussed infra at p. 49.
[313] 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. S. 736.0802(c) and (d).
[314] This includes the trustee's spouse and the trustee's descendants, siblings, parents or the spouse of any of them. S. 736.0802(3)(a) and (b).
[315] S. 736.0802(3).
[316] According to the comments to UTC section 802 from which section 736.0802 is 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.
[317] See in particular s. 518.11, F.S. (Florida's Prudent Investor rule).
[318] See s. 736.0802(5). This section also provides that the trustee may receive additional compensation for its services out of fees the mutual fund charges to the trust.
[319] S. 736.0802(7)(a) and (b).
[320] S. 736.0802(7)(c).
[321] S. 736.0802(7)(d).
[322] S. 736.0802(7)(e).

- 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[323] or the employment of agents to perform any act of administration, whether or not discretionary.[324]

Duty to redress breaches of former trustees

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.[325] This duty is qualified, however, by section 736.08125 which details several instances where a successor trustee has no personal liability for actions[326] of a prior trustee.[327]

Under Code section 736.08125, there is no personal liability, nor is there any *duty* to institute proceedings against a prior trustee:[328]

- 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.[329]

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;[330]
- 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;[331] or
- If a super majority of the eligible beneficiaries have released the successor trustee.[332]

---

[323] S. 736.0802(8). The trustee may act without independent investigation on their recommendations.
[324] *Id.*
[325] S. 736.0812.
[326] The term actions includes a failure to act. S. 736.0103(1).
[327] Section 736.08125 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. S. 736.08125(7).
[328] Or the estate of a prior trustee.
[329] S. 736.08125(1) – (4).
[330] S. 736.08125(5)(c).
[331] In addition informing the qualified beneficiary of the trustee's acceptance of the trusteeship in accordance with section 736.0813(1)(a) (see infra p. 41), 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. S. 736.08125(5)(b).
[332] S. 736.08125(5)(a). For purpose of this final exception, eligible beneficiaries is defined to be a subset of the qualified beneficiaries. The intermediate qualified beneficiaries described in section 736.0103(14)(b) 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). See s. 736.08125(6)(a). 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. S. 736.08125(6)(b).

Duty to inform and account

Under section 736.0813, a trustee must keep the qualified beneficiaries of an irrevocable[333] trust reasonably informed of the trust and its administration.[334] The extent of this duty, which is limited to the qualified beneficiaries, is described in detail in the five paragraphs of section 736.0813(1), each of which is included on the list of mandatory provisions.[335] 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;[336]
- 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;[337]
- Upon reasonable request, furnish them with a complete copy of the trust instrument;[338]
- 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;[339] and
- Upon reasonable request, provide them with relevant information about the trust's assets and liabilities and the particulars of the trust administration.[340]

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, section 736.0815 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

---

[333] While a trust is revocable, a trustee's duty to inform and account is owed only to the settlor. S. 736.0603(1); 736.0813(4),

[334] The representation provisions of Part III of the Code apply with respect to the rights of a qualified beneficiary under section 736.0813. S. 736.0813(3).

[335] See s. 736.0105(2)(q) – (s). Section 736.0813 applies only with respect to accountings rendered for periods beginning on or after January 1, 2008.

[336] S. 736.0813(1)(a).

[337] S. 736.0813(1)(b).

[338] S. 736.0813(1)(c).

[339] S. 736.0813(1)(d).

[340] 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). The contents of the required accounting are detailed in section 736.08135. This section is effective for all trust accountings rendered for any accounting period beginning on or after January 1, 2003. S. 736.08135(3). 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. S. 736.08135(2)(f). And a qualified beneficiary may waive (or withdraw a prior waiver of) the right to one or more accountings, including a final accounting. S. 736.0813(2), and a withdrawal of a prior waiver is effective only for accounting for future periods.

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, section 736.0816 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 section 736.0816, a trustee has authority to:

- Exercise federal, state and local tax elections;[341]
- Select payment options, exercise rights, and take other appropriate actions with respect to retirement plans, annuities and insurance contracts payable to the trust;[342]
- Make loans, including to a beneficiary, with terms and conditions that are fair and reasonable under the circumstances;[343] 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.[344]

Environmental powers

Code section 736.08163 incorporates almost verbatim[345] 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 section 736.0807, 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.[346] In accepting a delegation, an agent submits to the jurisdiction of Florida courts[347] and thereafter owes a duty to exercise reasonable care to comply with the terms of the delegation.[348] A trustee who properly delegates duties and powers under the strictures of section 736.0807 is not liable for the acts of the agent.[349]

---

[341] S. 736.0816(17).
[342] S. 736.0816(18).
[343] S. 736.0816(19). The trustee has a lien on future distributions for repayment of any loans.
[344] S. 736.0816(25).
[345] 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 section 736.0103(5).
[346] See s. 736.0807(1).
[347] S. 736.0807(4).
[348] S. 736.0807(2).
[349] Current law permits delegations of: investment functions (including special provisions relating to life insurance trusts) under section 518.112, 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 section 736.0807 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 section 736.0807 makes one other important change. Section 737.402(2)(y), F.S. states that

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 section 736.0808 deals with this topic. As there is no statutory equivalent under existing law, this section provides useful clarification.

By settlor of revocable trust

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 my follow a direction of the settlor even when the direction is contrary to the terms of the trust.[350]
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.[351] As such, the direction must be manifested in a manner that substantially complies with any provisions in the trust instrument pertaining to trust amendments.[352] Moreover, if the direction relates to a "testamentary aspect" of the trust, the direction must comply with the requirements of section 736.0403(2)(b).[353] That is, it must be made in a written instrument executed with testamentary formalities.[354]

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.[355]

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,[356] 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.[357]

---

trustees may act without independent investigation of an agent's recommendations. A similar statement is found in Code section 736.0816(20). The apparent conflict between this provision and the duties imposed in section 736.0807(1)(c) 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).

[350] S. 736.0808(1).
[351] On the equivalency of a settlor's direction to a trust amendment, see the comments to UTC s. 808.
[352] S. 736.0701(1)(a), discussed supra p. 29.
[353] Section 736.0403(2)(b) is discussed supra p. 30.
[354] 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.
[355] S. 736.0808(4).
[356] A power to direct trust modification or termination may also be given to a trustee. See s. 736.0808(3).
[357] S. 736.0808(2).

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 ch. 737, F.S.

Duty to distribute income of marital trust

Absent a contrary provision in the trust instrument, Code section 736.08147 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

Code sections 736.0814(2) through (5) 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 section 736.0814(2), 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:[358]

- Make distributions of income or principal to or for its own benefit other than distributions subject to an ascertainable standard;[359]
- Make distributions of income or principal to satisfy the trustee's support obligations;[360] or
- Make discretionary allocations of receipts or expenses to directly enlarge or shift beneficial interests in the trust.[361]

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.[362]

Exceptions

Notwithstanding the prohibitions listed above, exceptions are provided for:

- Trustees (whether the settlor or other person) of revocable or amendable trusts;[363]
- A power held by the trust settlor;[364] and

---

[358] *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). See also the statement in section 736.0814(5) 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.
[359] S. 736.0814(2)(a).
[360] S. 736.0814(2)(c).
[361] S. 736.0814(2)(b).
[362] S. 736.0814(4).
[363] S. 736.0814(3)(c).
[364] S. 736.0814(3)(a).

- 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;[365] or a trust qualifying for the annual exclusion under section 2503(c) of the Internal Revenue Code.[366]

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.

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.[367] 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.[368]

Protection of trustees from liability
When trustee acts in reasonable reliance on trust instrument

Although a breach of trust has occurred, new Code section 736.1006 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.[369]

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 section 736.1007, which is based on Uniform Code section 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 section 736.1012 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

---

[365] S. 736.0814(3)(b).
[366] S. 736.0814(3)(d).
[367] S. 736.1003. Accord *Boalt v. Hanson*, 412 So. 2d 880 (Fla. 3d DCA 1982); *Wohl v. Lewy*, 505 So. 2d 525 (Fla. 3d DCA 1987).
[368] See s. 736.1002(1).
[369] This provision is derived from Uniform Code section 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.

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

Code section 736.1008 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.[370]

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.[371] 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.[372] 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.[373] [374]

Remedies and damages for breach of trust

Section 736.1001(2) contains a nonexclusive list of actions a court may take with respect to a breach of trust.[375] 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;

---

[370] S. 736.0105(2)(u).
[371] S. 736.1011(1)(a).
[372] S. 736.1011(1)(b).
[373] S. 736.1011(2).
[374] Section 736.1011 is derived from Uniform Code section 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 section 1008 that disclosure to the settlor's attorney would suffice for this purpose.
[375] 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, section 736.1001(3) 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 section 736.1018 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 is identical to s. 737.209, F.S. When this remedy is unavailable or insufficient, section 736.1001(3) 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 section 736.1001(3) are aspirational. Courts are not bound by them. In appropriate situations, courts may adopt a remedy from the more comprehensive list found in section 736.1001(2) or may order any other relief they find appropriate.

- 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, section 736.1002 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.[376]

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.[377] 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.[378]

Section 736.1002(2) 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.[379]

Section 736.1002(3) specifies how the pro rata contribution is to be determined. In addition to stating that general principles of equity apply,[380] section 736.1002(3) clarifies that pro rata in this context means in proportion to the relative degrees of fault.[381] 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.[382]

Finally, in sequential order, subsections (4) through (6) of section 736.1002,

- 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.

---

[376] See s. 736.1002(1).
[377] Much of section 736.1002 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. S. 768.31(2)(g), F.S.
[378] S. 736.1002(7).
[379] S. 736.1002 (2).
[380] S. 736.1002 (3)(c).
[381] S. 736.1002 (a).
[382] S. 736.1002 (3)(b).

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 ch. 737, F.S. The provisions of the Code dealing with fees and costs include:

- **Section 736.1004:** 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 sections 736.04133 through 736.0412.[383] The section directs the court to award taxable costs and fees as in chancery actions[384] and authorizes the court to direct payment from the party's interest, from other property, or from both. Section 736.1004 makes no change in Florida law.

- **Section 736.1005:** 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:** 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 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:** 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 sections 736.1013 and 736.1015 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, section 736.1013 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.[385] [386]

---

[383] Judicial proceedings arising with respect to section 736.0412 actually arise under section 736.0410(2).
[384] 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).
[385] S. 736.1013(1).
[386] Unlike existing law, the Code contains no exception for contracts for attorney's fees.

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 fault.[387]

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.[388] 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.[389]

Trustee's liability as general partner

Code section 736.1015 is new to Florida law.[390] 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;[391] 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.[392]

Limitations on actions against trustees

Code section 736.1008 specifies limitations periods for claims by a beneficiary against a trustee for breach of trust.[393] 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 section 736.1008 is six months. This period applies to actions on matters the trustee has adequately disclosed on a trust accounting or other trust disclosure

---

[387] S. 736.1013(2). Accord s. 737.306(1)(b), F.S.
[388] S. 736.1013(3). Accord s. 737.306(1)(c), F.S.
[389] S. 736.1013(4). Accord s. 737.306(2), F.S.
[390] The section is derived from UTC. Section 736.1015 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. S. 736.1015 (3).
[391] S. 736.1015(2).
[392] S. 736.1015(1).
[393] For the limitations period applicable to actions contesting the validity of a revocable trust after the settlor's death, see section 736.0604 discussed supra at p. 31.

document when the trustee has provided the beneficiary with a related limitation notice.[394] 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.[395]

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 sections 736.1008(4)(a) and (4)(c). 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, section 736.1008(1)(a) provides that the claims are barred as provided in ch. 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.[396] An exception 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.[397]

Matters NOT adequately disclosed on a trust accounting
When trustee has issued final accounting and given written notice to beneficiary

The provisions of ch. 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 ch. 95, F.S.[398]

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.[399]

When trustee has NOT issued final accounting or has NOT given written notice to beneficiary

A careful reading of the portions of section 736.1008 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.

---

[394] See s. 736.1008(2).
[395] See s. 736.1008(4)(c).
[396] See s. 95.11(3), F.S. See also s. 736.1008(1)(a).
[397] Here again, Code section 736.1008 is identical to s. 737.307, F.S.
[398] See s. 736.1008(1)(b).
[399] S. 736.1008(1)(b).

As to both situations, section 736.1008(3) 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.[400]

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 section 736.1016, which is based on Uniform Code section 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 section 736.1017 which is derived from Uniform Code section 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.

Persons dealing with trustee in good faith

Section 736.1016 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 is included on the list of mandatory provisions; the protections it provides may not be altered in a trust instrument.[401] 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 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

---

[400] 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. S. 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.

[401] See s. 736.0105(2)(v).

section 736.1017 provides that the trustee may furnish a certification of trust.[402] The section sets out certain required information that must be included in the certification[403] 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.[404]

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.[405]
- 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.[406] [407]

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 section 736.0105(2) (of which there is only one — section 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.[408]

All of the statutory rules of construction found in Part XI have a counterpart in existing chapter 737, F.S. One of these – section 736.1106 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 section 736.1106 is discussed last.

Carryover provisions from existing law
Construction of generic terms

Code section 736.1102 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.

---

[402] S. 736.1017(1) and (8).
[403] See s. 736.1017 (1) for a list of the required contents. A certification of trust need not include the dispositive terms of the trust. S. 736.1017 (4).
[404] S. 736.1017 (3).
[405] S. 736.1017 (5).
[406] See s. 736. 1017(6) and (7).
[407] 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), final sentence.
[408] See s. 736.1016.

Multi-generational class gifts

Code section 736.1103 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 section 736.1106, discussed below.

Unlawful and intentional killings

Code section 736.1104 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, section 736.1105 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

Code section 736.1107 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).[409] 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 buy the issuer.

Trust contest penalty clauses

Code section 736.1108 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[410] are unenforceable. The second subsection of section 736.1108 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.[411]

---

[409] Section 736.1107 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.

[410] *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).

[411] For this purpose, a revocable trust is treated as if it was created when the right of revocation terminates. S. 736.1108(2).

Antilapse and the descendibility of beneficial interests in trusts

Code section 736.1106 is new.[412] Like current s. 737.6035, F.S. which it will replace, section 736.1106 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.[413]

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,[414] 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 but not life tenant W.[415] Then, in 2003, s. 737.6035, F.S. was created to apply similar rules in the case of interests created in living trusts.[416]

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.[417]

---

[412] Section 736.1106 is the trust law equivalent of s. 732.603, F.S. (the Probate Code antilapse statute). As is explained more fully below, adoption of section 736.1106 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.
[413] S. 736.1106(5).
[414] See s. 731.201(9), F.S.
[415] The 2001 changes became effective January 1, 2002.
[416] Section 737.6035 became effective on June 12, 2003.
[417] 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).

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.[418]

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 section 736.1106 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.[419] In addition, new section 732.603 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 section 732.603 explicitly applies to these interests.[420]

> **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 section 732.603 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 intervivos or a testamentary instrument.
- Application of new section 732.603 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 section 732.603 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 section 732.603 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

[418] In the interest of clarity, the analysis uses the adjective "new" when referencing the newly formulated version of section 732.603.
[419] New s. 732.603(4).
[420] See new s. 732.603(2).

power.[421] The section explicitly permits this unless the language creating the power expressly excludes the substitution of descendants for an object of the power.[422]

Words of survivorship and other indications of contrary intent

Like its predecessor, new section 732.603 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.[423] 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."[424]

Beneficial Interests in Trust
General effect of section 736.1106

With some exceptions discussed below, Code section 736.1106 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.[425] In such situations, section 736.1106 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, section 736.1106 creates a per stirptual alternate gift in such of the deceased beneficiary's descendants as are living at that time.[426]

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, section 736.1106 creates a per stirptual alternate gift of C's interest in favor of GC-1 and GC-2.[427]

Situations where section 736.1106 applies

Section 736.1106 applies to a broad array of situations where the beneficiary of a future interest[428] in a trust dies before the time the interest becomes possessory. The only two exceptions are situations

---

[421] 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 section 732.603 will be to preserve the gift for a person (GC) who is not an object of D's power.
[422] See new s. 732.603(2), final sentence.
[423] 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).
[424] See new s. 732.603(3)(a).
[425] The section refers to this as the "distribution date." See s. 736.1106(1)(b).
[426] S. 736.1106(2).
[427] Astute readers will readily see that the effect of section 736.1106 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).

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.[429]
- Whether or not the trust settlor and predeceasing beneficiary are related. That is, unlike section 732.603 of the Probate Code, there is no relationship test under section 736.1106.

The absence of a relationship test in section 736.1106 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 section 736.1106 is different. It is found in large part on matters of economy and administrative convenience. To illustrate, consider the impact of section 736.1106 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;
- 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 section 736.1106 *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 section 736.1106 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 section 736.1106 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

---

[428] Section 736.1106 applies only to future interests. See s. 736.1106(1)(a).
[429] See s. 736.1106(1)(a) and (c).

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.[430]

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.[431]

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 section 736.1106. 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.[432] 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.[433]

> **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.[434]

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:

---

[430] On the effectiveness of using words of survivorship for this purpose, see s. 736.1106(3)(a).
[431] See s. 736.1106(3)(b).
[432] S. 736.1106(4)(b).
[433] S. 736.1106(4)(c).
[434] 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 section 736.1106, all of the above remains true even if D and C are unrelated to each other.

- First, prior to application of the above rules, preference is given to the power donor's gift-in-default clause, if any.[435]

- 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.[436]

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 section 736.0110(1). 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**: 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 section 736.0108.

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

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

- **Section 736.1204**: Section 736.1204 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 to Code section 736.1205, and some section references were clarified as referring to the Internal Revenue Code.

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

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

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

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

- **Section 736.1209**: 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 section 736.1208(5).

---

[435] See s. 736.1106(4)(a).
[436] See s. 736.1106(4), final paragraph.

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

Miscellaneous (Part XIII)

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

Electronic records and signatures

Section 736.1301 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.

Severability

Section 736.1302 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.

Effective date

The final miscellaneous provisions are found in 736.1303. Section 736.1303 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.[437]
- 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.[438]
- The Code applies to all judicial proceedings concerning trusts commenced on or after its effective date.[439]
- 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.[440]
- 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.[441]

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

[437] S. 736.1303(1)(e).
[438] S. 736.1303(2).
[439] S. 736.1303(1)(b).
[440] S. 736.1303(1)(d).
[441] S. 736.1303(1)(a).

impairs vested rights) or unfair. For this reason, a number of Code sections include effective date sections that limit the default retroactivity rule of section 736.1303. 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.
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 product of the Committee 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 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 section 731.1035 (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 section 736.0302. 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.[442]

- **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

---

[442] See "Revisions to s. 732.603, F.S.", supra p. 55.

on January 1, 2003. The new term excludes from the class of beneficiaries with standing the middle tier qualified beneficiaries described in Code section 736.0103(14)(b) unless there is no third tier qualified beneficiary described in section 736.0103(14)(c). 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 section 736.0207 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 section 736.0207. Subsection (11) directs that before authorizing a guardian to bring an action under section 736.0207, the court must find that the action appears to be in the ward's best interest during the ward's probable lifetime.

- **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 amends subsection (2) of s. 607.0802, F.S., relating to qualifications of directors.

Section 16. This section amends subsection (2) of s. 617.0802, F.S., relating to qualifications of directors.

Section 17. This section amends subsection (6) of s. 660.25, F.S., to correctly reference s. 736 and not ch. 737, F.S.

Section 18. 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 19. This section amends s. 660.418, F.S., to correctly reference s. 736 and not ch. 737, F.S.

Section 20. This section amends subsection (5) of s. 689.071, F.S., to correctly reference s. 736 and not ch. 737, F.S.

Section 21. This section amends subsections (1) and (4) of s. 689.075, F.S., relating to inter vivos trusts; powers retained by settlor.

Section 22. This section creates s. 689.175, F.S., abolishing the Worthier title doctrine.

Section 23. This section amends subsection (8) of s. 709.08, F.S., to correctly reference s. 736 and not ch. 737, F.S.

Section 24. This section amends paragraph (c) of subsection (2) of s. 721.08, F.S., to correctly reference sections of s. 736 and not ch. 737, F.S.

Section 25. This section amends paragraph (e) of subsection (1) of s. 721.53, F.S., to correctly reference sections of s. 736 and not ch. 737, F.S.

Section 26. This section amends s. 731.103, F.S., regarding evidence as to death or status.

Section 27. 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 28. This section amends s. 731.201, F.S., regarding general definitions.

Section 29. This section amends paragraph (a) of subsection (1) and subsection (5) of s. 731.303, F.S., regarding representation.

Section 30. This section amends subsection (5) of s. 732.2075, F.S., to correctly reference a section of s. 736 and not ch. 737, F.S.

Section 31. This section amends subsection (2) of s. 732.513, F.S., relating to devises to trustee.

Section 32. This section amends s. 732.603, F.S., substantially rewording s. 732.603, F.S., relating to antilapse; deceased devisee; class gifts.

Section 33. This section amends s. 732.604, F.S., concerning a failure of testamentary provision.

Section 34. This section amends s. 732.611, F.S., regarding devises to multigeneration classes to be per stirpes.

Section 35. This section amends subsection (1) of s. 733.212, F.S., regarding a notice of administration.

Section 36. This section amends subsection (1) of s. 733.602, F.S., to correctly reference a ch. 736 and not ch. 737, F.S.

Section 37. This section amends subsection (4) of s. 733.805, F.S., to correctly reference a section of s. 736 and not ch. 737, F.S.

Section 38. This section amends paragraph (j) of subsection (1) of s. 733.817, F.S., correcting a reference to s. 731.201, F.S.

Section 39. 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 40. This section amends subsection (4) of s. 738.1041, F.S., to correctly reference a section of s. 736 and not ch. 737, F.S.

Section 41. This section amends subsection (5) of s. 738.202, F.S., to correctly reference a section of s. 736 and not ch. 737, F.S.

Section 42. This section amends paragraph (a) of subsection (12) of s. 739.102, F.S., to correctly reference a section of s. 736 and not ch. 737, F.S.

Section 43. This section amends paragraphs (b) and (f) of subsection (6) of s. 744.331, F.S., relating to orders determining incapacity.

Section 44. This section amends paragraph (a) of subsection (6) of s. 744.361, F.S., correcting a reference to ch. 518, F.S.

Section 45. This section amends subsections (11) and (18) of s. 744.441, F.S., relating to powers of a guardian upon court approval.

Section 46. This section creates s. 744.462, F.S., concerning determinations regarding alternatives to guardianship.

Section 47. 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 48. 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 settlers 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 section 736.0505(1), 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.

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 pertains to personal jurisdiction by Florida courts over the trustee, beneficiaries, and recipients of trust distributions. Specifically, section 736.0202(2) 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[443]. 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."[444]

Even assuming, for the sake of argument, that the provisions of the Florida Long Arm Statute have been satisfied,[445] federal due process requirements cannot be minimized. The U.S. Supreme

---

[443] The report points to 736.602, however section 736.0602 pertains to revocation or amendment of revocable trusts, therefore it would seem that the reference to 736.602 is merely a scrivener's error and it will be considered as such.
[444] Committee's Scrivener's Summary, page 12.
[445] S. 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

Court has "noted 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."[446]

Nevertheless, the U.S. Supreme Court maintains that the "constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum."[447] 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."[448] 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."[449]

"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

---

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 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.

[446] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985)(citations omitted).
[447] *Rudzewicz*, 471 U.S. 474-75 (citations omitted).
[448] *Id.*
[449] *Id.*

proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State."[450]

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.'"[451] 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."[452] 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, 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:

Section 736.0403(2)(b) provides: "The testamentary aspects of a revocable trust, executed by a settler who is a domiciliary of this state at the time of execution, are invalid unless the trust instrument is executed by the settler 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:[453]

> 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) 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

---

[450] *Rudzewicz*, 471 U.S. at 475-76. (emphasis in original)(citations omitted).
[451] *Georgia Insurers Insolvency Pool v. Brewer*, 602 So. 2d 1264, 1268 (Fla. 1992)(citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).
[452] *Id.* (citing *Rudzewicz*, 471 U.S. 462 (1985).
[453] Committee Report, pages 19-20.

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 conflicts of laws problem.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Part I, section 736.0103(11) defines a person as "an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity." However, "person" is currently defined in s. 1.01(3), F.S. as "[t]he word 'person' includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations." It is unclear why the Trust Code needs a different definition of "person."

Current law provides that a trust is presumed unproductive when its value falls below $50,000. Upon a finding that a trust is unproductive, a court may terminate the trust and distribute the remaining assets to the current beneficiaries. The concept of an unproductive trust balances the cost of administration against the frustration of the grantor's intent. It is unclear why this bill doubles the presumptive value of an unproductive trust from $50,000 to $100,000 (see lines 902-908).

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

n/a

1 A bill to be entitled
2 An act relating to the Florida Trust Code; creating parts
3 I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, and XIII
4 of chapter 736, F.S.; providing a short title; providing
5 general provisions and definitions; providing for judicial
6 proceedings; providing for representations; providing for
7 creation, validity, modification, and termination of
8 trusts; providing for creditors' claims; providing for
9 spendthrift, discretionary, and revocable trusts;
10 providing for the office of trustee; providing for powers
11 and duties of the trustee; providing for trust
12 investments; providing for liability of trustee and rights
13 of persons dealing with trustee; providing for rules of
14 construction; providing for charitable trusts; providing
15 miscellaneous provisions; creating s. 689.175, F.S.;
16 abolishing the worthier title doctrine; providing
17 construction of certain instrument language; amending s.
18 731.103, F.S.; correcting a cross-reference; providing
19 construction relating to establishment of death by certain
20 evidence under certain circumstances; creating s.
21 731.1035, F.S.; providing for application of rules of
22 evidence in civil actions to certain proceedings; amending
23 s. 731.201, F.S.; revising definitions; conforming terms
24 and correcting cross-references; amending s. 731.303,
25 F.S.; specifying nonapplication of certain orders relating
26 to powers of revocation and powers of appointment;
27 revising provisions relating to representation by a holder
28 of a power of appointment; amending s. 732.513, F.S.;

29 deleting a ground protecting a devise's validity; amending
30 s. 732.603, F.S.; revising provisions relating to
31 antilapse, deceased devisees, and class gifts; amending s.
32 744.331, F.S.; revising provisions relating to orders
33 determining incapacity; amending s. 744.441, F.S.;
34 revising authority of certain guardians to prosecute or
35 defend claims or proceedings for certain purposes;
36 specifying duties of a court; creating s. 744.462, F.S.;
37 providing requirements for judicial determinations
38 relating to alternatives to guardianship; providing duties
39 of a court; amending ss. 497.458, 607.0802, 617.0802,
40 660.25, 660.46, 660.418, 689.071, 689.075, 709.08, 721.08,
41 721.53, 732.2075, 732.604, 732.611, 733.212, 733.602,
42 733.805, 733.817, 738.104, 738.1041, 738.202, 739.102, and
43 744.361, F.S., to conform terms and correct cross-
44 references; repealing ss. 737.101, 737.105, 737.106,
45 737.111, 737.115, and 737.116, constituting part I of ch.
46 737, F.S., relating to trust registration; repealing ss.
47 737.201, 737.202, 737.203, 737.2035, 737.204, 737.2041,
48 737.205, 737.206, 737.2065, 737.207, 737.208, and 737.209,
49 constituting part II of ch. 737, F.S., relating to
50 jurisdiction of courts; repealing ss. 737.301, 737.302,
51 737.303, 737.3035, 737.304, 737.305, 737.3053, 737.3054,
52 737.3055, 737.306, 737.3061, 737.307, 737.308, and
53 737.309, constituting part III of ch. 737, F.S., relating
54 to duties and liabilities of trustees; repealing ss.
55 737.401, 737.402, 737.4025, 737.403, 737.4031, 737.4032,
56 737.4033, 737.404, 737.405, and 737.406, constituting part

57 IV of ch. 737, F.S., relating to powers of trustees;
58 repealing ss. 737.501, 737.502, 737.503, 737.504, 737.505,
59 737.506, 737.507, 737.508, 737.509, 737.510, 737.511, and
60 737.512, constituting part V of ch. 737, F.S., relating to
61 charitable trusts; repealing ss. 737.6035, 737.621,
62 737.622, 737.623, 737.624, 737.625, 737.626, and 737.627,
63 consisting of part VI of ch. 737, F.S., relating to rules
64 of construction of trust administration; providing an
65 effective date.
66
67 Be It Enacted by the Legislature of the State of Florida:
68
69 Section 1. Part I of chapter 736, Florida Statutes,
70 consisting of sections 736.0101, 736.0102, 736.0103, 736.0104,
71 736.0105, 736.0106, 736.0107, 736.0108, 736.0109, 736.0110,
72 736.0111, and 736.0112, is created to read:
73
74 PART I
75 GENERAL PROVISIONS AND DEFINITIONS
76
77 736.0101 Short title.--This chapter may be cited as the
78 "Florida Trust Code" and for purposes of this chapter is
79 referred to as the "code."
80 736.0102 Scope.--This code applies to express trusts,
81 charitable or noncharitable, and trusts created pursuant to a
82 law, judgment, or decree that requires the trust to be
83 administered in the manner of an express trust. This code does
84 not apply to constructive or resulting trusts; conservatorships;

85 custodial arrangements pursuant to the Florida Uniform Transfers
86 to Minors Act; business trusts providing for certificates to be
87 issued to beneficiaries; common trust funds; land trusts under
88 s. 689.05; trusts created by the form of the account or by the
89 deposit agreement at a financial institution; voting trusts;
90 security arrangements; liquidation trusts; trusts for the
91 primary purpose of paying debts, dividends, interest, salaries,
92 wages, profits, pensions, or employee benefits of any kind; and
93 any arrangement under which a person is nominee or escrowee for
94 another.
95 736.0103 Definitions.--Unless the context otherwise
96 requires, in this code:
97 (1) "Action," with respect to an act of a trustee,
98 includes a failure to act.
99 (2) "Ascertainable standard" means a standard relating to
100 an individual's health, education, support, or maintenance
101 within the meaning of s. 2041(b)(1)(A) or s. 2514(c)(1) of the
102 Internal Revenue Code of 1986, as amended.
103 (3) "Beneficiary" means a person who:
104 (a) Has a present or future beneficial interest in a
105 trust, vested or contingent; or
106 (b) Holds a power of appointment over trust property in a
107 capacity other than that of trustee.
108 (4) "Charitable trust" means a trust, or portion of a
109 trust, created for a charitable purpose as described in s.
110 736.0405(1).

111 (5) "Environmental law" means a federal, state, or local
112 law, rule, regulation, or ordinance that relates to protection
113 of the environment or human health.
114 (6) "General power of appointment" means a power of
115 appointment exercisable in favor of the holder of the power, the
116 power holder's creditors, the power holder's estate, or the
117 creditors of the power holder's estate.
118 (7) "Guardian of the person" means a person appointed by
119 the court to make decisions regarding the support, care,
120 education, health, and welfare of a minor or an incapacitated
121 adult. The term does not include a guardian ad litem.
122 (8) "Guardian of the property" means a person appointed by
123 the court to administer the estate of a minor or incapacitated
124 adult.
125 (9) "Interests of the beneficiaries" means the beneficial
126 interests provided in the terms of the trust.
127 (10) "Jurisdiction" with respect to a geographic area,
128 includes a state or country.
129 (11) "Person" means an individual; corporation; business
130 trust; estate; trust; partnership; limited liability company;
131 association; joint venture; government; governmental
132 subdivision, agency, or instrumentality; public corporation; or
133 any other legal or commercial entity.
134 (12) "Power of withdrawal" means a presently exercisable
135 general power of appointment other than a power:
136 (a) Exercisable by a trustee and limited by an
137 ascertainable standard; or

138 (b) Exercisable by another person only upon consent of the
139 trustee or a person holding an adverse interest.
140 (13) "Property" means anything that may be the subject of
141 ownership, real or personal, legal or equitable, or any interest
142 therein.
143 (14) "Qualified beneficiary" means a living beneficiary
144 who, on the date the beneficiary's qualification is determined:
145 (a) Is a distributee or permissible distributee of trust
146 income or principal;
147 (b) Would be a distributee or permissible distributee of
148 trust income or principal if the interests of the distributees
149 described in paragraph (a) terminated on that date without
150 causing the trust to terminate; or
151 (c) Would be a distributee or permissible distributee of
152 trust income or principal if the trust terminated in accordance
153 with its terms on that date.
154 (15) "Revocable," as applied to a trust, means revocable
155 by the settlor without the consent of the trustee or a person
156 holding an adverse interest.
157 (16) "Settlor" means a person, including a testator, who
158 creates or contributes property to a trust. If more than one
159 person creates or contributes property to a trust, each person
160 is a settlor of the portion of the trust property attributable
161 to that person's contribution except to the extent another
162 person has the power to revoke or withdraw that portion.
163 (17) "Spendthrift provision" means a term of a trust that
164 restrains both voluntary and involuntary transfer of a
165 beneficiary's interest.

166 (18) "State" means any state of the United States and
167 includes the District of Columbia, the Commonwealth of Puerto
168 Rico, and any territory or possession subject to the legislative
169 authority of the United States.
170 (19) "Terms of a trust" means the manifestation of the
171 settlor's intent regarding a trust's provisions as expressed in
172 the trust instrument or as may be established by other evidence
173 that would be admissible in a judicial proceeding.
174 (20) "Trust instrument" means an instrument executed by a
175 settlor that contains terms of the trust, including any
176 amendments to the trust.
177 (21) "Trustee" means the original trustee and includes any
178 additional trustee, any successor trustee, and any cotrustee.
179 736.0104 Knowledge.--
180 (1) Subject to subsection (2), a person has knowledge of a
181 fact if the person:
182 (a) Has actual knowledge of the fact;
183 (b) Has received a notice or notification of the fact; or
184 (c) Has reason to know the fact from all the other facts
185 and circumstances known to the person at the time in question.
186 (2) An organization that conducts activities through
187 employees has notice or knowledge of a fact involving a trust
188 only from the time the information was received by an employee
189 having responsibility to act on matters involving the trust, or
190 would have been brought to the employee's attention if the
191 organization had exercised reasonable diligence. An organization
192 exercises reasonable diligence if the organization maintains
193 reasonable routines for communicating significant information to

194 the employee having responsibility to act on matters involving
195 the trust and there is reasonable compliance with the routines.
196 Reasonable diligence does not require an employee of the
197 organization to communicate information unless the communication
198 is part of the individual's regular duties or the individual
199 knows a matter involving the trust would be materially affected
200 by the information.
201 736.0105 Default and mandatory rules.--
202 (1) Except as otherwise provided in the terms of the
203 trust, this code governs the duties and powers of a trustee,
204 relations among trustees, and the rights and interests of a
205 beneficiary.
206 (2) The terms of a trust prevail over any provision of
207 this code except:
208 (a) The requirements for creating a trust.
209 (b) The duty of the trustee to act in good faith and in
210 accordance with the terms and purposes of the trust and the
211 interests of the beneficiaries.
212 (c) The requirement that a trust and its terms be for the
213 benefit of the trust's beneficiaries, and that the trust have a
214 purpose that is lawful, not contrary to public policy, and
215 possible to achieve.
216 (d) The periods of limitation for commencing a judicial
217 proceeding.
218 (e) The power of the court to take such action and
219 exercise such jurisdiction as may be necessary in the interests
220 of justice.

221 (f) The requirements under s. 736.0108(1) for the
222 designation of a principal place of administration of the trust.
223 (g) The jurisdiction and venue provisions in ss. 736.0202,
224 736.0203, and 736.0204.
225 (h) The restrictions on the designation of representative
226 under s. 736.0306.
227 (i) The formalities required under s. 736.0403(2) for the
228 execution of a trust.
229 (j) The power of the court to modify or terminate a trust
230 under ss. 736.0410-736.04115, except as provided in s.
231 736.04115(3)(b), and under ss. 736.0413, 736.0415, and 736.0416.
232 (k) The ability to modify a trust under s. 736.0412,
233 except as provided in s. 736.0412(4)(b).
234 (l) The effect of a spendthrift provision and the rights
235 of certain creditors and assignees to reach a trust as provided
236 in part V.
237 (m) The trustee's duty under s. 736.05053 to pay expenses
238 and obligations of the settlor's estate.
239 (n) The trustee's duty under s. 736.05055 to file a notice
240 of trust at the settlor's death.
241 (o) The right of a trustee under s. 736.0701 to decline a
242 trusteeship and the right of a trustee under s. 736.0705 to
243 resign a trusteeship.
244 (p) The power of the court under s. 736.0702 to require,
245 dispense with, modify, or terminate a bond.
246 (q) The power of the court under s. 736.0708(2) to adjust
247 a trustee's compensation specified in the terms of the trust
248 that is unreasonably low or high.

249 (r) The duty under s. 736.0813(1)(a) and (b) to notify
250 qualified beneficiaries of an irrevocable trust of the existence
251 of the trust, of the identity of the trustee, and of their
252 rights to trust accountings.
253 (s) The duty under s. 736.0813(1)(c) and (d) to provide a
254 complete copy of the trust instrument and to account to
255 qualified beneficiaries.
256 (t) The duty under s. 736.0813(1)(e) to respond to the
257 request of a qualified beneficiary of an irrevocable trust for
258 relevant information about the assets and liabilities of the
259 trust and the particulars relating to trust administration.
260 (u) The effect of an exculpatory term under s. 736.1011.
261 (v) The rights under ss. 736.1013-736.1017 of a person
262 other than a trustee or beneficiary.
263 (w) The effect of a penalty clause for contesting a trust
264 under s. 736.1108.
265 736.0106 Common law of trusts; principles of equity.--The
266 common law of trusts and principles of equity supplement this
267 code, except to the extent modified by this code or another law
268 of this state.
269 736.0107 Governing law.--The meaning and effect of the
270 terms of a trust are determined by:
271 (1) The law of the jurisdiction designated in the terms
272 unless the designation of that jurisdiction's law is contrary to
273 a strong public policy of the jurisdiction having the most
274 significant relationship to the matter at issue; or

275 (2) The law of the jurisdiction having the most
276 significant relationship to the matter at issue in the absence
277 of a controlling designation in the terms of the trust.
278 736.0108 Principal place of administration.--
279 (1) Terms of a trust designating the principal place of
280 administration of the trust are valid only if there is a
281 sufficient connection with the designated jurisdiction. Without
282 precluding other means for establishing a sufficient connection,
283 terms of a trust designating the principal place of
284 administration are valid and controlling if:
285 (a) A trustee's principal place of business is located in
286 or a trustee is a resident of the designated jurisdiction; or
287 (b) All or part of the administration occurs in the
288 designated jurisdiction.
289 (2) Unless otherwise validly designated in the trust
290 instrument, the principal place of administration of a trust is
291 the trustee's usual place of business where the records
292 pertaining to the trust are kept or, if the trustee has no place
293 of business, the trustee's residence. In the case of cotrustees,
294 the principal place of administration is:
295 (a) The usual place of business of the corporate trustee,
296 if there is only one corporate cotrustee;
297 (b) The usual place of business or residence of the
298 individual trustee who is a professional fiduciary, if there is
299 only one such person and no corporate cotrustee; or otherwise
300 (c) The usual place of business or residence of any of the
301 cotrustees as agreed on by the cotrustees.

302 (3) Notwithstanding any other provision of this section,
303 the principal place of administration of a trust, for which a
304 bank, association, or trust company organized under the laws of
305 this state or bank or savings association organized under the
306 laws of the United States with its main office in this state has
307 been appointed trustee, shall not be moved or otherwise affected
308 solely because the trustee engaged in an interstate merger
309 transaction with an out-of-state bank pursuant to s. 658.2953 in
310 which the out-of-state bank is the resulting bank.
311 (4) A trustee is under a continuing duty to administer the
312 trust at a place appropriate to its purposes, its
313 administration, and the interests of the beneficiaries.
314 (5) Without precluding the right of the court to order,
315 approve, or disapprove a transfer, the trustee, in furtherance
316 of the duty prescribed by subsection (4), may transfer the
317 trust's principal place of administration to another state or to
318 a jurisdiction outside of the United States.
319 (6) The trustee shall notify the qualified beneficiaries
320 of a proposed transfer of a trust's principal place of
321 administration not less than 60 days before initiating the
322 transfer. The notice of proposed transfer must include:
323 (a) The name of the jurisdiction to which the principal
324 place of administration is to be transferred.
325 (b) The address and telephone number at the new location
326 at which the trustee can be contacted.
327 (c) An explanation of the reasons for the proposed
328 transfer.

329 (d) The date on which the proposed transfer is anticipated
330 to occur.
331 (e) The date, not less than 60 days after the notice is
332 provided, by which the qualified beneficiary must notify the
333 trustee of an objection to the proposed transfer.
334 (7) The authority of a trustee to act under this section
335 without court approval to transfer a trust's principal place of
336 administration is suspended if a qualified beneficiary files a
337 lawsuit objecting to the proposed transfer on or before the date
338 specified in the notice. The suspension is effective until the
339 lawsuit is dismissed or withdrawn.
340 (8) In connection with a transfer of the trust's principal
341 place of administration, the trustee may transfer any of the
342 trust property to a successor trustee designated in the terms of
343 the trust or appointed pursuant to s. 736.0704.
344 736.0109 Methods and waiver of notice.--
345 (1) Notice to a person under this code or the sending of a
346 document to a person under this code must be accomplished in a
347 manner reasonably suitable under the circumstances and likely to
348 result in receipt of the notice or document. Permissible methods
349 of notice or for sending a document include first-class mail,
350 personal delivery, delivery to the person's last known place of
351 residence or place of business, or a properly directed facsimile
352 or other electronic message.
353 (2) Notice otherwise required under this code or a
354 document otherwise required to be sent under this code need not
355 be provided to a person whose identity or location is unknown to
356 and not reasonably ascertainable by the trustee.

357 (3) Notice under this code or the sending of a document
358 under this code may be waived by the person to be notified or to
359 whom the document is to be sent.
360 (4) Notice of a judicial proceeding must be given as
361 provided in the Florida Rules of Civil Procedure.
362 736.0110 Others treated as qualified beneficiaries.--
363 (1) A charitable organization expressly designated to
364 receive distributions under the terms of a charitable trust has
365 the rights of a qualified beneficiary under this code if the
366 charitable organization, on the date the charitable
367 organization's qualification is being determined:
368 (a) Is a distributee or permissible distributee of trust
369 income or principal;
370 (b) Would be a distributee or permissible distributee of
371 trust income or principal on termination of the interests of
372 other distributees or permissible distributees then receiving or
373 eligible to receive distributions; or
374 (c) Would be a distributee or permissible distributee of
375 trust income or principal if the trust terminated on that date.
376 (2) A person appointed to enforce a trust created for the
377 care of an animal or another noncharitable purpose as provided
378 in s. 736.0408 or s. 736.0409 has the rights of a qualified
379 beneficiary under this code.
380 (3) The Attorney General may assert the rights of a
381 qualified beneficiary with respect to a charitable trust having
382 its principal place of administration in this state.
383 736.0111 Nonjudicial settlement agreements.--

384 (1) For purposes of this section, the term "interested
385 persons" means persons whose interest would be affected by a
386 settlement agreement.
387 (2) Except as otherwise provided in subsection (3),
388 interested persons may enter into a binding nonjudicial
389 settlement agreement with respect to any matter involving a
390 trust.
391 (3) A nonjudicial settlement agreement among the trustee
392 and trust beneficiaries is valid only to the extent the terms
393 and conditions could be properly approved by the court. A
394 nonjudicial settlement may not be used to produce a result not
395 authorized by other provisions of this code, including, but not
396 limited to, terminating or modifying a trust in an impermissible
397 manner.
398 (4) Matters that may be resolved by a nonjudicial
399 settlement agreement include:
400 (a) The interpretation or construction of the terms of the
401 trust.
402 (b) The approval of a trustee's report or accounting.
403 (c) The direction to a trustee to refrain from performing
404 a particular act or the grant to a trustee of any necessary or
405 desirable power.
406 (d) The resignation or appointment of a trustee and the
407 determination of a trustee's compensation.
408 (e) The transfer of a trust's principal place of
409 administration.
410 (f) The liability of a trustee for an action relating to
411 the trust.

412 (5) Any interested person may request the court to approve
413 or disapprove a nonjudicial settlement agreement.
414 736.0112 Qualification of foreign trustee.--Unless
415 otherwise doing business in this state, local qualification by a
416 foreign trustee is not required for the trustee to receive
417 distribution from a local estate. Nothing in this chapter shall
418 affect the provisions of s. 660.41.
419 Section 2. Part II of chapter 736, Florida Statutes,
420 consisting of sections 736.0201, 736.0202, 736.0203, 736.0204,
421 736.0205, 736.0206, and 736.0207, is created to read:
422
423 PART II
424 JUDICIAL PROCEEDINGS
425
426 736.0201 Role of court in trust proceedings.--
427 (1) Except as provided in subsection (5) and s. 736.0206,
428 proceedings concerning trusts shall be commenced by filing a
429 complaint and shall be governed by the Florida Rules of Civil
430 Procedure.
431 (2) The court may intervene in the administration of a
432 trust to the extent the court's jurisdiction is invoked by an
433 interested person or as provided by law.
434 (3) A trust is not subject to continuing judicial
435 supervision unless ordered by the court.
436 (4) A judicial proceeding involving a trust may relate to
437 the validity, administration, or distribution of a trust,
438 including proceedings to:
439 (a) Determine the validity of all or part of a trust;

440 (b) Appoint or remove a trustee;
441 (c) Review trustees' fees;
442 (d) Review and settle interim or final accounts;
443 (e) Ascertain beneficiaries; determine any question
444 arising in the administration or distribution of any trust,
445 including questions of construction of trust instruments;
446 instruct trustees; and determine the existence or nonexistence
447 of any immunity, power, privilege, duty, or right;
448 (f) Obtain a declaration of rights; or
449 (g) Determine any other matters involving trustees and
450 beneficiaries.
451 (5) A proceeding for the construction of a testamentary
452 trust may be filed in the probate proceeding for the testator's
453 estate. The proceeding shall be governed by the Florida Probate
454 Rules.
455 736.0202 Jurisdiction over trustee and beneficiary.--
456 (1) By accepting the trusteeship of a trust having its
457 principal place of administration in this state or by moving the
458 principal place of administration to this state, the trustee
459 submits personally to the jurisdiction of the courts of this
460 state regarding any matter involving the trust.
461 (2) With respect to their interests in the trust, the
462 beneficiaries of a trust having its principal place of
463 administration in this state are subject to the jurisdiction of
464 the courts of this state regarding any matter involving the
465 trust. By accepting a distribution from such a trust, the
466 recipient submits personally to the jurisdiction of the courts
467 of this state regarding any matter involving the distribution.

468 (3) This section does not preclude other methods of
469 obtaining jurisdiction over a trustee, beneficiary, or other
470 person receiving property from the trust.
471 736.0203 Subject-matter jurisdiction.--The circuit court
472 has original jurisdiction in this state of all proceedings
473 arising under this code.
474 736.0204 Venue.--Venue for actions and proceedings
475 concerning trusts, including those under s. 736.0201, may be
476 laid in:
477 (1) Any county where the venue is proper under chapter 47;
478 (2) Any county where the beneficiary suing or being sued
479 resides or has its principal place of business; or
480 (3) The county where the trust has its principal place of
481 administration.
482 736.0205 Trust proceedings; dismissal of matters relating
483 to foreign trusts.--Over the objection of a party, the court
484 shall not entertain proceedings under s. 736.0201 for a trust
485 registered, or having its principal place of administration, in
486 another state unless all interested parties could not be bound
487 by litigation in the courts of the state where the trust is
488 registered or has its principal place of administration. The
489 court may condition a stay or dismissal of a proceeding under
490 this section on the consent of any party to jurisdiction of the
491 state where the trust is registered or has its principal place
492 of business, or the court may grant a continuance or enter any
493 other appropriate order.
494 736.0206 Proceedings for review of employment of agents
495 and review of compensation of trustee and employees of trust.--

496 (1) After notice to all interested persons, the court may
497 review the propriety of the employment by a trustee of any
498 person, including any attorney, auditor, investment adviser, or
499 other specialized agent or assistant, and the reasonableness of
500 any compensation paid to that person or to the trustee.
501 (2) If the settlor's estate is being probated, and the
502 settlor's trust or the trustee of the settlor's trust is a
503 beneficiary under the settlor's will, the trustee, any person
504 employed by the trustee, or any interested person may have the
505 propriety of employment and the reasonableness of the
506 compensation of the trustee or any person employed by the
507 trustee determined in the probate proceeding.
508 (3) The burden of proof of the propriety of the employment
509 and the reasonableness of the compensation shall be on the
510 trustee and the person employed by the trustee. Any person who
511 is determined to have received excessive compensation from a
512 trust for services rendered may be ordered to make appropriate
513 refunds.
514 (4) Court proceedings to determine reasonable compensation
515 of a trustee or any person employed by a trustee, if required,
516 are a part of the trust administration process. The costs,
517 including attorney's fees, of the person assuming the burden of
518 proof of propriety of the employment and reasonableness of the
519 compensation shall be determined by the court and paid from the
520 assets of the trust unless the court finds the compensation paid
521 or requested to be substantially unreasonable. The court shall
522 direct from which part of the trust assets the compensation
523 shall be paid.

524 (5) The court may determine reasonable compensation for a
525 trustee or any person employed by a trustee without receiving
526 expert testimony. Any party may offer expert testimony after
527 notice to interested persons. If expert testimony is offered, a
528 reasonable expert witness fee shall be awarded by the court and
529 paid from the assets of the trust. The court shall direct from
530 which part of the trust assets the fee shall be paid.
531 (6) Persons given notice as provided in this section shall
532 be bound by all orders entered on the complaint.
533 (7) In a proceeding pursuant to subsection (2), the
534 petitioner may serve formal notice as provided in the Florida
535 Probate Rules, and such notice shall be sufficient for the court
536 to acquire jurisdiction over the person receiving the notice to
537 the extent of the person's interest in the trust.
538 736.0207 Trust contests.--An action to contest the
539 validity of all or part of a trust may not be commenced until
540 the trust becomes irrevocable, except this section does not
541 prohibit such action by the guardian of the property of an
542 incapacitated settlor.
543 Section 3. Part III of chapter 736, Florida Statutes,
544 consisting of sections 736.0301, 736.0302, 736.0303, 736.0304,
545 736.0305, and 736.0306, is created to read:
546
547 PART III
548 REPRESENTATION
549
550 736.0301 Representation; basic effect.--

551 (1) Notice, information, accountings, or reports given to
552 a person who may represent and bind another person under this
553 part may serve as a substitute for and have the same effect as
554 notice, information, accountings, or reports given directly to
555 the other person.
556 (2) Actions taken by a person who represents the interests
557 of another person under this part are binding on the person
558 whose interests are represented to the same extent as if the
559 actions had been taken by the person whose interests are
560 represented.
561 (3) Except as otherwise provided in s. 736.0602, a person
562 under this part who represents a settlor lacking capacity may
563 receive notice and give a binding consent on the settlor's
564 behalf.
565 (4) A trustee is not liable for giving notice,
566 information, accountings, or reports to a beneficiary who is
567 represented by another person under this part and nothing in
568 this part prohibits the trustee from giving notice, information,
569 accountings, or reports to the person represented.
570 736.0302 Representation by holder of power of
571 appointment.--
572 (1) The holder of a power of appointment may represent and
573 bind persons whose interests, as permissible appointees, takers
574 in default, or otherwise, are subject to the power.
575 (2) Subsection (1) does not apply to:
576 (a) Any matter determined by the court to involve fraud or
577 bad faith by the trustee;
578 (b) A power of a trustee to distribute trust property; or

579 (c) A power of appointment held by a person while the
580 person is the sole trustee.
581 736.0303 Representation by fiduciaries and parents.--To
582 the extent there is no conflict of interest between the
583 representative and the person represented or among those being
584 represented with respect to a particular question or dispute:
585 (1) A guardian of the property may represent and bind the
586 estate that the guardian of the property controls.
587 (2) An agent having authority to act with respect to the
588 particular question or dispute may represent and bind the
589 principal.
590 (3) A trustee may represent and bind the beneficiaries of
591 the trust.
592 (4) A personal representative of a decedent's estate may
593 represent and bind persons interested in the estate.
594 (5) A parent may represent and bind the parent's unborn
595 child, or the parent's minor child if a guardian of the property
596 for the minor child has not been appointed.
597 736.0304 Representation by person having substantially
598 identical interest.--Unless otherwise represented, a minor,
599 incapacitated, or unborn individual, or a person whose identity
600 or location is unknown and not reasonably ascertainable, may be
601 represented by and bound by another person having a
602 substantially identical interest with respect to the particular
603 question or dispute, but only to the extent there is no conflict
604 of interest between the representative and the person
605 represented.
606 736.0305 Appointment of representative.--

607 (1) If the court determines that an interest is not
608 represented under this part, or that the otherwise available
609 representation might be inadequate, the court may appoint a
610 representative to receive notice, give consent, and otherwise
611 represent, bind, and act on behalf of a minor, incapacitated, or
612 unborn individual, or a person whose identity or location is
613 unknown. If not precluded by a conflict of interest, a
614 representative may be appointed to represent several persons or
615 interests.
616 (2) A representative may act on behalf of the individual
617 represented with respect to any matter arising under this code,
618 whether or not a judicial proceeding concerning the trust is
619 pending.
620 (3) In making decisions, a representative may consider
621 general benefits accruing to the living members of the
622 represented individual's family.
623 736.0306 Designated representative.--
624 (1) If authorized in the trust instrument, one or more
625 persons may be designated to represent and bind a beneficiary
626 and receive any notice, information, accounting, or report.
627 (2) Except as otherwise provided in this code, a person
628 designated, as provided in subsection (1) may not represent and
629 bind a beneficiary while that person is serving as trustee.
630 (3) Except as otherwise provided in this code, a person
631 designated, as provided in subsection (1) may not represent and
632 bind another beneficiary if the person designated also is a
633 beneficiary, unless:
634 (a) That person was named by the settlor; or

635 (b) That person is the beneficiary's spouse or a
636 grandparent or descendant of a grandparent of the beneficiary or
637 the beneficiary's spouse.
638 (4) No person designated, as provided in subsection (1) is
639 liable to the beneficiary whose interests are represented, or to
640 anyone claiming through that beneficiary, for any actions or
641 omissions to act made in good faith.
642 Section 4. Part IV of chapter 736, Florida Statutes,
643 consisting of sections 736.0401, 736.0402, 736.0403, 736.0404,
644 736.0405, 736.0406, 736.0407, 736.0408, 736.0409, 736.0410,
645 736.04113, 736.04115, 736.0412, 736.0413, 736.0414, 736.0415,
646 736.0416, and 736.0417, is created to read:
647
648 PART IV
649 CREATION, VALIDITY, MODIFICATION, AND TERMINATION
650
651 736.0401 Methods of creating trust.--A trust may be
652 created by:
653 (1) Transfer of property to another person as trustee
654 during the settlor's lifetime or by will or other disposition
655 taking effect on the settlor's death;
656 (2) Declaration by the owner of property that the owner
657 holds identifiable property as trustee; or
658 (3) Exercise of a power of appointment in favor of a
659 trustee.
660 736.0402 Requirements for creation.--
661 (1) A trust is created only if:
662 (a) The settlor has capacity to create a trust.

663 (b) The settlor indicates an intent to create the trust.
664 (c) The trust has a definite beneficiary or is:
665 1. A charitable trust;
666 2. A trust for the care of an animal, as provided in s.
667 736.0408; or
668 3. A trust for a noncharitable purpose, as provided in s.
669 736.0409.
670 (d) The trustee has duties to perform.
671 (e) The same person is not the sole trustee and sole
672 beneficiary.
673 (2) A beneficiary is definite if the beneficiary can be
674 ascertained now or in the future, subject to any applicable rule
675 against perpetuities.
676 (3) A power of a trustee to select a beneficiary from an
677 indefinite class is valid. If the power is not exercised within
678 a reasonable time, the power fails and the property subject to
679 the power passes to the persons who would have taken the
680 property had the power not been conferred.
681 736.0403 Trusts created in other jurisdictions;
682 formalities required for revocable trusts.--
683 (1) A trust not created by will is validly created if the
684 creation of the trust complies with the law of the jurisdiction
685 in which the trust instrument was executed or the law of the
686 jurisdiction in which, at the time of creation, the settlor was
687 domiciled.
688 (2) Notwithstanding subsection (1):

689 (a) No trust or confidence of or in any messuages, lands,
690 tenements, or hereditaments shall arise or result unless the
691 trust complies with the provisions of s. 689.05.
692 (b) The testamentary aspects of a revocable trust,
693 executed by a settlor who is a domiciliary of this state at the
694 time of execution, are invalid unless the trust instrument is
695 executed by the settlor with the formalities required for the
696 execution of a will in this state. For purposes of this
697 subsection, the term "testamentary aspects" means those
698 provisions of the trust instrument that dispose of the trust
699 property on or after the death of the settlor other than to the
700 settlor's estate.
701 (3) This section does not apply to trusts established as
702 part of an employee annuity described in s. 403 of the Internal
703 Revenue Code of 1986, as amended, an individual retirement
704 account as described in s. 408 of the Internal Revenue Code of
705 1986, as amended, a Keogh (HR-10) Plan, or a retirement or other
706 plan that is qualified under s. 401 of the Internal Revenue Code
707 of 1986, as amended.
708 (4) This section applies to trusts created on or after the
709 effective date of this code. Section 737.111, as in effect prior
710 to the effective date of this code, continues to apply to trusts
711 created before the effective date of this code.
712 736.0404 Trust purposes.--A trust may be created only to
713 the extent the purposes of the trust are lawful, not contrary to
714 public policy, and possible to achieve. A trust and its terms
715 must be for the benefit of its beneficiaries.
716 736.0405 Charitable purposes; enforcement.--

717 (1) A trust may be created for charitable purposes.
718 Charitable purposes include, but are not limited to, the relief
719 of poverty; the advancement of arts, sciences, education, or
720 religion; and the promotion of health, governmental, or
721 municipal purposes.
722 (2) If the terms of a charitable trust do not indicate a
723 particular charitable purpose or beneficiary, the court may
724 select one or more charitable purposes or beneficiaries. The
725 selection must be consistent with the settlor's intent to the
726 extent such intent can be ascertained.
727 (3) The settlor of a charitable trust, among others, has
728 standing to enforce the trust.
729 736.0406 Effect of fraud, duress, mistake, or undue
730 influence.--A trust is void if the creation of the trust is
731 procured by fraud, duress, mistake, or undue influence. Any part
732 of the trust is void if procured by such means, but the
733 remainder of the trust not procured by such means is valid if
734 the remainder is not invalid for other reasons.
735 736.0407 Evidence of oral trust.--Except as required by s.
736 736.0403 or a law other than this code, a trust need not be
737 evidenced by a trust instrument but the creation of an oral
738 trust and its terms may be established only by clear and
739 convincing evidence.
740 736.0408 Trust for care of an animal.--
741 (1) A trust may be created to provide for the care of an
742 animal alive during the settlor's lifetime. The trust terminates
743 on the death of the animal or, if the trust was created to

744 provide for the care of more than one animal alive during the
745 settlor's lifetime, on the death of the last surviving animal.
746 (2) A trust authorized by this section may be enforced by
747 a person appointed in the terms of the trust or, if no person is
748 appointed, by a person appointed by the court. A person having
749 an interest in the welfare of the animal may request the court
750 to appoint a person to enforce the trust or to remove a person
751 appointed.
752 (3) Property of a trust authorized by this section may be
753 applied only to the intended use of the property, except to the
754 extent the court determines that the value of the trust property
755 exceeds the amount required for the intended use. Except as
756 otherwise provided in the terms of the trust, property not
757 required for the intended use must be distributed to the
758 settlor, if then living, otherwise as part of the settlor's
759 estate.
760 736.0409 Noncharitable trust without ascertainable
761 beneficiary.--Except as otherwise provided in s. 736.0408 or by
762 another provision of law, the following rules apply:
763 (1) A trust may be created for a noncharitable purpose
764 without a definite or definitely ascertainable beneficiary or
765 for a noncharitable but otherwise valid purpose to be selected
766 by the trustee. The trust may not be enforced for more than 21
767 years.
768 (2) A trust authorized by this section may be enforced by
769 a person appointed in the terms of the trust or, if no person is
770 appointed, by a person appointed by the court.

771 (3) Property of a trust authorized by this section may be
772 applied only to the intended use of the property, except to the
773 extent the court determines that the value of the trust property
774 exceeds the amount required for the intended use. Except as
775 otherwise provided in the terms of the trust, property not
776 required for the intended use must be distributed to the
777 settlor, if then living, otherwise as part of the settlor's
778 estate.
779 736.0410 Modification or termination of trust; proceedings
780 for disapproval of nonjudicial acts.--
781 (1) In addition to the methods of termination prescribed
782 by ss. 736.04113-736.0414, a trust terminates to the extent the
783 trust expires or is revoked or is properly distributed pursuant
784 to the terms of the trust.
785 (2) A proceeding to disapprove a proposed modification or
786 termination under s. 736.0412 or a trust combination or division
787 under s. 736.0417 may be commenced by any beneficiary.
788 (3) A proceeding to disapprove a proposed termination
789 under s. 736.0414(1) may be commenced by any qualified
790 beneficiary.
791 736.04113 Judicial modification of irrevocable trust when
792 modification is not inconsistent with settlor's purpose.--
793 (1) Upon the application of a trustee of the trust or any
794 qualified beneficiary, a court at any time may modify the terms
795 of a trust that is not then revocable in the manner provided in
796 subsection (2), if:

797 (a) The purposes of the trust have been fulfilled or have
798 become illegal, impossible, wasteful, or impracticable to
799 fulfill;
800 (b) Because of circumstances not anticipated by the
801 settlor, compliance with the terms of the trust would defeat or
802 substantially impair the accomplishment of a material purpose of
803 the trust; or
804 (c) A material purpose of the trust no longer exists.
805 (2) In modifying a trust under this section, a court may:
806 (a) Amend or change the terms of the trust, including
807 terms governing distribution of the trust income or principal or
808 terms governing administration of the trust;
809 (b) Terminate the trust in whole or in part;
810 (c) Direct or permit the trustee to do acts that are not
811 authorized or that are prohibited by the terms of the trust; or
812 (d) Prohibit the trustee from performing acts that are
813 permitted or required by the terms of the trust.
814 (3) In exercising discretion to modify a trust under this
815 section:
816 (a) The court shall consider the terms and purposes of the
817 trust, the facts and circumstances surrounding the creation of
818 the trust, and extrinsic evidence relevant to the proposed
819 modification.
820 (b) The court shall consider spendthrift provisions as a
821 factor in making a decision but the court is not precluded from
822 modifying a trust because the trust contains spendthrift
823 provisions.

824 (4) The provisions of this section are in addition to, and
825 not in derogation of, rights under the common law to modify,
826 amend, terminate, or revoke trusts.
827 736.04115 Judicial modification of irrevocable trust when
828 modification is in best interest of beneficiaries.--
829 (1) Without regard to the reasons for modification
830 provided in s. 736.04113, if compliance with the terms of a
831 trust is not in the best interests of the beneficiaries, upon
832 the application of a trustee or any qualified beneficiary, a
833 court may at any time modify a trust that is not then revocable
834 as provided in s. 736.04113(2).
835 (2) In exercising discretion to modify a trust under this
836 section:
837 (a) The court shall exercise discretion in a manner that
838 conforms to the extent possible with the intent of the settlor,
839 taking into account the current circumstances and best interests
840 of the beneficiaries.
841 (b) The court shall consider the terms and purposes of the
842 trust, the facts and circumstances surrounding the creation of
843 the trust, and extrinsic evidence relevant to the proposed
844 modification.
845 (c) The court shall consider spendthrift provisions as a
846 factor in making a decision but the court is not precluded from
847 modifying a trust because the trust contains spendthrift
848 provisions.
849 (3) This section shall not apply to:
850 (a) Any trust created prior to January 1, 2001.
851 (b) Any trust created after December 31, 2000, if:

852 1. Under the terms of the trust, all beneficial interests
853 in the trust must vest or terminate within the period prescribed
854 by the rule against perpetuities in s. 689.225(2),
855 notwithstanding s. 689.225(2)(f).
856 2. The terms of the trust expressly prohibit judicial
857 modification.
858 (4) For purposes of subsection (3), a revocable trust
859 shall be treated as created when the right of revocation
860 terminates.
861 (5) The provisions of this section are in addition to, and
862 not in derogation of, rights under the common law to modify,
863 amend, terminate, or revoke trusts.
864 736.0412 Nonjudicial modification of irrevocable trust.--
865 (1) After the settlor's death, a trust may be modified at
866 any time as provided in s. 736.04113(2) upon the unanimous
867 agreement of the trustee and all qualified beneficiaries.
868 (2) Modification of a trust as authorized in this section
869 is not prohibited by a spendthrift clause or by a provision in
870 the trust instrument that prohibits amendment or revocation of
871 the trust.
872 (3) An agreement to modify a trust under this section is
873 binding on a beneficiary whose interest is represented by
874 another person under part III of this code.
875 (4) This section shall not apply to:
876 (a) Any trust created prior to January 1, 2001.
877 (b) Any trust created after December 31, 2000, if, under
878 the terms of the trust, all beneficial interests in the trust
879 must vest or terminate within the period prescribed by the rule

880 against perpetuities in s. 689.225(2), notwithstanding s.
881 689.225(2)(f), unless the terms of the trust expressly authorize
882 nonjudicial modification.
883 (c) Any trust for which a charitable deduction is allowed
884 or allowable under the Internal Revenue Code until the
885 termination of all charitable interests in the trust.
886 (5) For purposes of subsection (4), a revocable trust
887 shall be treated as created when the right of revocation
888 terminates.
889 (6) The provisions of this section are in addition to, and
890 not in derogation of, rights under the common law to modify,
891 amend, terminate, or revoke trusts.
892 736.0413 Cy pres.--
893 (1) If a particular charitable purpose becomes unlawful,
894 impracticable, impossible to achieve, or wasteful, the court may
895 apply the doctrine of cy pres to modify or terminate the trust
896 by directing that the trust property be applied or distributed,
897 in whole or in part, in a manner consistent with the settlor's
898 charitable purposes.
899 (2) A proceeding to modify or terminate a trust under this
900 section may be commenced by a settlor, a trustee, or any
901 qualified beneficiary.
902 736.0414 Modification or termination of uneconomic
903 trust.--
904 (1) After notice to the qualified beneficiaries, the
905 trustee of a trust consisting of trust property having a total
906 value less than $100,000 may terminate the trust if the trustee

907 concludes that the value of the trust property is insufficient
908 to justify the cost of administration.
909 (2) Upon application of a trustee or any qualified
910 beneficiary, the court may modify or terminate a trust or remove
911 the trustee and appoint a different trustee if the court
912 determines that the value of the trust property is insufficient
913 to justify the cost of administration.
914 (3) Upon termination of a trust under this section, the
915 trustee shall distribute the trust property in a manner
916 consistent with the purposes of the trust. The trustee may enter
917 into agreements or make such other provisions that the trustee
918 deems necessary or appropriate to protect the interests of the
919 beneficiaries and the trustee and to carry out the intent and
920 purposes of the trust.
921 (4) The existence of a spendthrift provision in the trust
922 does not make this section inapplicable unless the trust
923 instrument expressly provides that the trustee may not terminate
924 the trust pursuant to this section.
925 (5) This section does not apply to an easement for
926 conservation or preservation.
927 736.0415 Reformation to correct mistakes.--Upon
928 application of a settlor or any interested person, the court may
929 reform the terms of a trust, even if unambiguous, to conform the
930 terms to the settlor's intent if it is proved by clear and
931 convincing evidence that both the accomplishment of the
932 settlor's intent and the terms of the trust were affected by a
933 mistake of fact or law, whether in expression or inducement. In
934 determining the settlor's original intent, the court may

935 consider evidence relevant to the settlor's intent even though
936 the evidence contradicts an apparent plain meaning of the trust
937 instrument.
938 736.0416 Modification to achieve settlor's tax
939 objectives.--Upon application of any interested person, to
940 achieve the settlor's tax objectives the court may modify the
941 terms of a trust in a manner that is not contrary to the
942 settlor's probable intent. The court may provide that the
943 modification has retroactive effect.
944 736.0417 Combination and division of trusts.--
945 (1) After notice to the qualified beneficiaries, a trustee
946 may combine two or more trusts into a single trust or divide a
947 trust into two or more separate trusts, if the result does not
948 impair rights of any beneficiary or adversely affect achievement
949 of the purposes of the trusts or trust, respectively.
950 (2) Subject to the terms of the trust, the trustee may
951 take into consideration differences in federal tax attributes
952 and other pertinent factors in administering the trust property
953 of any separate account or trust, in making applicable tax
954 elections, and in making distributions. A separate trust created
955 by severance must be treated as a separate trust for all
956 purposes from the date on which the severance is effective. The
957 effective date of the severance may be retroactive to a date
958 before the date on which the trustee exercises such power.
959 Section 5. Part V of chapter 736, Florida Statutes,
960 consisting of sections 736.0501, 736.0502, 736.0503, 736.0504,
961 736.0505, 736.05053, 736.05055, 736.0506, and 736.0507, is
962 created to read:

963
964 PART V
965 CREDITORS' CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS
966
967 736.0501 Rights of beneficiary's creditor or assignee.--To
968 the extent a beneficiary's interest is not subject to a
969 spendthrift provision, the court may authorize a creditor or
970 assignee of the beneficiary to reach the beneficiary's interest
971 by attachment of present or future distributions to or for the
972 benefit of the beneficiary or by other means. The court may
973 limit the award to such relief as is appropriate under the
974 circumstances.
975 736.0502 Spendthrift provision.--
976 (1) A spendthrift provision is valid only if the provision
977 restrains both voluntary and involuntary transfer of a
978 beneficiary's interest. This subsection does not apply to any
979 trust in existence on the effective date of this code.
980 (2) A term of a trust providing that the interest of a
981 beneficiary is held subject to a spendthrift trust, or words of
982 similar import, is sufficient to restrain both voluntary and
983 involuntary transfer of the beneficiary's interest.
984 (3) A beneficiary may not transfer an interest in a trust
985 in violation of a valid spendthrift provision and, except as
986 otherwise provided in this part, a creditor or assignee of the
987 beneficiary may not reach the interest or a distribution by the
988 trustee before receipt of the interest or distribution by the
989 beneficiary.

990 (4) A valid spendthrift provision does not prevent the
991 appointment of interests through the exercise of a power of
992 appointment.
993 736.0503 Exceptions to spendthrift provision.--
994 (1) As used in this section, the term "child" includes any
995 person for whom an order or judgment for child support has been
996 entered in this or any other state.
997 (2) To the extent provided in subsection (3), a
998 spendthrift provision is unenforceable against:
999 (a) A beneficiary's child, spouse, or former spouse who
1000 has a judgment or court order against the beneficiary for
1001 support or maintenance.
1002 (b) A judgment creditor who has provided services for the
1003 protection of a beneficiary's interest in the trust.
1004 (c) A claim of this state or the United States to the
1005 extent a law of this state or a federal law so provides.
1006 (3) Except as otherwise provided in this subsection, a
1007 claimant against which a spendthrift provision may not be
1008 enforced may obtain from a court, or pursuant to the Uniform
1009 Interstate Family Support Act, an order attaching present or
1010 future distributions to or for the benefit of the beneficiary.
1011 The court may limit the award to such relief as is appropriate
1012 under the circumstances. Notwithstanding this subsection, the
1013 remedies provided in this subsection apply to a claim by a
1014 beneficiary's child, spouse, former spouse, or a judgment
1015 creditor described in paragraph (2)(a) or paragraph (2)(b) only
1016 as a last resort upon an initial showing that traditional
1017 methods of enforcing the claim are insufficient.

1018 736.0504 Discretionary trusts; effect of standard.--
1019 (1) Whether or not a trust contains a spendthrift
1020 provision, a creditor of a beneficiary may not compel a
1021 distribution that is subject to the trustee's discretion, even
1022 if:
1023 (a) The discretion is expressed in the form of a standard
1024 of distribution; or
1025 (b) The trustee has abused the discretion.
1026 (2) If the trustee's discretion to make distributions for
1027 the trustee's own benefit is limited by an ascertainable
1028 standard, a creditor may not reach or compel distribution of the
1029 beneficial interest except to the extent the interest would be
1030 subject to the creditor's claim were the beneficiary not acting
1031 as trustee.
1032 (3) This section does not limit the right of a beneficiary
1033 to maintain a judicial proceeding against a trustee for an abuse
1034 of discretion or failure to comply with a standard for
1035 distribution.
1036 736.0505 Creditors' claims against settlor.--
1037 (1) Whether or not the terms of a trust contain a
1038 spendthrift provision, the following rules apply:
1039 (a) During the lifetime of the settlor, the property of a
1040 revocable trust is subject to claims of the settlor's creditors.
1041 (b) With respect to an irrevocable trust, a creditor or
1042 assignee of the settlor may reach the maximum amount that can be
1043 distributed to or for the settlor's benefit. If a trust has more
1044 than one settlor, the amount the creditor or assignee of a
1045 particular settlor may reach may not exceed the settlor's

1046 interest in the portion of the trust attributable to that
1047 settlor's contribution.
1048 (2) For purposes of this section:
1049 (a) During the period the power may be exercised, the
1050 holder of a power of withdrawal is treated in the same manner as
1051 the settlor of a revocable trust to the extent of the property
1052 subject to the power.
1053 (b) Upon the lapse, release, or waiver of the power, the
1054 holder is treated as the settlor of the trust only to the extent
1055 the value of the property affected by the lapse, release, or
1056 waiver exceeds the greater of the amount specified in:
1057 1. Section 2041(b)(2) or s. 2514(e); or
1058 2. Section 2503(b),
1059
1060 of the Internal Revenue Code of 1986, as amended.
1061 736.05053 Trustee's duty to pay expenses and obligations
1062 of settlor's estate.--
1063 (1) A trustee of a trust described in s. 733.707(3) shall
1064 pay to the personal representative of a settlor's estate any
1065 amounts that the personal representative certifies in writing to
1066 the trustee are required to pay the expenses of the
1067 administration and obligations of the settlor's estate. Payments
1068 made by a trustee, unless otherwise provided in the trust
1069 instrument, must be charged as expenses of the trust without a
1070 contribution from anyone. The interests of all beneficiaries of
1071 such a trust are subject to the provisions of this subsection;
1072 however, the payments must be made from assets, property, or the
1073 proceeds of the assets or property, other than assets proscribed

1074 in s. 733.707(3), that are included in the settlor's gross
1075 estate for federal estate tax purposes.
1076 (2) Unless a settlor provides by will, or designates in a
1077 trust described in s. 733.707(3) funds or property passing under
1078 the trust to be used as designated, the expenses of the
1079 administration and obligations of the settlor's estate must be
1080 paid from the trust in the following order:
1081 (a) Property of the residue of the trust remaining after
1082 all distributions that are to be satisfied by reference to a
1083 specific property or type of property, fund, or sum.
1084 (b) Property that is not to be distributed from specified
1085 or identified property or a specified or identified item of
1086 property.
1087 (c) Property that is to be distributed from specified or
1088 identified property or a specified or identified item of
1089 property.
1090 (3) Trust distributions that are to be satisfied from
1091 specified or identified property must be classed as
1092 distributions to be satisfied from the general assets of the
1093 trust and not otherwise disposed of in the trust instrument on
1094 the failure or insufficiency of funds or property from which
1095 payment should be made, to the extent of the insufficiency.
1096 Trust distributions given for valuable consideration abate with
1097 other distributions of the same class only to the extent of the
1098 excess over the value of the consideration until all others of
1099 the same class are exhausted. Except as provided in this
1100 section, trust distributions abate equally and ratably and
1101 without preference or priority between real and personal

1102 property. When a specified or identified item of property that
1103 has been designated for distribution in the trust instrument or
1104 that is charged with a distribution is sold or taken by the
1105 trustee, other beneficiaries shall contribute according to their
1106 respective interests to the beneficiary whose property has been
1107 sold or taken. Before distribution, the trustee shall determine
1108 the amounts of the respective contributions and such amounts
1109 must be paid or withheld before distribution is made.
1110 (4) The trustee shall pay the expenses of trust
1111 administration, including compensation of trustees and attorneys
1112 of the trustees, before and in preference to the expenses of the
1113 administration and obligations of the settlor's estate.
1114 736.05055 Notice of trust.--
1115 (1) Upon the death of a settlor of a trust described in s.
1116 733.707(3), the trustee must file a notice of trust with the
1117 court of the county of the settlor's domicile and the court
1118 having jurisdiction of the settlor's estate.
1119 (2) The notice of trust must contain the name of the
1120 settlor, the settlor's date of death, the title of the trust, if
1121 any, the date of the trust, and the name and address of the
1122 trustee.
1123 (3) If the settlor's probate proceeding has been
1124 commenced, the clerk shall notify the trustee in writing of the
1125 date of the commencement of the probate proceeding and the file
1126 number.
1127 (4) The clerk shall file and index the notice of trust in
1128 the same manner as a caveat unless there exists a probate
1129 proceeding for the settlor's estate, in which case the notice of

1130 trust must be filed in the probate proceeding and the clerk
1131 shall send a copy to the personal representative.
1132 (5) The clerk shall send a copy of any caveat filed
1133 regarding the settlor to the trustee, and the notice of trust to
1134 any caveator, unless there is a probate proceeding pending and
1135 the personal representative and the trustee are the same.
1136 (6) Any proceeding affecting the expenses of the
1137 administration or obligations of the settlor's estate prior to
1138 the trustee filing a notice of trust are binding on the trustee.
1139 (7) The trustee's failure to file the notice of trust does
1140 not affect the trustee's obligation to pay expenses of
1141 administration and obligations of the settlor's estate as
1142 provided in s. 733.607(2).
1143 736.0506 Overdue distribution.--
1144 (1) As used in this section, the term "mandatory
1145 distribution" means a distribution of income or principal the
1146 trustee is required to make to a beneficiary under the terms of
1147 the trust, including a distribution on termination of the trust.
1148 The term does not include a distribution subject to the exercise
1149 of the trustee's discretion even if:
1150 (a) The discretion is expressed in the form of a standard
1151 of distribution; or
1152 (b) The terms of the trust authorizing a distribution
1153 couple language of discretion with language of direction.
1154 (2) A creditor or assignee of a beneficiary may reach a
1155 mandatory distribution of income or principal, including a
1156 distribution upon termination of the trust, if the trustee has
1157 not made the distribution to the beneficiary within a reasonable

1158 time after the designated distribution date, whether or not a
1159 trust contains a spendthrift provision.
1160 736.0507 Personal obligations of trustee.--Except to the
1161 extent of the trustee's interest in the trust other than as a
1162 trustee, trust property is not subject to personal obligations
1163 of the trustee, even if the trustee becomes insolvent or
1164 bankrupt.
1165 Section 6. Part VI of chapter 736, Florida Statutes,
1166 consisting of sections 736.0601, 736.0602, 736.0603, and
1167 736.0604, is created to read:
1168
1169 PART VI
1170 REVOCABLE TRUSTS
1171
1172 736.0601 Capacity of settlor of revocable trust.--The
1173 capacity required to create, amend, revoke, or add property to a
1174 revocable trust, or to direct the actions of the trustee of a
1175 revocable trust, is the same as that required to make a will.
1176 736.0602 Revocation or amendment of revocable trust.--
1177 (1) Unless the terms of a trust expressly provide that the
1178 trust is irrevocable, the settlor may revoke or amend the trust.
1179 This subsection does not apply to a trust created under an
1180 instrument executed before the effective date of this code.
1181 (2) If a revocable trust is created or funded by more than
1182 one settlor:
1183 (a) To the extent the trust consists of community
1184 property, the trust may be revoked by either spouse acting alone
1185 but may be amended only by joint action of both spouses.

1186 (b) To the extent the trust consists of property other
1187 than community property, each settlor may revoke or amend the
1188 trust with regard to the portion of the trust property
1189 attributable to that settlor's contribution.
1190 (c) Upon the revocation or amendment of the trust by fewer
1191 than all of the settlors, the trustee shall promptly notify the
1192 other settlors of the revocation or amendment.
1193 (3) Subject to s. 736.0403(2), the settlor may revoke or
1194 amend a revocable trust:
1195 (a) By substantial compliance with a method provided in
1196 the terms of the trust; or
1197 (b) If the terms of the trust do not provide a method, by:
1198 1. A later will or codicil that expressly refers to the
1199 trust or specifically devises property that would otherwise have
1200 passed according to the terms of the trust; or
1201 2. Any other method manifesting clear and convincing
1202 evidence of the settlor's intent.
1203 (4) Upon revocation of a revocable trust, the trustee
1204 shall deliver the trust property as the settlor directs.
1205 (5) A settlor's powers with respect to revocation,
1206 amendment, or distribution of trust property may be exercised by
1207 an agent under a power of attorney only as authorized by s.
1208 709.08.
1209 (6) A guardian of the property of the settlor may exercise
1210 a settlor's powers with respect to revocation, amendment, or
1211 distribution of trust property only as provided in s. 744.441.
1212 (7) A trustee who does not know that a trust has been
1213 revoked or amended is not liable for distributions made and

1214 other actions taken on the assumption that the trust had not
1215 been amended or revoked.
1216 736.0603 Settlor's powers; powers of withdrawal.--
1217 (1) While a trust is revocable, the duties of the trustee
1218 are owed exclusively to the settlor.
1219 (2) During the period the power may be exercised, the
1220 holder of a power of withdrawal has the rights of a settlor of a
1221 revocable trust under this section to the extent of the property
1222 subject to the power.
1223 736.0604 Limitation on action contesting validity of
1224 revocable trust.--An action to contest the validity of a trust
1225 that was revocable at the settlor's death is barred, if not
1226 commenced within the earlier of:
1227 (1) The time as provided in chapter 95; or
1228 (2) Six months after the trustee sent the person a copy of
1229 the trust instrument and a notice informing the person of the
1230 trust's existence, of the trustee's name and address, and of the
1231 time allowed for commencing a proceeding.
1232 Section 7. Part VII of chapter 736, Florida Statutes,
1233 consisting of sections 736.0701, 736.0702, 736.0703, 736.0704,
1234 736.0705, 736.0706, 736.0707, 736.0708, and 736.0709, is created
1235 to read:
1236
1237 PART VII
1238 OFFICE OF TRUSTEE
1239
1240 736.0701 Accepting or declining trusteeship.--

1241 (1) Except as otherwise provided in subsection (3), a
1242 person designated as trustee accepts the trusteeship:
1243 (a) By substantially complying with a method of acceptance
1244 provided in the terms of the trust; or
1245 (b) If the terms of the trust do not provide a method or
1246 the method provided in the terms is not expressly made
1247 exclusive, by accepting delivery of the trust property,
1248 exercising powers or performing duties as trustee, or otherwise
1249 indicating acceptance of the trusteeship.
1250 (2) A person designated as trustee who has not accepted
1251 the trusteeship may decline the trusteeship. A designated
1252 trustee who does not accept the trusteeship within a reasonable
1253 time after knowing of the designation is deemed to have declined
1254 the trusteeship.
1255 (3) A person designated as trustee may, without accepting
1256 the trusteeship:
1257 (a) Act to preserve the trust property if, within a
1258 reasonable time after acting, the person sends to a qualified
1259 beneficiary a written statement declining the trusteeship.
1260 (b) Inspect or investigate trust property to determine
1261 potential liability under environmental or other law or for any
1262 other purpose.
1263 736.0702 Trustee's bond.--
1264 (1) A trustee shall give bond to secure performance of the
1265 trustee's duties only if the court finds that a bond is needed
1266 to protect the interests of the beneficiaries or is required by
1267 the terms of the trust and the court has not dispensed with the
1268 requirement.

1269 (2) The court may specify the amount of a bond, the
1270 trustee's liabilities under the bond, and whether sureties are
1271 necessary. The court may modify or terminate a bond at any time.
1272 736.0703 Cotrustees.--
1273 (1) Cotrustees who are unable to reach a unanimous
1274 decision may act by majority decision.
1275 (2) If a vacancy occurs in a cotrusteeship, the remaining
1276 cotrustees or a majority of the remaining cotrustees may act for
1277 the trust.
1278 (3) A cotrustee must participate in the performance of a
1279 trustee's function unless the cotrustee is unavailable to
1280 perform the function because of absence, illness,
1281 disqualification under other provision of law, or other
1282 temporary incapacity or the cotrustee has properly delegated the
1283 performance of the function to another cotrustee.
1284 (4) If a cotrustee is unavailable to perform duties
1285 because of absence, illness, disqualification under other law,
1286 or other temporary incapacity, and prompt action is necessary to
1287 achieve the purposes of the trust or to avoid injury to the
1288 trust property, the remaining cotrustee or a majority of the
1289 remaining cotrustees may act for the trust.
1290 (5) A cotrustee may not delegate to another cotrustee the
1291 performance of a function the settlor reasonably expected the
1292 cotrustees to perform jointly. A cotrustee may revoke a
1293 delegation previously made.
1294 (6) Except as otherwise provided in subsection (7), a
1295 cotrustee who does not join in an action of another cotrustee is
1296 not liable for the action.

1297 (7) Each cotrustee shall exercise reasonable care to:
1298 (a) Prevent a cotrustee from committing a breach of trust.
1299 (b) Compel a cotrustee to redress a breach of trust.
1300 (8) A dissenting cotrustee who joins in an action at the
1301 direction of the majority of the cotrustees and who notifies any
1302 cotrustee of the dissent at or before the time of the action is
1303 not liable for the action.
1304 736.0704 Vacancy in trusteeship; appointment of
1305 successor.--
1306 (1) A vacancy in a trusteeship occurs if:
1307 (a) A person designated as trustee declines the
1308 trusteeship;
1309 (b) A person designated as trustee cannot be identified or
1310 does not exist;
1311 (c) A trustee resigns;
1312 (d) A trustee is disqualified or removed;
1313 (e) A trustee dies; or
1314 (f) A trustee is adjudicated to be incapacitated.
1315 (2) If one or more cotrustees remain in office, a vacancy
1316 in a trusteeship need not be filled. A vacancy in a trusteeship
1317 must be filled if the trust has no remaining trustee.
1318 (3) A vacancy in a trusteeship of a noncharitable trust
1319 that is required to be filled must be filled in the following
1320 order of priority:
1321 (a) By a person named or designated pursuant to the terms
1322 of the trust to act as successor trustee.
1323 (b) By a person appointed by unanimous agreement of the
1324 qualified beneficiaries.

1325 (c) By a person appointed by the court.
1326 (4) A vacancy in a trusteeship of a charitable trust that
1327 is required to be filled must be filled in the following order
1328 of priority:
1329 (a) By a person named or designated pursuant to the terms
1330 of the trust to act as successor trustee.
1331 (b) By a person selected by unanimous agreement of the
1332 charitable organizations expressly designated to receive
1333 distributions under the terms of the trust.
1334 (c) By a person appointed by the court.
1335 (5) The court may appoint an additional trustee or special
1336 fiduciary whenever the court considers the appointment necessary
1337 for the administration of the trust, whether or not a vacancy in
1338 a trusteeship exists or is required to be filled.
1339 736.0705 Resignation of trustee.--
1340 (1) A trustee may resign:
1341 (a) Upon at least 30 days' notice to the qualified
1342 beneficiaries, the settlor, if living, and all cotrustees; or
1343 (b) With the approval of the court.
1344 (2) In approving a resignation, the court may issue orders
1345 and impose conditions reasonably necessary for the protection of
1346 the trust property.
1347 (3) Any liability of a resigning trustee or of any
1348 sureties on the trustee's bond for acts or omissions of the
1349 trustee is not discharged or affected by the trustee's
1350 resignation.
1351 736.0706 Removal of trustee.--

1352 (1) The settlor, a cotrustee, or a beneficiary may request
1353 the court to remove a trustee or a trustee may be removed by the
1354 court on the court's own initiative.
1355 (2) The court may remove a trustee if:
1356 (a) The trustee has committed a serious breach of trust;
1357 (b) The lack of cooperation among cotrustees substantially
1358 impairs the administration of the trust;
1359 (c) Due to the unfitness, unwillingness, or persistent
1360 failure of the trustee to administer the trust effectively, the
1361 court determines that removal of the trustee best serves the
1362 interests of the beneficiaries; or
1363 (d) There has been a substantial change of circumstances
1364 or removal is requested by all of the qualified beneficiaries,
1365 the court finds that removal of the trustee best serves the
1366 interests of all of the beneficiaries and is not inconsistent
1367 with a material purpose of the trust, and a suitable cotrustee
1368 or successor trustee is available.
1369 (3) Pending a final decision on a request to remove a
1370 trustee, or in lieu of or in addition to removing a trustee, the
1371 court may order such appropriate relief under s. 736.1001(2) as
1372 may be necessary to protect the trust property or the interests
1373 of the beneficiaries.
1374 736.0707 Delivery of property by former trustee.--
1375 (1) Unless a cotrustee remains in office or the court
1376 otherwise orders and until the trust property is delivered to a
1377 successor trustee or other person entitled to the property, a
1378 trustee who has resigned or been removed has the duties of a
1379 trustee and the powers necessary to protect the trust property.

1380 (2) A trustee who has resigned or been removed shall
1381 within a reasonable time deliver the trust property within the
1382 trustee's possession to the cotrustee, successor trustee, or
1383 other person entitled to the property, subject to the right of
1384 the trustee to retain a reasonable reserve for the payment of
1385 debts, expenses, and taxes. The provisions of this subsection
1386 are in addition to and are not in derogation of the rights of a
1387 removed or resigning trustee under the common law.
1388 736.0708 Compensation of trustee.--
1389 (1) If the terms of a trust do not specify the trustee's
1390 compensation, a trustee is entitled to compensation that is
1391 reasonable under the circumstances.
1392 (2) If the terms of a trust specify the trustee's
1393 compensation, the trustee is entitled to be compensated as
1394 specified but the court may allow more or less compensation if:
1395 (a) The duties of the trustee are substantially different
1396 from those contemplated when the trust was created; or
1397 (b) The compensation specified by the terms of the trust
1398 would be unreasonably low or high.
1399 (3) If the trustee has rendered other services in
1400 connection with the administration of the trust, the trustee
1401 shall also be allowed reasonable compensation for the other
1402 services rendered in addition to reasonable compensation as
1403 trustee.
1404 736.0709 Reimbursement of expenses.--
1405 (1) A trustee is entitled to be reimbursed out of the
1406 trust property, with interest as appropriate, for reasonable

1407 expenses that were properly incurred in the administration of
1408 the trust.
1409 (2) An advance by the trustee of money for the protection
1410 of the trust gives rise to a lien against trust property to
1411 secure reimbursement with reasonable interest.
1412 Section 8. Part VIII of chapter 736, Florida Statutes,
1413 consisting of sections 736.0801, 736.0802, 736.0803, 736.0804,
1414 736.0805, 736.0806, 736.0807, 736.0808, 736.0809, 736.0810,
1415 736.08105, 736.0811, 736.0812, 736.08125, 736.0813, 736.08135,
1416 736.0814, 736.08147, 736.0815, 736.0816, 736.08163, 736.08165,
1417 and 736.0817, is created to read:
1418
1419 PART VIII
1420 DUTIES AND POWERS OF TRUSTEE
1421
1422 736.0801 Duty to administer trust.--Upon acceptance of a
1423 trusteeship, the trustee shall administer the trust in good
1424 faith, in accordance with its terms and purposes and the
1425 interests of the beneficiaries, and in accordance with this
1426 code.
1427 736.0802 Duty of loyalty.--
1428 (1) As between a trustee and the beneficiaries, a trustee
1429 shall administer the trust solely in the interests of the
1430 beneficiaries.
1431 (2) Subject to the rights of persons dealing with or
1432 assisting the trustee as provided in s. 736.1016, a sale,
1433 encumbrance, or other transaction involving the investment or
1434 management of trust property entered into by the trustee for the

1435 trustee's own personal account or which is otherwise affected by
1436 a conflict between the trustee's fiduciary and personal
1437 interests is voidable by a beneficiary affected by the
1438 transaction unless:
1439 (a) The transaction was authorized by the terms of the
1440 trust;
1441 (b) The transaction was approved by the court;
1442 (c) The beneficiary did not commence a judicial proceeding
1443 within the time allowed by s. 736.1008;
1444 (d) The beneficiary consented to the trustee's conduct,
1445 ratified the transaction, or released the trustee in compliance
1446 with s. 736.1012;
1447 (e) The transaction involves a contract entered into or
1448 claim acquired by the trustee when that person had not become or
1449 contemplated becoming trustee; or
1450 (f) The transaction was consented to in writing by a
1451 settlor of the trust while the trust was revocable.
1452 (3) A sale, encumbrance, or other transaction involving
1453 the investment or management of trust property is presumed to be
1454 affected by a conflict between personal and fiduciary interests
1455 if the sale, encumbrance, or other transaction is entered into
1456 by the trustee with:
1457 (a) The trustee's spouse;
1458 (b) The trustee's descendants, siblings, parents, or their
1459 spouses;
1460 (c) An officer, director, employee, agent, or attorney of
1461 the trustee; or

1462 (d) A corporation or other person or enterprise in which
1463 the trustee, or a person that owns a significant interest in the
1464 trustee, has an interest that might affect the trustee's best
1465 judgment.
1466 (4) A transaction not concerning trust property in which
1467 the trustee engages in the trustee's individual capacity
1468 involves a conflict between personal and fiduciary interests if
1469 the transaction concerns an opportunity properly belonging to
1470 the trust.
1471 (5) An investment by a trustee in securities of an
1472 investment company or investment trust to which the trustee, or
1473 an affiliate of the trustee, provides services in a capacity
1474 other than as trustee is not presumed to be affected by a
1475 conflict between personal and fiduciary interests if the
1476 investment otherwise complies with chapter 518. In addition to
1477 the trustee's compensation for acting as trustee, the trustee
1478 may be compensated by the investment company or investment trust
1479 for providing those services out of fees charged to the trust.
1480 If the trustee receives compensation from the investment company
1481 or investment trust for providing those services, the trustee
1482 shall notify the qualified beneficiaries at least annually.
1483 (6) In voting shares of stock or in exercising powers of
1484 control over similar interests in other forms of enterprise, the
1485 trustee shall act in the best interests of the beneficiaries. If
1486 the trust is the sole owner of a corporation or other form of
1487 enterprise, the trustee shall elect or appoint directors or
1488 other managers who will manage the corporation or enterprise in
1489 the best interests of the beneficiaries.

1490 (7) This section does not preclude the following
1491 transactions, if fair to the beneficiaries:
1492 (a) An agreement between a trustee and a beneficiary
1493 relating to the appointment or compensation of the trustee;
1494 (b) A payment of reasonable compensation to the trustee;
1495 (c) A transaction between a trust and another trust, the
1496 decedent's estate, or a guardian of the property of which the
1497 trustee is a fiduciary or in which a beneficiary has an
1498 interest;
1499 (d) A deposit of trust money in a regulated financial-
1500 service institution operated by the trustee; or
1501 (e) An advance by the trustee of money for the protection
1502 of the trust.
1503 (8) This section does not preclude the employment of
1504 persons, including, but not limited to, attorneys, accountants,
1505 investment advisers, or agents, even if they are the trustee, an
1506 affiliate of the trustee, or otherwise associated with the
1507 trustee, to advise or assist the trustee in the exercise of any
1508 of the trustee's powers and to pay reasonable compensation and
1509 costs incurred in connection with such employment from the
1510 assets of the trust; to act without independent investigation on
1511 their recommendations; and, instead of acting personally, to
1512 employ one or more agents to perform any act of administration,
1513 whether or not discretionary.
1514 (9) The court may appoint a special fiduciary to act with
1515 respect to any proposed transaction that might violate this
1516 section if entered into by the trustee.

1517 (10) Payment of costs or attorney's fees incurred in any
1518 trust proceeding from the assets of the trust may be made by the
1519 trustee without the approval of any person and without court
1520 authorization, except that court authorization shall be required
1521 if an action has been filed or defense asserted against the
1522 trustee based upon a breach of trust. Court authorization is not
1523 required if the action or defense is later withdrawn or
1524 dismissed by the party that is alleging a breach of trust or
1525 resolved without a determination by the court that the trustee
1526 has committed a breach of trust.
1527 736.0803 Impartiality.--If a trust has two or more
1528 beneficiaries, the trustee shall act impartially in
1529 administering the trust property, giving due regard to the
1530 beneficiaries' respective interests.
1531 736.0804 Prudent administration.--A trustee shall
1532 administer the trust as a prudent person would, by considering
1533 the purposes, terms, distribution requirements, and other
1534 circumstances of the trust. In satisfying this standard, the
1535 trustee shall exercise reasonable care, skill, and caution.
1536 736.0805 Expenses of administration.--In administering a
1537 trust, the trustee shall only incur expenses that are reasonable
1538 in relation to the trust property, the purposes of the trust,
1539 and the skills of the trustee.
1540 736.0806 Trustee's skills.--A trustee who has special
1541 skills or expertise, or is named trustee in reliance on the
1542 trustee's representation that the trustee has special skills or
1543 expertise, shall use those special skills or expertise.
1544 736.0807 Delegation by trustee.--

1545 (1) A trustee may delegate duties and powers that a
1546 prudent trustee of comparable skills could properly delegate
1547 under the circumstances. The trustee shall exercise reasonable
1548 care, skill, and caution in:
1549 (a) Selecting an agent.
1550 (b) Establishing the scope and terms of the delegation,
1551 consistent with the purposes and terms of the trust.
1552 (c) Reviewing the agent's actions periodically, in order
1553 to monitor the agent's performance and compliance with the terms
1554 of the delegation.
1555 (2) In performing a delegated function, an agent owes a
1556 duty to the trust to exercise reasonable care to comply with the
1557 terms of the delegation.
1558 (3) A trustee who complies with subsection (1) is not
1559 liable to the beneficiaries or to the trust for an action of the
1560 agent to whom the function was delegated.
1561 (4) By accepting a delegation of powers or duties from the
1562 trustee of a trust that is subject to the law of this state, an
1563 agent submits to the jurisdiction of the courts of this state.
1564 736.0808 Powers to direct.--
1565 (1) Subject to ss. 736.0403(2) and 736.0602(3)(a), the
1566 trustee may follow a direction of the settlor that is contrary
1567 to the terms of the trust while a trust is revocable.
1568 (2) If the terms of a trust confer on a person other than
1569 the settlor of a revocable trust, the power to direct certain
1570 actions of the trustee, the trustee shall act in accordance with
1571 an exercise of the power unless the attempted exercise is
1572 manifestly contrary to the terms of the trust or the trustee

1573 knows the attempted exercise would constitute a serious breach
1574 of a fiduciary duty that the person holding the power owes to
1575 the beneficiaries of the trust.
1576 (3) The terms of a trust may confer on a trustee or other
1577 person a power to direct the modification or termination of the
1578 trust.
1579 (4) A person, other than a beneficiary, who holds a power
1580 to direct is presumptively a fiduciary who, as such, is required
1581 to act in good faith with regard to the purposes of the trust
1582 and the interests of the beneficiaries. The holder of a power to
1583 direct is liable for any loss that results from breach of a
1584 fiduciary duty.
1585 736.0809 Control and protection of trust property.--A
1586 trustee shall take reasonable steps to take control of and
1587 protect the trust property.
1588 736.0810 Recordkeeping and identification of trust
1589 property.--
1590 (1) A trustee shall keep clear, distinct, and accurate
1591 records of the administration of the trust.
1592 (2) A trustee shall keep trust property separate from the
1593 trustee's own property.
1594 (3) Except as otherwise provided in subsection (4), a
1595 trustee shall cause the trust property to be designated so that
1596 the interest of the trust, to the extent feasible, appears in
1597 records maintained by a party other than a trustee or
1598 beneficiary.

1599 (4) If the trustee maintains records clearly indicating
1600 the respective interests, a trustee may invest as a whole the
1601 property of two or more separate trusts.
1602 736.08105 Duty to ascertain marketable title of trust real
1603 property.--A trustee holding title to real property received
1604 from a settlor or estate shall not be required to obtain title
1605 insurance or proof of marketable title until a marketable title
1606 is required for a sale or conveyance of the real property.
1607 736.0811 Enforcement and defense of claims.--A trustee
1608 shall take reasonable steps to enforce claims of the trust and
1609 to defend claims against the trust.
1610 736.0812 Collecting trust property.--A trustee shall take
1611 reasonable steps to compel a former trustee or other person to
1612 deliver trust property to the trustee and, except as provided in
1613 s. 736.08125, to redress a breach of trust known to the trustee
1614 to have been committed by a former trustee.
1615 736.08125 Protection of successor trustees.--
1616 (1) A successor trustee is not personally liable for
1617 actions taken by any prior trustee, nor does any successor
1618 trustee have a duty to institute any proceeding against any
1619 prior trustee, or file any claim against any prior trustee's
1620 estate, for any of the prior trustee's actions as trustee under
1621 any of the following circumstances:
1622 (a) As to a successor trustee who succeeds a trustee who
1623 was also the settlor of a trust that was revocable during the
1624 time that the settlor served as trustee;

1625 (b) As to any beneficiary who has waived any accounting
1626 required by s. 736.0813, but only as to the periods included in
1627 the waiver;
1628 (c) As to any beneficiary who has released the successor
1629 trustee from the duty to institute any proceeding or file any
1630 claim;
1631 (d) As to any person who is not an eligible beneficiary;
1632 or
1633 (e) As to any eligible beneficiary:
1634 1. If a supermajority of the eligible beneficiaries have
1635 released the successor trustee;
1636 2. If the eligible beneficiary has not delivered a written
1637 request to the successor trustee to institute an action or file
1638 a claim against the prior trustee within 6 months after the date
1639 of the successor trustee's acceptance of the trust, if the
1640 successor trustee has notified the eligible beneficiary in
1641 writing of acceptance by the successor trustee in accordance
1642 with 736.0813(1)(a) and that writing advises the beneficiary
1643 that, unless the beneficiary delivers the written request within
1644 6 months after the date of acceptance, the right to proceed
1645 against the successor trustee will be barred pursuant to this
1646 section; or
1647 3. For any action or claim that the eligible beneficiary
1648 is barred from bringing against the prior trustee.
1649 (2) For the purposes of this section, the term:
1650 (a) "Eligible beneficiaries" means:

1651 1. At the time the determination is made, if there are one
1652 or more beneficiaries as described in s. 736.0103(14)(c), the
1653 beneficiaries described in s. 736.0103(14)(a) and (c); or
1654 2. If there is no beneficiary as described in s.
1655 736.0103(14)(c), the beneficiaries described in s.
1656 736.0103(14)(a) and (b).
1657 (b) "Supermajority of eligible beneficiaries" means at
1658 least two-thirds in interest of the eligible beneficiaries if
1659 the interests of the eligible beneficiaries are reasonably
1660 ascertainable, otherwise, at least two-thirds in number of the
1661 eligible beneficiaries.
1662 (3) Nothing in this section affects any liability of the
1663 prior trustee or the right of the successor trustee or any
1664 beneficiary to pursue an action or claim against the prior
1665 trustee.
1666 736.0813 Duty to inform and account.--The trustee shall
1667 keep the qualified beneficiaries of the trust reasonably
1668 informed of the trust and its administration.
1669 (1) The trustee's duty to inform and account includes, but
1670 is not limited to, the following:
1671 (a) Within 60 days after acceptance of the trust, the
1672 trustee shall give notice to the qualified beneficiaries of the
1673 acceptance of the trust and the full name and address of the
1674 trustee.
1675 (b) Within 60 days after the date the trustee acquires
1676 knowledge of the creation of an irrevocable trust, or the date
1677 the trustee acquires knowledge that a formerly revocable trust
1678 has become irrevocable, whether by the death of the settlor or

1679 otherwise, the trustee shall give notice to the qualified
1680 beneficiaries of the trust's existence, the identity of the
1681 settlor or settlors, the right to request a copy of the trust
1682 instrument, and the right to accountings under this section.
1683 (c) Upon reasonable request, the trustee shall provide a
1684 qualified beneficiary with a complete copy of the trust
1685 instrument.
1686 (d) A trustee of an irrevocable trust shall provide a
1687 trust accounting, as set forth in s. 736.08135, to each
1688 qualified beneficiary annually and on termination of the trust
1689 or on change of the trustee.
1690 (e) Upon reasonable request, the trustee shall provide a
1691 qualified beneficiary with relevant information about the assets
1692 and liabilities of the trust and the particulars relating to
1693 administration.
1694
1695 Paragraphs (a) and (b) do not apply to an irrevocable trust
1696 created before the effective date of this code, or to a
1697 revocable trust that becomes irrevocable before the effective
1698 date of this code. Paragraph (a) does not apply to a trustee who
1699 accepts a trusteeship before the effective date of this code.
1700 (2) A qualified beneficiary may waive the trustee's duty
1701 to account under paragraph (1)(d). A qualified beneficiary may
1702 withdraw a waiver previously given. Waivers and withdrawals of
1703 prior waivers under this subsection must be in writing.
1704 Withdrawals of prior waivers are effective only with respect to
1705 accountings for future periods.

1706 (3) The representation provisions of part III apply with
1707 respect to all rights of a qualified beneficiary under this
1708 section.
1709 (4) As provided in s. 736.0603(1), the trustee's duties
1710 under this section extend only to the settlor while a trust is
1711 revocable.
1712 (5) This section applies to trust accountings rendered for
1713 accounting periods beginning on or after January 1, 2008.
1714 736.08135 Trust accountings.--
1715 (1) A trust accounting must be a reasonably understandable
1716 report from the date of the last accounting or, if none, from
1717 the date on which the trustee became accountable, that
1718 adequately discloses the information required in subsection (2).
1719 (2)(a) The accounting must begin with a statement
1720 identifying the trust, the trustee furnishing the accounting,
1721 and the time period covered by the accounting.
1722 (b) The accounting must show all cash and property
1723 transactions and all significant transactions affecting
1724 administration during the accounting period, including
1725 compensation paid to the trustee and the trustee's agents. Gains
1726 and losses realized during the accounting period and all
1727 receipts and disbursements must be shown.
1728 (c) To the extent feasible, the accounting must identify
1729 and value trust assets on hand at the close of the accounting
1730 period. For each asset or class of assets reasonably capable of
1731 valuation, the accounting shall contain two values, the asset
1732 acquisition value or carrying value and the estimated current
1733 value. The accounting must identify each known noncontingent

1734 liability with an estimated current amount of the liability if
1735 known.
1736 (d) To the extent feasible, the accounting must show
1737 significant transactions that do not affect the amount for which
1738 the trustee is accountable, including name changes in investment
1739 holdings, adjustments to carrying value, a change of custodial
1740 institutions, and stock splits.
1741 (e) The accounting must reflect the allocation of
1742 receipts, disbursements, accruals, or allowances between income
1743 and principal when the allocation affects the interest of any
1744 beneficiary of the trust.
1745 (f) The trustee shall include in the final accounting a
1746 plan of distribution for any undistributed assets shown on the
1747 final accounting.
1748 (3) This section applies to all trust accountings rendered
1749 for any accounting periods beginning on or after January 1,
1750 2003.
1751 736.0814 Discretionary powers; tax savings.--
1752 (1) Notwithstanding the breadth of discretion granted to a
1753 trustee in the terms of the trust, including the use of such
1754 terms as "absolute," "sole," or "uncontrolled," the trustee
1755 shall exercise a discretionary power in good faith and in
1756 accordance with the terms and purposes of the trust and the
1757 interests of the beneficiaries. A court shall not determine that
1758 a trustee abused its discretion merely because the court would
1759 have exercised the discretion in a different manner or would not
1760 have exercised the discretion.

1761 (2) Subject to subsection (3) and unless the terms of the
1762 trust expressly indicate that a rule in this subsection does not
1763 apply, a person who is a beneficiary and a trustee may not:
1764 (a) Make discretionary distributions of either principal
1765 or income to or for the benefit of that trustee, other than
1766 distributions subject to an ascertainable standard;
1767 (b) Make discretionary allocations of receipts or expenses
1768 as between principal and income, unless the trustee acts in a
1769 fiduciary capacity whereby the trustee has no power to enlarge
1770 or shift any beneficial interest except as an incidental
1771 consequence of the discharge of the trustee's fiduciary duties;
1772 (c) Make discretionary distributions of either principal
1773 or income to satisfy any of the trustee's legal support
1774 obligations; or
1775 (d) Exercise any other power, including, but not limited
1776 to, the right to remove or to replace any trustee, so as to
1777 cause the powers enumerated in paragraph (a), paragraph (b), or
1778 paragraph (c) to be exercised on behalf of, or for the benefit
1779 of, a beneficiary who is also a trustee.
1780 (3) Subsection (2) does not apply to:
1781 (a) A power held by the settlor of the trust;
1782 (b) A power held by the settlor's spouse who is the
1783 trustee of a trust for which a marital deduction, as defined in
1784 s. 2056(a) or s. 2523(a) of the Internal Revenue Code of 1986,
1785 as amended, was previously allowed;
1786 (c) Any trust during any period that the trust may be
1787 revoked or amended by its settlor; or

1788 (d) A trust if contributions to the trust qualify for the
1789 annual exclusion under s. 2503(c) of the Internal Revenue Code
1790 of 1986, as amended.
1791 (4) A power whose exercise is limited or prohibited by
1792 subsection (2) may be exercised by the remaining trustees whose
1793 exercise of the power is not so limited or prohibited. If there
1794 is no trustee qualified to exercise the power, on petition by
1795 any qualified beneficiary, the court may appoint an independent
1796 trustee with authority to exercise the power.
1797 (5) A person who has the right to remove or to replace a
1798 trustee does not possess nor may that person be deemed to
1799 possess, by virtue of having that right, the powers of the
1800 trustee that is subject to removal or to replacement.
1801 736.08147 Duty to distribute trust income.--If a will or
1802 trust instrument granting income to the settlor's or testator's
1803 spouse for life is silent as to the time of distribution of
1804 income and the frequency of distributions, the trustee shall
1805 distribute all net income, as defined in chapter 738, to the
1806 spouse no less frequently than annually. This provision shall
1807 apply to any trust established before, on, or after July 1,
1808 2007, unless the trust instrument expressly directs or permits
1809 net income to be distributed less frequently than annually.
1810 736.0815 General powers of trustee.--
1811 (1) A trustee, without authorization by the court, may,
1812 except as limited or restricted by this code, exercise:
1813 (a) Powers conferred by the terms of the trust.
1814 (b) Except as limited by the terms of the trust:

1815 1. All powers over the trust property that an unmarried
1816 competent owner has over individually owned property.
1817 2. Any other powers appropriate to achieve the proper
1818 investment, management, and distribution of the trust property.
1819 3. Any other powers conferred by this code.
1820 (2) The exercise of a power is subject to the fiduciary
1821 duties prescribed by this code.
1822 736.0816 Specific powers of trustee.--Except as limited or
1823 restricted by this code, a trustee may:
1824 (1) Collect trust property and accept or reject additions
1825 to the trust property from a settlor, including an asset in
1826 which the trustee is personally interested, and hold property in
1827 the name of a nominee or in other form without disclosure of the
1828 trust so that title to the property may pass by delivery but the
1829 trustee is liable for any act of the nominee in connection with
1830 the property so held.
1831 (2) Acquire or sell property, for cash or on credit, at
1832 public or private sale.
1833 (3) Acquire an undivided interest in a trust asset,
1834 including, but not limited to, a money market mutual fund,
1835 mutual fund, or common trust fund, in which asset the trustee
1836 holds an undivided interest in any trust capacity, including any
1837 money market or other mutual fund from which the trustee or any
1838 affiliate or associate of the trustee is entitled to receive
1839 reasonable compensation for providing necessary services as an
1840 investment adviser, portfolio manager, or servicing agent. A
1841 trustee or affiliate or associate of the trustee may receive
1842 compensation for such services in addition to fees received for

1843 administering the trust provided such compensation is fully
1844 disclosed in writing to all qualified beneficiaries.
1845 (4) Exchange, partition, or otherwise change the character
1846 of trust property.
1847 (5) Deposit trust money in an account in a regulated
1848 financial-service institution.
1849 (6) Borrow money, with or without security, and mortgage
1850 or pledge trust property for a period within or extending beyond
1851 the duration of the trust and advance money for the protection
1852 of the trust.
1853 (7) With respect to an interest in a proprietorship,
1854 partnership, limited liability company, business trust,
1855 corporation, or other form of business or enterprise, continue
1856 the business or other enterprise and take any action that may be
1857 taken by shareholders, members, or property owners, including,
1858 but not limited to, merging, dissolving, or otherwise changing
1859 the form of business organization or contributing additional
1860 capital.
1861 (8) With respect to stocks or other securities, exercise
1862 the rights of an absolute owner, including, but not limited to,
1863 the right to:
1864 (a) Vote, or give proxies to vote, with or without power
1865 of substitution, or enter into or continue a voting trust
1866 agreement.
1867 (b) Hold a security in the name of a nominee or in other
1868 form without disclosure of the trust so that title may pass by
1869 delivery.

1870 (c) Pay calls, assessments, and other sums chargeable or
1871 accruing against the securities, and sell or exercise stock
1872 subscription or conversion rights.
1873 (d) Deposit the securities with a depositary or other
1874 regulated financial-service institution.
1875 (9) With respect to an interest in real property,
1876 construct, or make ordinary or extraordinary repairs to,
1877 alterations to, or improvements in, buildings or other
1878 structures, demolish improvements, raze existing or erect new
1879 party walls or buildings, subdivide or develop land, dedicate
1880 land to public use or grant public or private easements, and
1881 make or vacate plats and adjust boundaries.
1882 (10) Enter into a lease for any purpose as lessor or
1883 lessee, including a lease or other arrangement for exploration
1884 and removal of natural resources, with or without the option to
1885 purchase or renew, for a period within or extending beyond the
1886 duration of the trust.
1887 (11) Grant an option involving a sale, lease, or other
1888 disposition of trust property or acquire an option for the
1889 acquisition of property, including an option exercisable beyond
1890 the duration of the trust, and exercise an option so acquired.
1891 (12) Insure the property of the trust against damage or
1892 loss and insure the trustee, trustee's agents, and beneficiaries
1893 against liability arising from the administration of the trust.
1894 (13) Abandon or decline to administer property of no value
1895 or of insufficient value to justify the collection or continued
1896 administration of such property.

1897 (14) Pay or contest any claim, settle a claim by or
1898 against the trust, and release, in whole or in part, a claim
1899 belonging to the trust.
1900 (15) Pay taxes, assessments, compensation of the trustee
1901 and of employees and agents of the trust, and other expenses
1902 incurred in the administration of the trust.
1903 (16) Allocate items of income or expense to trust income
1904 or principal, as provided by law.
1905 (17) Exercise elections with respect to federal, state,
1906 and local taxes.
1907 (18) Select a mode of payment under any employee benefit
1908 or retirement plan, annuity, or life insurance payable to the
1909 trustee, exercise rights under such plan, annuity, or insurance,
1910 including exercise of the right to indemnification for expenses
1911 and against liabilities, and take appropriate action to collect
1912 the proceeds.
1913 (19) Make loans out of trust property, including, but not
1914 limited to, loans to a beneficiary on terms and conditions that
1915 are fair and reasonable under the circumstances, and the trustee
1916 has a lien on future distributions for repayment of those loans.
1917 (20) Employ persons, including, but not limited to,
1918 attorneys, accountants, investment advisers, or agents, even if
1919 they are the trustee, an affiliate of the trustee, or otherwise
1920 associated with the trustee, to advise or assist the trustee in
1921 the exercise of any of the trustee's powers and pay reasonable
1922 compensation and costs incurred in connection with such
1923 employment from the assets of the trust and act without

1924 independent investigation on the recommendations of such
1925 persons.
1926 (21) Pay an amount distributable to a beneficiary who is
1927 under a legal disability or who the trustee reasonably believes
1928 is incapacitated, by paying the amount directly to the
1929 beneficiary or applying the amount for the beneficiary's
1930 benefit, or by:
1931 (a) Paying the amount to the beneficiary's guardian of the
1932 property or, if the beneficiary does not have a guardian of the
1933 property, the beneficiary's guardian of the person;
1934 (b) Paying the amount to the beneficiary's custodian under
1935 a Uniform Transfers to Minors Act or custodial trustee under a
1936 Uniform Custodial Trust Act, and, for that purpose, creating a
1937 custodianship or custodial trust;
1938 (c) Paying the amount to an adult relative or other person
1939 having legal or physical care or custody of the beneficiary, to
1940 be expended on the beneficiary's behalf, if the trustee does not
1941 know of a guardian of the property, guardian of the person,
1942 custodian, or custodial trustee; or
1943 (d) Managing the amount as a separate fund on the
1944 beneficiary's behalf, subject to the beneficiary's continuing
1945 right to withdraw the distribution.
1946 (22) On distribution of trust property or the division or
1947 termination of a trust, make distributions in divided or
1948 undivided interests, allocate particular assets in proportionate
1949 or disproportionate shares, value the trust property for those
1950 purposes, and adjust for resulting differences in valuation.

1951 (23) Prosecute or defend, including appeals, an action,
1952 claim, or judicial proceeding in any jurisdiction to protect
1953 trust property or the trustee in the performance of the
1954 trustee's duties.
1955 (24) Sign and deliver contracts and other instruments that
1956 are useful to achieve or facilitate the exercise of the
1957 trustee's powers.
1958 (25) On termination of the trust, exercise the powers
1959 appropriate to wind up the administration of the trust and
1960 distribute the trust property to the persons entitled to the
1961 property, subject to the right of the trustee to retain a
1962 reasonable reserve for the payment of debts, expenses, and
1963 taxes.
1964 736.08163 Powers of trustees relating to environmental or
1965 human health laws or to trust property contaminated with
1966 hazardous or toxic substances; liability.--
1967 (1) From the creation of a trust until final distribution
1968 of the assets from the trust, the trustee has, without court
1969 authorization, the powers specified in subsection (2).
1970 (2) Unless otherwise provided in the trust instrument, a
1971 trustee has the power, acting reasonably, to:
1972 (a) Inspect or investigate, or cause to be inspected or
1973 investigated, property held by the trustee, including interests
1974 in sole proprietorships, partnerships, or corporations and any
1975 assets owned by any such business entity for the purpose of
1976 determining compliance with an environmental law affecting that
1977 property or to respond to an actual or threatened violation of
1978 an environmental law affecting that property;

1979 (b) Take, on behalf of the trust, any action necessary to
1980 prevent, abate, or otherwise remedy an actual or potential
1981 violation of an environmental law affecting property held by the
1982 trustee, before or after initiation of an enforcement action by
1983 a governmental body;
1984 (c) Refuse to accept property in trust if the trustee
1985 determines that any property to be donated or conveyed to the
1986 trustee is contaminated with a hazardous substance or is being
1987 used or has been used for an activity directly or indirectly
1988 involving a hazardous substance, which circumstance could result
1989 in liability to the trust or trustee or otherwise impair the
1990 value of the assets to be held;
1991 (d) Settle or compromise at any time any claim against the
1992 trust or trustee that may be asserted by a governmental body or
1993 private party that involves the alleged violation of an
1994 environmental law affecting property of any trust over which the
1995 trustee has responsibility;
1996 (e) Disclaim any power granted by any document, law, or
1997 rule of law that, in the sole judgment of the trustee, may cause
1998 the trustee to incur personal liability, or the trust to incur
1999 liability, under any environmental law;
2000 (f) Decline to serve as a trustee, or having undertaken to
2001 serve as a trustee, resign at any time, if the trustee believes
2002 there is or may be a conflict of interest in its fiduciary
2003 capacity and in its individual capacity because of potential
2004 claims or liabilities that may be asserted against the trustee
2005 on behalf of the trust by reason of the type or condition of the
2006 assets held; or

2007 (g) Charge against the income and principal of the trust
2008 the cost of any inspection, investigation, review, abatement,
2009 response, cleanup, or remedial action that this section
2010 authorizes the trustee to take and, if the trust terminates or
2011 closes or the trust property is transferred to another trustee,
2012 hold assets sufficient to cover the cost of cleaning up any
2013 known environmental problem.
2014 (3) A trustee is not personally liable to any beneficiary
2015 or any other person for a decrease in value of assets in a trust
2016 by reason of the trustee's compliance or efforts to comply with
2017 an environmental law, specifically including any reporting
2018 requirement under that law.
2019 (4) A trustee that acquires ownership or control of a
2020 vessel or other property, without having owned, operated, or
2021 materially participated in the management of that vessel or
2022 property before assuming ownership or control as trustee, is not
2023 considered an owner or operator for purposes of liability under
2024 chapter 376, chapter 403, or any other environmental law. A
2025 trustee that willfully, knowingly, or recklessly causes or
2026 exacerbates a release or threatened release of a hazardous
2027 substance is personally liable for the cost of the response, to
2028 the extent that the release or threatened release is
2029 attributable to the trustee's activities. This subsection does
2030 not preclude the filing of claims against the assets that
2031 constitute the trust held by the trustee or the filing of
2032 actions against the trustee in its representative capacity and
2033 in any such action, an award or judgment against the trustee
2034 must be satisfied only from the assets of the trust.

2035 (5) The acceptance by the trustee of the property or a
2036 failure by the trustee to inspect or investigate the property
2037 does not create any inference as to whether there is liability
2038 under an environmental law with respect to that property.
2039 (6) For the purposes of this section, the term "hazardous
2040 substance" means a substance defined as hazardous or toxic, or
2041 any contaminant, pollutant, or constituent thereof, or otherwise
2042 regulated, by an environmental law.
2043 (7) This section does not apply to any trust created under
2044 a document executed before July 1, 1995, unless the trust is
2045 amendable and the settlor amends the trust at any time to
2046 incorporate the provisions of this section.
2047 736.08165 Administration pending outcome of contest or
2048 other proceeding.--
2049 (1) Pending the outcome of a proceeding filed to determine
2050 the validity of all or part of a trust or the beneficiaries of
2051 all or part of a trust, the trustee shall proceed with the
2052 administration of the trust as if no proceeding had been
2053 commenced, except no action may be taken and no distribution may
2054 be made to a beneficiary in contravention of the rights of those
2055 persons who may be affected by the outcome of the proceeding.
2056 (2) Upon motion of a party and after notice to interested
2057 persons, a court, on good cause shown, may make an exception to
2058 the prohibition under subsection (1) and authorize the trustee
2059 to act or to distribute trust assets to a beneficiary subject to
2060 any conditions the court, in the court's discretion, may impose,
2061 including the posting of bond by the beneficiary.

2062 736.0817 Distribution on termination.--Upon the occurrence
2063 of an event terminating or partially terminating a trust, the
2064 trustee shall proceed expeditiously to distribute the trust
2065 property to the persons entitled to the property, subject to the
2066 right of the trustee to retain a reasonable reserve for the
2067 payment of debts, expenses, and taxes. The provisions of this
2068 section are in addition to and are not in derogation of the
2069 rights of a trustee under the common law with respect to final
2070 distribution of a trust.
2071 Section 9. Part IX of chapter 736, Florida Statutes,
2072 consisting of section 736.0901, is created to read:
2073
2074 PART IX
2075 TRUST INVESTMENTS
2076
2077 736.0901 Applicability of chapter 518.--A trustee shall
2078 invest trust property in accordance with chapter 518.
2079 Section 10. Part X of chapter 736, Florida Statutes,
2080 consisting of sections 736.1001, 736.1002, 736.1003, 736.1004,
2081 736.1005, 736.1006, 736.1007, 736.1008, 736.1009, 736.1010,
2082 736.1011, 736.1012, 736.1013, 736.1014, 736.1015, 736.1016,
2083 736.1017, and 736.1018, is created to read:
2084
2085 PART X
2086 LIABILITY OF TRUSTEE AND RIGHTS OF PERSONS DEALING WITH TRUSTEE
2087
2088 736.1001 Remedies for breach of trust.--

2089 (1) A violation by a trustee of a duty the trustee owes to
2090 a beneficiary is a breach of trust.
2091 (2) To remedy a breach of trust that has occurred or may
2092 occur, the court may:
2093 (a) Compel the trustee to perform the trustee's duties;
2094 (b) Enjoin the trustee from committing a breach of trust;
2095 (c) Compel the trustee to redress a breach of trust by
2096 paying money or restoring property or by other means;
2097 (d) Order a trustee to account;
2098 (e) Appoint a special fiduciary to take possession of the
2099 trust property and administer the trust;
2100 (f) Suspend the trustee;
2101 (g) Remove the trustee as provided in s. 736.706;
2102 (h) Reduce or deny compensation to the trustee;
2103 (i) Subject to s. 736.1016, void an act of the trustee,
2104 impose a lien or a constructive trust on trust property, or
2105 trace trust property wrongfully disposed of and recover the
2106 property or its proceeds; or
2107 (j) Order any other appropriate relief.
2108 (3) As an illustration of the remedies available to the
2109 court and without limiting the court's discretion as provided in
2110 subsection (2), if a breach of trust results in the favoring of
2111 any beneficiary to the detriment of any other beneficiary or
2112 consists of an abuse of the trustee's discretion:
2113 (a) To the extent the breach of trust has resulted in no
2114 distribution to a beneficiary or a distribution that is too
2115 small, the court may require the trustee to pay from the trust
2116 to the beneficiary an amount the court determines will restore

2117 the beneficiary, in whole or in part, to his or her appropriate
2118 position.
2119 (b) To the extent the breach of trust has resulted in a
2120 distribution to a beneficiary that is too large, the court may
2121 restore the beneficiaries, the trust, or both, in whole or in
2122 part, to their appropriate positions by requiring the trustee to
2123 withhold an amount from one or more future distributions to the
2124 beneficiary who received the distribution that was too large or
2125 by requiring that beneficiary to return some or all of the
2126 distribution to the trust.
2127 736.1002 Damages for breach of trust.--
2128 (1) A trustee who commits a breach of trust is liable for
2129 the greater of:
2130 (a) The amount required to restore the value of the trust
2131 property and trust distributions to what they would have been if
2132 the breach had not occurred, including lost income, capital
2133 gain, or appreciation that would have resulted from proper
2134 administration; or
2135 (b) The profit the trustee made by reason of the breach.
2136 (2) Except as otherwise provided in this subsection, if
2137 more than one person, including a trustee or trustees, is liable
2138 to the beneficiaries for a breach of trust, each liable person
2139 is entitled to pro rata contribution from the other person or
2140 persons. A person is not entitled to contribution if the person
2141 committed the breach of trust in bad faith. A person who
2142 received a benefit from the breach of trust is not entitled to
2143 contribution from another person to the extent of the benefit
2144 received.

2145 (3) In determining the pro rata shares of liable persons
2146 in the entire liability for a breach of trust:
2147 (a) Their relative degrees of fault shall be the basis for
2148 allocation of liability.
2149 (b) If equity requires, the collective liability of some
2150 as a group shall constitute a single share.
2151 (c) Principles of equity applicable to contribution
2152 generally shall apply.
2153 (4) The right of contribution shall be enforced as
2154 follows:
2155 (a) Contribution may be enforced by separate action,
2156 whether or not judgment has been entered in an action against
2157 two or more liable persons for the same breach of trust.
2158 (b) When a judgment has been entered in an action against
2159 two or more liable persons for the same breach of trust,
2160 contribution may be enforced in that action by judgment in favor
2161 of one judgment defendant against any other judgment defendants
2162 by motion upon notice to all parties to the action.
2163 (c) If there is a judgment for breach of trust against the
2164 liable person seeking contribution, any separate action by that
2165 person to enforce contribution must be commenced within 1 year
2166 after the judgment has become final by lapse of time for appeal
2167 or after appellate review.
2168 (d) If there is no judgment for the breach of trust
2169 against the liable person seeking contribution, the person's
2170 right of contribution is barred unless the person has:
2171 1. Discharged by payment the common liability within the
2172 period of the statute of limitations applicable to the

2173 beneficiary's right of action against the liable person and the
2174 person has commenced an action for contribution within 1 year
2175 after payment, or
2176 2. Agreed, while action is pending against the liable
2177 person, to discharge the common liability and has within 1 year
2178 after the agreement paid the liability and commenced the
2179 person's action for contribution.
2180 (5) The beneficiary's recovery of a judgment for breach of
2181 trust against one liable person does not of itself discharge
2182 other liable persons from liability for the breach of trust
2183 unless the judgment is satisfied. The satisfaction of the
2184 judgment does not impair any right of contribution.
2185 (6) The judgment of the court in determining the liability
2186 of several defendants to the beneficiary for breach of trust is
2187 binding upon such defendants in determining the right of such
2188 defendants to contribution.
2189 (7) Subsection (2) applies to all causes of action for
2190 breach of trust pending on July 1, 2007, under which causes of
2191 action the right of contribution among persons jointly and
2192 severally liable is involved and to all causes of action filed
2193 after July 1, 2007.
2194 736.1003 Damages in absence of breach.--Absent a breach of
2195 trust, a trustee is not liable to a beneficiary for a loss or
2196 depreciation in the value of trust property or for not having
2197 made a profit.
2198 736.1004 Attorney's fees and costs.--

2199 (1)(a) In all actions for breach of fiduciary duty or
2200 challenging the exercise of, or failure to exercise, a trustee's
2201 powers; and
2202 (b) In proceedings arising under ss. 736.0410-736.0417,
2203
2204 the court shall award taxable costs as in chancery actions,
2205 including attorney fees and guardian ad litem fees.
2206 (2) When awarding taxable costs under this section,
2207 including attorney fees and guardian ad litem fees, the court,
2208 in its discretion, may direct payment from a party's interest,
2209 if any, in the trust or enter a judgment that may be satisfied
2210 from other property of the party, or both.
2211 736.1005 Attorney's fees for services to the trust.--
2212 (1) Any attorney who has rendered services to a trust may
2213 be awarded reasonable compensation from the trust. The attorney
2214 may apply to the court for an order awarding attorney's fees
2215 and, after notice and service on the trustee and all
2216 beneficiaries entitled to an accounting under s. 736.0813, the
2217 court shall enter an order on the fee application.
2218 (2) Whenever attorney's fees are to be paid out of the
2219 trust, the court, in its discretion, may direct from what part
2220 of the trust the fees shall be paid.
2221 (3) Except when a trustee's interest may be adverse in a
2222 particular matter, the attorney shall give reasonable notice in
2223 writing to the trustee of the attorney's retention by an
2224 interested person and the attorney's entitlement to fees
2225 pursuant to this section. A court may reduce any fee award for
2226 services rendered by the attorney prior to the date of actual

2227 notice to the trustee, if the actual notice date is later than a
2228 date of reasonable notice. In exercising this discretion, the
2229 court may exclude compensation for services rendered after the
2230 reasonable notice date but prior to the date of actual notice.
2231 736.1006 Costs in trust proceedings.--
2232 (1) In all trust proceedings, costs may be awarded as in
2233 chancery actions.
2234 (2) Whenever costs are to be paid out of the trust, the
2235 court, in its discretion, may direct from what part of the trust
2236 the costs shall be paid.
2237 736.1007 Trustee's attorney's fees.--
2238 (1) If the trustee of a revocable trust retains an
2239 attorney to render legal services in connection with the initial
2240 administration of the trust, the attorney is entitled to
2241 reasonable compensation for those legal services, payable from
2242 the assets of the trust without court order. The trustee and the
2243 attorney may agree to compensation that is determined in a
2244 manner or amount other than the manner or amount provided in
2245 this section. The agreement is not binding on a person who bears
2246 the impact of the compensation unless that person is a party to
2247 or otherwise consents to be bound by the agreement. The
2248 agreement may provide that the trustee is not individually
2249 liable for the attorney's fees and costs.
2250 (2) Unless otherwise agreed, compensation based on the
2251 value of the trust assets immediately following the settlor's
2252 death and the income earned by the trust during initial
2253 administration at the rate of 75 percent of the schedule
2254 provided in s. 733.6171(3)(a)-(h) is presumed to be reasonable

2255 total compensation for ordinary services of all attorneys
2256 employed generally to advise a trustee concerning the trustee's
2257 duties in initial trust administration.
2258 (3) An attorney who is retained to render only limited and
2259 specifically defined legal services shall be compensated as
2260 provided in the retaining agreement. If the amount or method of
2261 determining compensation is not provided in the agreement, the
2262 attorney is entitled to a reasonable fee, taking into account
2263 the factors set forth in subsection (6).
2264 (4) Ordinary services of the attorney in an initial trust
2265 administration include legal advice and representation
2266 concerning the trustee's duties relating to:
2267 (a) Review of the trust instrument and each amendment for
2268 legal sufficiency and interpretation.
2269 (b) Implementation of substitution of the successor
2270 trustee.
2271 (c) Persons who must or should be served with required
2272 notices and the method and timing of such service.
2273 (d) The obligation of a successor to require a former
2274 trustee to provide an accounting.
2275 (e) The trustee's duty to protect, insure, and manage
2276 trust assets and the trustee's liability relating to these
2277 duties.
2278 (f) The trustee's duty regarding investments imposed by
2279 the prudent investor rule.
2280 (g) The trustee's obligation to inform and account to
2281 beneficiaries and the method of satisfaction of such
2282 obligations, the liability of the trust and trustee to the

2283 settlor's creditors, and the advisability or necessity for
2284 probate proceedings to bar creditors.
2285 (h) Contributions due to the personal representative of
2286 the settlor's estate for payment of expenses of administration
2287 and obligations of the settlor's estate.
2288 (i) Identifying tax returns required to be filed by the
2289 trustee, the trustee's liability for payment of taxes, and the
2290 due date of returns.
2291 (j) Filing a nontaxable affidavit, if not filed by a
2292 personal representative.
2293 (k) Order of payment of expenses of administration of the
2294 trust and order and priority of abatement of trust
2295 distributions.
2296 (l) Distribution of income or principal to beneficiaries
2297 or funding of further trusts provided in the governing
2298 instrument.
2299 (m) Preparation of any legal documents required to effect
2300 distribution.
2301 (n) Fiduciary duties, avoidance of self-dealing, conflicts
2302 of interest, duty of impartiality, and obligations to
2303 beneficiaries.
2304 (o) If there is a conflict of interest between a trustee
2305 who is a beneficiary and other beneficiaries of the trust,
2306 advice to the trustee on limitations of certain authority of the
2307 trustee regarding discretionary distributions or exercise of
2308 certain powers and alternatives for appointment of an
2309 independent trustee and appropriate procedures.

2310 (p) Procedures for the trustee's discharge from liability
2311 for administration of the trust on termination or resignation.
2312 (5) In addition to the attorney's fees for ordinary
2313 services, the attorney for the trustee shall be allowed further
2314 reasonable compensation for any extraordinary service. What
2315 constitutes an extraordinary service may vary depending on many
2316 factors, including the size of the trust. Extraordinary services
2317 may include, but are not limited to:
2318 (a) Involvement in a trust contest, trust construction, a
2319 proceeding for determination of beneficiaries, a contested
2320 claim, elective share proceedings, apportionment of estate
2321 taxes, or other adversary proceedings or litigation by or
2322 against the trust.
2323 (b) Representation of the trustee in an audit or any
2324 proceeding for adjustment, determination, or collection of any
2325 taxes.
2326 (c) Tax advice on postmortem tax planning, including, but
2327 not limited to, disclaimer, renunciation of fiduciary
2328 commission, alternate valuation date, allocation of
2329 administrative expenses between tax returns, the QTIP or reverse
2330 QTIP election, allocation of GST exemption, qualification for
2331 Internal Revenue Code ss. 303 and 6166 privileges, deduction of
2332 last illness expenses, distribution planning, asset basis
2333 considerations, throwback rules, handling income or deductions
2334 in respect of a decedent, valuation discounts, special use and
2335 other valuation, handling employee benefit or retirement
2336 proceeds, prompt assessment request, or request for release from
2337 personal liability for payment of tax.

2338 (d) Review of an estate tax return and preparation or
2339 review of other tax returns required to be filed by the trustee.
2340 (e) Preparation of decedent's federal estate tax return.
2341 If this return is prepared by the attorney, a fee of one-half of
2342 1 percent up to a value of $10 million and one-fourth of 1
2343 percent on the value in excess of $10 million, of the gross
2344 estate as finally determined for federal estate tax purposes, is
2345 presumed to be reasonable compensation for the attorney for this
2346 service. These fees shall include services for routine audit of
2347 the return, not beyond the examining agent level, if required.
2348 (f) Purchase, sale, lease, or encumbrance of real property
2349 by the trustee or involvement in zoning, land use,
2350 environmental, or other similar matters.
2351 (g) Legal advice regarding carrying on of decedent's
2352 business or conducting other commercial activity by the trustee.
2353 (h) Legal advice regarding claims for damage to the
2354 environment or related procedures.
2355 (i) Legal advice regarding homestead status of trust real
2356 property or proceedings involving the status.
2357 (j) Involvement in fiduciary, employee, or attorney
2358 compensation disputes.
2359 (k) Considerations of special valuation of trust assets,
2360 including discounts for blockage, minority interests, lack of
2361 marketability, and environmental liability.
2362 (6) Upon petition of any interested person in a proceeding
2363 to review the compensation paid or to be paid to the attorney
2364 for the trustee, the court may increase or decrease the
2365 compensation for ordinary services of the attorney for the

2366 trustee or award compensation for extraordinary services if the
2367 facts and circumstances of the particular administration
2368 warrant. In determining reasonable compensation, the court shall
2369 consider all of the following factors giving such weight to each
2370 as the court may determine to be appropriate:
2371 (a) The promptness, efficiency, and skill with which the
2372 initial administration was handled by the attorney.
2373 (b) The responsibilities assumed by, and potential
2374 liabilities of, the attorney.
2375 (c) The nature and value of the assets that are affected
2376 by the decedent's death.
2377 (d) The benefits or detriments resulting to the trust or
2378 the trust's beneficiaries from the attorney's services.
2379 (e) The complexity or simplicity of the administration and
2380 the novelty of issues presented.
2381 (f) The attorney's participation in tax planning for the
2382 estate, the trust, and the trust's beneficiaries and tax return
2383 preparation or review and approval.
2384 (g) The nature of the trust assets, the expenses of
2385 administration, and the claims payable by the trust and the
2386 compensation paid to other professionals and fiduciaries.
2387 (h) Any delay in payment of the compensation after the
2388 services were furnished.
2389 (i) Any other relevant factors.
2390 (7) The court may determine reasonable attorney's
2391 compensation without receiving expert testimony. Any party may
2392 offer expert testimony after notice to interested persons. If
2393 expert testimony is offered, an expert witness fee may be

2394 awarded by the court and paid from the assets of the trust. The
2395 court shall direct from what part of the trust the fee is to be
2396 paid.
2397 (8) If a separate written agreement regarding compensation
2398 exists between the attorney and the settlor, the attorney shall
2399 furnish a copy to the trustee prior to commencement of
2400 employment and, if employed, shall promptly file and serve a
2401 copy on all interested persons. A separate agreement or a
2402 provision in the trust suggesting or directing the trustee to
2403 retain a specific attorney does not obligate the trustee to
2404 employ the attorney or obligate the attorney to accept the
2405 representation but, if the attorney who is a party to the
2406 agreement or who drafted the trust is employed, the compensation
2407 paid shall not exceed the compensation provided in the
2408 agreement.
2409 (9) Court proceedings to determine compensation, if
2410 required, are a part of the trust administration process and the
2411 costs, including fees for the trustee's attorney, shall be
2412 determined by the court and paid from the assets of the trust
2413 unless the court finds the attorney's fees request to be
2414 substantially unreasonable. The court shall direct from what
2415 part of the trust the fees are to be paid.
2416 (10) As used in this section, the term "initial trust
2417 administration" means administration of a revocable trust during
2418 the period that begins with the death of the settlor and ends on
2419 the final distribution of trust assets outright or to continuing
2420 trusts created under the trust agreement but, if an estate tax
2421 return is required, not until after issuance of an estate tax

2422 closing letter or other evidence of termination of the estate
2423 tax proceeding. This initial period is not intended to include
2424 continued regular administration of the trust.
2425 736.1008 Limitations on proceedings against trustees.--
2426 (1) Except as provided in subsection (2), all claims by a
2427 beneficiary against a trustee for breach of trust are barred as
2428 provided in chapter 95 as to:
2429 (a) All matters adequately disclosed in a trust disclosure
2430 document issued by the trustee, with the limitations period
2431 beginning on the date of receipt of adequate disclosure.
2432 (b) All matters not adequately disclosed in a trust
2433 disclosure document if the trustee has issued a final trust
2434 accounting and has given written notice to the beneficiary of
2435 the availability of the trust records for examination and that
2436 any claims with respect to matters not adequately disclosed may
2437 be barred unless an action is commenced within the applicable
2438 limitations period provided in chapter 95. The limitations
2439 period begins on the date of receipt of the final trust
2440 accounting and notice.
2441 (2) Unless sooner barred by adjudication, consent, or
2442 limitations, a beneficiary is barred from bringing an action
2443 against a trustee for breach of trust with respect to a matter
2444 that was adequately disclosed in a trust disclosure document
2445 unless a proceeding to assert the claim is commenced within 6
2446 months after receipt from the trustee of the trust disclosure
2447 document or a limitation notice that applies to that disclosure
2448 document, whichever is received later.

2449 (3) When a trustee has not issued a final trust accounting
2450 or has not given written notice to the beneficiary of the
2451 availability of the trust records for examination and that
2452 claims with respect to matters not adequately disclosed may be
2453 barred, a claim against the trustee for breach of trust based on
2454 a matter not adequately disclosed in a trust disclosure document
2455 accrues when the beneficiary has actual knowledge of the
2456 trustee's repudiation of the trust or adverse possession of
2457 trust assets, and is barred as provided in chapter 95.
2458 (4) As used in this section, the term:
2459 (a) "Trust disclosure document" means a trust accounting
2460 or any other written report of the trustee. A trust disclosure
2461 document adequately discloses a matter if the document provides
2462 sufficient information so that a beneficiary knows of a claim or
2463 reasonably should have inquired into the existence of a claim
2464 with respect to that matter.
2465 (b) "Trust accounting" means an accounting that adequately
2466 discloses the information required by and that substantially
2467 complies with the standards set forth in s. 736.08135.
2468 (c) "Limitation notice" means a written statement of the
2469 trustee that an action by a beneficiary against the trustee for
2470 breach of trust based on any matter adequately disclosed in a
2471 trust disclosure document may be barred unless the action is
2472 commenced within 6 months after receipt of the trust disclosure
2473 document or receipt of a limitation notice that applies to that
2474 trust disclosure document, whichever is later. A limitation
2475 notice may but is not required to be in the following form: "An
2476 action for breach of trust based on matters disclosed in a trust

2477 accounting or other written report of the trustee may be subject
2478 to a 6-month statute of limitations from the receipt of the
2479 trust accounting or other written report. If you have questions,
2480 please consult your attorney."
2481 (5) For purposes of this section, a limitation notice
2482 applies to a trust disclosure document when the limitation
2483 notice is:
2484 (a) Contained as a part of the trust disclosure document
2485 or as a part of another trust disclosure document received
2486 within 1 year prior to the receipt of the latter trust
2487 disclosure document;
2488 (b) Accompanied concurrently by the trust disclosure
2489 document or by another trust disclosure document that was
2490 received within 1 year prior to the receipt of the latter trust
2491 disclosure document;
2492 (c) Delivered separately within 10 days after the delivery
2493 of the trust disclosure document or of another trust disclosure
2494 document that was received within 1 year prior to the receipt of
2495 the latter trust disclosure document. For purposes of this
2496 paragraph, a limitation notice is not delivered separately if
2497 the notice is accompanied by another written communication,
2498 other than a written communication that refers only to the
2499 limitation notice; or
2500 (d) Received more than 10 days after the delivery of the
2501 trust disclosure document but only if the limitation notice
2502 references that trust disclosure document and:
2503 1. Offers to provide to the beneficiary on request another
2504 copy of that trust disclosure document if the document was

2505 received by the beneficiary within 1 year prior to receipt of
2506 the limitation notice; or
2507 2. Is accompanied by another copy of that trust disclosure
2508 document if the trust disclosure document was received by the
2509 beneficiary 1 year or more prior to the receipt of the
2510 limitation notice.
2511 (6) This section applies to trust accountings for
2512 accounting periods beginning on or after January 1, 2008, and to
2513 written reports, other than trust accountings, received by a
2514 beneficiary on or after January 1, 2008.
2515 736.1009 Reliance on trust instrument.--A trustee who acts
2516 in reasonable reliance on the terms of the trust as expressed in
2517 the trust instrument is not liable to a beneficiary for a breach
2518 of trust to the extent the breach resulted from the reliance.
2519 736.1010 Event affecting administration or
2520 distribution.--If the happening of an event, including marriage,
2521 divorce, performance of educational requirements, or death,
2522 affects the administration or distribution of a trust, a trustee
2523 who has exercised reasonable care to ascertain the happening of
2524 the event is not liable for a loss resulting from the trustee's
2525 lack of knowledge.
2526 736.1011 Exculpation of trustee.--
2527 (1) A term of a trust relieving a trustee of liability for
2528 breach of trust is unenforceable to the extent that the term:
2529 (a) Relieves the trustee of liability for breach of trust
2530 committed in bad faith or with reckless indifference to the
2531 purposes of the trust or the interests of the beneficiaries; or

2532 (b) Was inserted into the trust instrument as the result
2533 of an abuse by the trustee of a fiduciary or confidential
2534 relationship with the settlor.
2535 (2) An exculpatory term drafted or caused to be drafted by
2536 the trustee is invalid as an abuse of a fiduciary or
2537 confidential relationship unless the trustee proves that the
2538 exculpatory term is fair under the circumstances and that the
2539 term's existence and contents were adequately communicated
2540 directly to the settlor.
2541 736.1012 Beneficiary's consent, release, or
2542 ratification.--A trustee is not liable to a beneficiary for
2543 breach of trust if the beneficiary consented to the conduct
2544 constituting the breach, released the trustee from liability for
2545 the breach, or ratified the transaction constituting the breach,
2546 unless:
2547 (1) The consent, release, or ratification of the
2548 beneficiary was induced by improper conduct of the trustee; or
2549 (2) At the time of the consent, release, or ratification,
2550 the beneficiary did not know of the beneficiary's rights or of
2551 the material facts relating to the breach.
2552 736.1013 Limitation on personal liability of trustee.--
2553 (1) Except as otherwise provided in the contract, a
2554 trustee is not personally liable on a contract properly entered
2555 into in the trustee's fiduciary capacity in the course of
2556 administering the trust if the trustee in the contract disclosed
2557 the fiduciary capacity.
2558 (2) A trustee is personally liable for torts committed in
2559 the course of administering a trust or for obligations arising

2560 from ownership or control of trust property only if the trustee
2561 is personally at fault.
2562 (3) A claim based on a contract entered into by a trustee
2563 in the trustee's fiduciary capacity, on an obligation arising
2564 from ownership or control of trust property, or on a tort
2565 committed in the course of administering a trust may be asserted
2566 in a judicial proceeding against the trustee in the trustee's
2567 fiduciary capacity, whether or not the trustee is personally
2568 liable for the claim.
2569 (4) Issues of liability between the trust estate and the
2570 trustee individually may be determined in a proceeding for
2571 accounting, surcharge, or indemnification or in any other
2572 appropriate proceeding.
2573 736.1014 Limitations on actions against certain trusts.--
2574 (1) After the death of a settlor, no creditor of the
2575 settlor may bring, maintain, or continue any direct action
2576 against a trust described in s. 733.707(3), the trustee of the
2577 trust, or any beneficiary of the trust that is dependent on the
2578 individual liability of the settlor. Such claims and causes of
2579 action against the settlor shall be presented and enforced
2580 against the settlor's estate as provided in part VII of chapter
2581 733 and the personal representative of the settlor's estate may
2582 obtain payment from the trustee of a trust described in s.
2583 733.707(3) as provided in ss. 733.607(2), 733.707(3), and
2584 736.05053.
2585 (2) This section does not preclude a direct action against
2586 a trust described in s. 733.707(3), the trustee of the trust, or

2587 a beneficiary of the trust that is not dependent on the
2588 individual liability of the settlor.
2589 (3) This section does not affect the lien of any duly
2590 recorded mortgage or security interest or the lien of any person
2591 in possession of personal property or the right to foreclose and
2592 enforce the mortgage or lien.
2593 736.1015 Interest as general partner.--
2594 (1) Unless personal liability is imposed in the contract,
2595 a trustee who holds an interest as a general partner in a
2596 general or limited partnership is not personally liable on a
2597 contract entered into by the partnership after the trust's
2598 acquisition of the interest if the fiduciary capacity was
2599 disclosed in the contract or in a statement previously filed
2600 pursuant to a Uniform Partnership Act or Uniform Limited
2601 Partnership Act.
2602 (2) A trustee who holds an interest as a general partner
2603 is not personally liable for torts committed by the partnership
2604 or for obligations arising from ownership or control of the
2605 interest unless the trustee is personally at fault.
2606 (3) If the trustee of a revocable trust holds an interest
2607 as a general partner, the settlor is personally liable for
2608 contracts and other obligations of the partnership as if the
2609 settlor were a general partner.
2610 736.1016 Protection of person dealing with trustee.--
2611 (1) A person other than a beneficiary who in good faith
2612 assists a trustee or who in good faith and for value deals with
2613 a trustee, without knowledge that the trustee is exceeding or

2614 improperly exercising the trustee's powers, is protected from
2615 liability as if the trustee properly exercised the power.
2616 (2) A person other than a beneficiary who in good faith
2617 deals with a trustee is not required to inquire into the extent
2618 of the trustee's powers or the propriety of their exercise.
2619 (3) A person who in good faith delivers assets to a
2620 trustee need not ensure their proper application.
2621 (4) A person other than a beneficiary who in good faith
2622 assists a former trustee or who in good faith and for value
2623 deals with a former trustee, without knowledge that the
2624 trusteeship has terminated, is protected from liability as if
2625 the former trustee were still a trustee.
2626 (5) Comparable protective provisions of other laws
2627 relating to commercial transactions or transfer of securities by
2628 fiduciaries prevail over the protection provided by this
2629 section.
2630 736.1017 Certification of trust.--
2631 (1) Instead of furnishing a copy of the trust instrument
2632 to a person other than a beneficiary, the trustee may furnish to
2633 the person a certification of trust containing the following
2634 information:
2635 (a) The trust exists and the date the trust instrument was
2636 executed.
2637 (b) The identity of the settlor.
2638 (c) The identity and address of the currently acting
2639 trustee.
2640 (d) The powers of the trustee.

2641 (e) The revocability or irrevocability of the trust and
2642 the identity of any person holding a power to revoke the trust.
2643 (f) The authority of cotrustees to sign or otherwise
2644 authenticate and whether all or less than all are required in
2645 order to exercise powers of the trustee.
2646 (g) The manner of taking title to trust property.
2647 (2) A certification of trust may be signed or otherwise
2648 authenticated by any trustee.
2649 (3) A certification of trust must state that the trust has
2650 not been revoked, modified, or amended in any manner that would
2651 cause the representations contained in the certification of
2652 trust to be incorrect.
2653 (4) A certification of trust need not contain the
2654 dispositive terms of a trust.
2655 (5) A recipient of a certification of trust may require
2656 the trustee to furnish copies of any excerpts from the original
2657 trust instrument and later amendments that designate the trustee
2658 and confer upon the trustee the power to act in the pending
2659 transaction.
2660 (6) A person who acts in reliance on a certification of
2661 trust without knowledge that the representations contained in
2662 the certification are incorrect is not liable to any person for
2663 so acting and may assume without inquiry the existence of the
2664 facts contained in the certification. Knowledge of the terms of
2665 the trust may not be inferred solely from the fact that a copy
2666 of all or part of the trust instrument is held by the person
2667 relying on the certification.

2668 (7) A person who in good faith enters into a transaction
2669 in reliance on a certification of trust may enforce the
2670 transaction against the trust property as if the representations
2671 contained in the certification were correct.
2672 (8) This section does not limit the right of a person to
2673 obtain a copy of the trust instrument when required to be
2674 furnished by law or in a judicial proceeding concerning the
2675 trust.
2676 736.1018 Improper distribution or payment; liability of
2677 distributee.--Any person who received a distribution or was paid
2678 improperly from a trust shall return the assets or funds
2679 received and the income from those assets or interest on the
2680 funds from the date of distribution or payment unless the
2681 distribution or payment cannot be questioned because of
2682 adjudication, estoppel, or limitations. If the person does not
2683 have the assets or funds, the value of the assets or funds at
2684 the date of disposition, income from the assets or funds, and
2685 gain received by the person from the assets or funds shall be
2686 returned.
2687 Section 11. Part XI of chapter 736, Florida Statutes,
2688 consisting of sections 736.1101, 736.1102, 736.1103, 736.1104,
2689 736.1105, 736.1106, 736.1107, and 736.1108, is created to read:
2690
2691 PART XI
2692 RULES OF CONSTRUCTION
2693
2694 736.1101 Rules of construction; general
2695 provisions.--Except as provided in s. 736.0105(2):

2696 (1) The intent of the settlor as expressed in the terms of
2697 the trust controls the legal effect of the dispositions made in
2698 the trust.
2699 (2) The rules of construction as expressed in this part
2700 shall apply unless a contrary intent is indicated by the terms
2701 of the trust.
2702 736.1102 Construction of generic terms.--Adopted persons
2703 and persons born out of wedlock are included in class gift
2704 terminology and terms of relationship, in accordance with rules
2705 for determining relationships for purposes of intestate
2706 succession.
2707 736.1103 Gifts to multigeneration classes to be per
2708 stirpes.--Class gifts to descendants, issue, and other
2709 multigeneration classes shall be per stirpes.
2710 736.1104 Killer not entitled to receive property or other
2711 benefits by reason of victim's death.--
2712 (1) A beneficiary of a trust who unlawfully and
2713 intentionally kills or unlawfully and intentionally participates
2714 in procuring the death of the settlor or another person on whose
2715 death such beneficiary's interest depends, is not entitled to
2716 any trust interest, including homestead, dependent on the
2717 victim's death and such interest shall devolve as though the
2718 killer had predeceased the victim.
2719 (2) A final judgment of conviction of murder in any degree
2720 is conclusive for the purposes of this section. In the absence
2721 of a murder conviction in any degree, the court may determine by
2722 the greater weight of the evidence whether the killing was
2723 unlawful and intentional for purposes of this section.

2724 736.1105 Dissolution of marriage; effect on revocable
2725 trust.--Unless the trust instrument or the judgment for
2726 dissolution of marriage or divorce expressly provides otherwise,
2727 if a revocable trust is executed by a husband or wife as settlor
2728 prior to annulment of the marriage or entry of a judgment for
2729 dissolution of marriage or divorce of the settlor from the
2730 settlor's spouse, any provision of the trust that affects the
2731 settlor's spouse will become void upon annulment of the marriage
2732 or entry of the judgment of dissolution of marriage or divorce
2733 and any such trust shall be administered and construed as if the
2734 settlor's spouse had died on the date of the annulment or on
2735 entry of the judgment for dissolution of marriage or divorce.
2736 736.1106 Antilapse; survivorship with respect to future
2737 interests under terms of inter vivos and testamentary trusts;
2738 substitute takers.--
2739 (1) As used in this section, the term:
2740 (a) "Beneficiary" means the beneficiary of a future
2741 interest and includes a class member if the future interest is
2742 in the form of a class gift.
2743 (b) "Distribution date," with respect to a future
2744 interest, means the time when the future interest is to take
2745 effect in possession or enjoyment. The distribution date need
2746 not occur at the beginning or end of a calendar day, but can
2747 occur at a time during the course of a day.
2748 (c) "Future interest" includes an alternative future
2749 interest and a future interest in the form of a class gift.
2750 (d) "Future interest under the terms of a trust" means a
2751 future interest created by an inter vivos or testamentary

2752 transfer to an existing trust or creating a trust or by an
2753 exercise of a power of appointment to an existing trust
2754 directing the continuance of an existing trust, designating a
2755 beneficiary of an existing trust, or creating a trust.
2756 (e) "Surviving beneficiary" or "surviving descendant"
2757 means a beneficiary or a descendant who did not predecease the
2758 distribution date or is not deemed to have predeceased the
2759 distribution date by operation of law.
2760 (2) A future interest under the terms of a trust is
2761 contingent upon the beneficiary surviving the distribution date.
2762 Unless a contrary intent appears in the trust instrument, if a
2763 beneficiary of a future interest under the terms of a trust
2764 fails to survive the distribution date, and the deceased
2765 beneficiary leaves surviving descendants, a substitute gift is
2766 created in the beneficiary's surviving descendants. They take
2767 per stirpes the property to which the beneficiary would have
2768 been entitled if the beneficiary had survived the distribution
2769 date.
2770 (3) In the application of this section:
2771 (a) Words of survivorship attached to a future interest
2772 are a sufficient indication of an intent contrary to the
2773 application of this section.
2774 (b) A residuary clause in a will is not a sufficient
2775 indication of an intent contrary to the application of this
2776 section, whether or not the will specifically provides that
2777 lapsed or failed devises are to pass under the residuary clause.

2778 (4) If, after the application of subsections (2) and (3),
2779 there is no surviving taker, the property passes in the
2780 following order:
2781 (a) If the future interest was created by the exercise of
2782 a power of appointment, the property passes under the donor's
2783 gift-in-default clause, if any, which clause is treated as
2784 creating a future interest under the terms of a trust.
2785 (b) If no taker is produced by the application of
2786 paragraph (a) and the trust was created in a nonresiduary devise
2787 or appointment in the transferor's will, the property passes
2788 under the residuary clause in the transferor's will. For
2789 purposes of this section, the residuary clause is treated as
2790 creating a future interest under the terms of a trust.
2791 (c) If no taker is produced by the application of
2792 paragraph (a) or paragraph (b), the property passes to those
2793 persons, including the state, and in such shares as would
2794 succeed to the transferor's intestate estate under the intestate
2795 succession law of the transferor's domicile if the transferor
2796 died when the disposition is to take effect in possession or
2797 enjoyment.
2798
2799 For purposes of paragraphs (b) and (c), the term "transferor"
2800 with respect to a future interest created by the exercise of a
2801 power of appointment, means the donor if the power was a
2802 nongeneral power and the donee if the power was a general power.
2803 (5) This section applies to all trusts other than trusts
2804 that were irrevocable before the effective date of this code.

2805 736.1107 Change in securities; accessions;
2806 nonademption.--A gift of specific securities, rather than their
2807 equivalent value, entitles the beneficiary only to:
2808 (1) As much of the gifted securities of the same issuer
2809 held by the trust estate at the time of the occurrence of the
2810 event entitling the beneficiary to distribution.
2811 (2) Any additional or other securities of the same issuer
2812 held by the trust estate because of action initiated by the
2813 issuer, excluding any acquired by exercise of purchase options.
2814 (3) Securities of another issuer held by the trust estate
2815 as a result of a merger, consolidation, reorganization, or other
2816 similar action initiated by the original issuer.
2817 736.1108 Penalty clause for contest.--
2818 (1) A provision in a trust instrument purporting to
2819 penalize any interested person for contesting the trust
2820 instrument or instituting other proceedings relating to a trust
2821 estate or trust assets is unenforceable.
2822 (2) This section applies to trusts created on or after
2823 October 1, 1993. For purposes of this subsection, a revocable
2824 trust shall be treated as created when the right of revocation
2825 terminates.
2826 Section 12. Part XII of chapter 736, Florida Statutes,
2827 consisting of sections 736.1201, 736.1202, 736.1203, 736.1204,
2828 736.1205, 736.1206, 736.1207, 736.1208, 736.1209, and 736.1210,
2829 is created to read:
2830
2831 PART XII
2832 CHARITABLE TRUSTS

2833

2834 736.1201 Definitions.--As used in this part:

2835 (1) "Charitable organization" means an organization
2836 described in s. 501(c)(3) of the Internal Revenue Code and
2837 exempt from tax under s. 501(a) of the Internal Revenue Code.

2838 (2) "Internal Revenue Code" means the Internal Revenue
2839 Code of 1986, as amended.

2840 (3) "Private foundation trust" means a trust, including a
2841 trust described in s. 4947(a)(1) of the Internal Revenue Code,
2842 as defined in s. 509(a) of the Internal Revenue Code.

2843 (4) "Split interest trust" means a trust for individual
2844 and charitable beneficiaries that is subject to the provisions
2845 of s. 4947(a)(2) of the Internal Revenue Code.

2846 (5) "State attorney" means the state attorney for the
2847 judicial circuit of the principal place of administration of the
2848 trust pursuant to s. 736.0108.

2849 736.1202 Application of this part.--Except as otherwise
2850 provided in the trust, the provisions of this part apply to all
2851 private foundation trusts and split interest trusts, whether
2852 created or established before or after November 1, 1971, and to
2853 all trust assets acquired by the trustee before or after
2854 November 1, 1971.

2855 736.1203 Trustee of a private foundation trust or a split
2856 interest trust.--Except as provided in s. 736.1205, the trustee
2857 of a private foundation trust or a split interest trust has the
2858 duties and powers conferred on the trustee by this part.

2859 736.1204 Powers and duties of trustee of a private
2860 foundation trust or a split interest trust.--

2861 (1) In the exercise of a trustee's powers, including the
2862 powers granted by this part, a trustee has a duty to act with
2863 due regard to the trustee's obligation as a fiduciary, including
2864 a duty not to exercise any power in such a way as to:
2865 (a) Deprive the trust of an otherwise available tax
2866 exemption, deduction, or credit for tax purposes;
2867 (b) Deprive a donor of a trust asset or tax deduction or
2868 credit; or
2869 (c) Operate to impose a tax on a donor, trust, or other
2870 person.
2871
2872 For purposes of this subsection, the term "tax" includes, but is
2873 not limited to, any federal, state, or local excise, income,
2874 gift, estate, or inheritance tax.
2875 (2) Except as provided in s. 736.1205, a trustee of a
2876 private foundation trust shall make distributions at such time
2877 and in such manner as not to subject the trust to tax under s.
2878 4942 of the Internal Revenue Code.
2879 (3) Except as provided in subsection (4) and in s.
2880 736.1205, a trustee of a private foundation trust, or a split
2881 interest trust to the extent that the split interest trust is
2882 subject to the provisions of s. 4947(a)(2) of the Internal
2883 Revenue Code, in the exercise of the trustee's powers shall not:
2884 (a) Engage in any act of self-dealing as defined in s.
2885 4941(d) of the Internal Revenue Code;
2886 (b) Retain any excess business holdings as defined in s.
2887 4943(c) of the Internal Revenue Code;

2888 (c) Make any investments in a manner that subjects the
2889 foundation to tax under s. 4944 of the Internal Revenue Code; or
2890 (d) Make any taxable expenditures as defined in s. 4945(d)
2891 of the Internal Revenue Code.
2892 (4) Paragraphs (3)(b) and (c) shall not apply to a split
2893 interest trust if:
2894 (a) All the interest from income, and none of the
2895 remainder interest, of the trust is devoted solely to one or
2896 more of the purposes described in s. 170(c)(2)(B) of the
2897 Internal Revenue Code, and all amounts in the trust for which a
2898 deduction was allowed under s. 170, s. 545(b)(2), s. 556(b)(2),
2899 s. 642(c), s. 2055, s. 2106(a)(2), or s. 2522 of the Internal
2900 Revenue Code have an aggregate fair market value of not more
2901 than 60 percent of the aggregate fair market value of all
2902 amounts in the trust; or
2903 (b) A deduction was allowed under s. 170, s. 545(b)(2), s.
2904 556(b)(2), s. 642(c), s. 2055, s. 2106(a)(2), or s. 2522 of the
2905 Internal Revenue Code for amounts payable under the terms of the
2906 trust to every remainder beneficiary but not to any income
2907 beneficiary.
2908 736.1205 Notice that this part does not apply.--In the
2909 case of a power to make distributions, if the trustee determines
2910 that the governing instrument contains provisions that are more
2911 restrictive than s. 736.1204(2), or if the trust contains other
2912 powers, inconsistent with the provisions of s. 736.1204(3) that
2913 specifically direct acts by the trustee, the trustee shall
2914 notify the state attorney when the trust becomes subject to this
2915 part. Section 736.1204 does not apply to any trust for which

2916 notice has been given pursuant to this section unless the trust
2917 is amended to comply with the terms of this part.
2918 736.1206 Power to amend trust instrument.--
2919 (1) In the case of a trust that is solely for a named
2920 charitable organization or organizations and for which the
2921 trustee does not possess any discretion concerning the
2922 distribution of income or principal among two or more such
2923 organizations, the trustee may amend the governing instrument to
2924 comply with the provisions of s. 736.1204(2) with the consent of
2925 the named charitable organization or organizations.
2926 (2) In the case of a charitable trust that is not subject
2927 to the provisions of subsection (1), the trustee may amend the
2928 governing instrument to comply with the provisions of s.
2929 736.1204(2) with the consent of the state attorney.
2930 736.1207 Power of court to permit deviation.--This part
2931 does not affect the power of a court to relieve a trustee from
2932 any restrictions on the powers and duties that are placed on the
2933 trustee by the governing instrument or applicable law for cause
2934 shown and on complaint of the trustee, state attorney, or an
2935 affected beneficiary and notice to the affected parties.
2936 736.1208 Release; property and persons affected; manner of
2937 effecting.--
2938 (1) The trustee of a trust, all of the unexpired interests
2939 in which are devoted to one or more charitable purposes, may
2940 release a power to select charitable donees unless the creating
2941 instrument provides otherwise.
2942 (2) The release of a power to select charitable donees may
2943 apply to all or any part of the property subject to the power

2944 and may reduce or limit the charitable organizations, or classes
2945 of charitable organizations, in whose favor the power is
2946 exercisable.
2947 (3) A release shall be effected by a duly acknowledged
2948 written instrument signed by the trustee and delivered as
2949 provided in subsection (4).
2950 (4) Delivery of a release shall be accomplished as
2951 follows:
2952 (a) If the release is accomplished by specifying a
2953 charitable organization or organizations as beneficiary or
2954 beneficiaries of the trust, by delivery of a copy of the release
2955 to each designated charitable organization.
2956 (b) If the release is accomplished by reducing the class
2957 of permissible charitable organizations, by delivery of a copy
2958 of the release to the state attorney.
2959 (5) If a release is accomplished by specifying a public
2960 charitable organization or organizations as beneficiary or
2961 beneficiaries of the trust, the trust at all times thereafter
2962 shall be operated exclusively for the benefit of, and be
2963 supervised by, the specified public charitable organization or
2964 organizations.
2965 736.1209 Election to come under this part.--With the
2966 consent of that organization or organizations, a trustee of a
2967 trust for the benefit of a public charitable organization or
2968 organizations may come under s. 736.0838(5) by filing with the
2969 state attorney an election, accompanied by the proof of required
2970 consent. Thereafter the trust shall be subject to s.
2971 736.1208(5).

2972 736.1210 Interpretation.--This part shall be interpreted
2973 to effectuate the intent of the state to preserve, foster, and
2974 encourage gifts to, or for the benefit of, charitable
2975 organizations.
2976 Section 13. Part XIII of chapter 736, Florida Statutes,
2977 consisting of sections 736.1301, 736.1302, and 736.1303, is
2978 created to read:
2979
2980 PART XIII
2981 MISCELLANEOUS
2982
2983 736.1301 Electronic records and signatures.--Any
2984 provisions of this code governing the legal effect, validity, or
2985 enforceability of electronic records or electronic signatures,
2986 and of contracts formed or performed with the use of such
2987 records or signatures, are deemed to conform to the requirements
2988 of s. 102 of the Electronic Signatures in Global and National
2989 Commerce Act, 15 U.S.C. s. 7002, and supersede, modify, and
2990 limit the requirements of the Electronic Signatures in Global
2991 and National Commerce Act.
2992 736.1302 Severability clause.--If any provision of this
2993 code or its application to any person or circumstances is held
2994 invalid, the invalidity does not affect other provisions or
2995 applications of this code that can be given effect without the
2996 invalid provision or application, and to this end the provisions
2997 of this code are severable.
2998 736.1303 Application to existing relationships.--

2999 (1) Except as otherwise provided in this code, on July 1,
3000 2007:
3001 (a) This code applies to all trusts created before, on, or
3002 after such date.
3003 (b) This code applies to all judicial proceedings
3004 concerning trusts commenced on or after such date.
3005 (c) This code applies to judicial proceedings concerning
3006 trusts commenced before such date, unless the court finds that
3007 application of a particular provision of this code would
3008 substantially interfere with the effective conduct of the
3009 judicial proceedings or prejudice the rights of the parties, in
3010 which case the particular provision of this code does not apply
3011 and the superseded law applies.
3012 (d) Any rule of construction or presumption provided in
3013 this code applies to trust instruments executed before the
3014 effective date of this code unless there is a clear indication
3015 of a contrary intent in the terms of the trust.
3016 (e) An act done before such date is not affected by this
3017 code.
3018 (2) If a right is acquired, extinguished, or barred on the
3019 expiration of a prescribed period that has commenced to run
3020 under any other law before July 1, 2007, that law continues to
3021 apply to the right even if it has been repealed or superseded.
3022 Section 14. Paragraph (a) of subsection (5) of section
3023 497.458, Florida Statutes, is amended to read:
3024 497.458 Disposition of proceeds received on contracts.--
3025 (5) The trustee of the trust established pursuant to this
3026 section shall only have the power to:

3027 (a) Invest in investments as prescribed in s. 215.47 and
3028 exercise the powers set forth in part VIII of chapter 736 ~~part~~
3029 ~~IV of chapter 737~~, provided that the licensing authority may by
3030 order require the trustee to liquidate or dispose of any
3031 investment within 30 days after such order, or within such other
3032 times as the order may direct. The licensing authority may issue
3033 such order if it determines that the investment violates any
3034 provision of this chapter or is not in the best interests of the
3035 preneed contract holders whose contracts are secured by the
3036 trust funds.
3037 Section 15. Subsection (2) of section 607.0802, Florida
3038 Statutes, is amended to read:
3039 607.0802 Qualifications of directors.--
3040 (2) In the event that the eligibility to serve as a member
3041 of the board of directors of a condominium association,
3042 cooperative association, homeowners' association, or mobile home
3043 owners' association is restricted to membership in such
3044 association and membership is appurtenant to ownership of a
3045 unit, parcel, or mobile home, a grantor of a trust described in
3046 s. 733.707(3), or a qualified beneficiary as defined in s.
3047 736.0103(14) ~~737.303(4)(b)~~ of a trust which owns a unit, parcel,
3048 or mobile home shall be deemed a member of the association and
3049 eligible to serve as a director of the condominium association,
3050 cooperative association, homeowners' association, or mobile home
3051 owners' association, provided that said beneficiary occupies the
3052 unit, parcel, or mobile home.
3053 Section 16. Subsection (2) of section 617.0802, Florida
3054 Statutes, is amended to read:

3055 617.0802 Qualifications of directors.--
3056 (2) In the event that the eligibility to serve as a member
3057 of the board of directors of a condominium association,
3058 cooperative association, homeowners' association, or mobile home
3059 owners' association is restricted to membership in such
3060 association and membership is appurtenant to ownership of a
3061 unit, parcel, or mobile home, a grantor of a trust described in
3062 s. 733.707(3), or a qualified beneficiary as defined in s.
3063 736.0103(14) ~~737.303(4)(b)~~ of a trust which owns a unit, parcel,
3064 or mobile home shall be deemed a member of the association and
3065 eligible to serve as a director of the condominium association,
3066 cooperative association, homeowners' association, or mobile home
3067 owners' association, provided that said beneficiary occupies the
3068 unit, parcel, or mobile home.
3069 Section 17. Subsection (6) of section 660.25, Florida
3070 Statutes, is amended to read:
3071 660.25 Definitions.--Subject to other definitions
3072 contained in other sections of this code, and unless the context
3073 otherwise requires, in this chapter:
3074 (6) Terms used but not defined in this chapter, but which
3075 are expressly defined in chapter 518, the financial institutions
3076 codes, chapter 732, chapter 733, chapter 734, chapter 735,
3077 chapter 736 ~~737~~, chapter 738, chapter 744, or chapter 747, shall
3078 in this chapter, unless the context otherwise requires, have the
3079 meanings ascribed to them in said chapters; and references in
3080 any of said chapters to a "trust company" or to "trust
3081 companies" shall include every trust department as defined in s.
3082 658.12.

3083 Section 18. Paragraphs (a), (d), and (e) of subsection (1)
3084 and subsections (2), (3), (9), and (10) of section 660.46,
3085 Florida Statutes, are amended to read:
3086 660.46 Substitution of fiduciaries.--
3087 (1) The provisions of this section shall apply to the
3088 transfer of fiduciary accounts by substitution, and for those
3089 purposes these provisions shall constitute alternative
3090 procedures to those provided or required by any other provisions
3091 of law relating to the transfer of fiduciary accounts or the
3092 substitution of persons acting or who are to act in a fiduciary
3093 capacity. In this section, and only for its purposes, the term:
3094 (a) "Limitation notice" has the meaning ascribed in s.
3095 736.1008(4) ~~737.307(3)~~.
3096 (d) "Trust accounting" has the meaning ascribed in s.
3097 736.08135 ~~737.3035~~.
3098 (e) "Trust disclosure document" has the meaning ascribed
3099 in s. 736.1008(4)(a) ~~737.307(2)~~.
3100 (2) Any original fiduciary and any proposed substitute
3101 fiduciary may, with respect to any fiduciary account or accounts
3102 which they shall mutually select, initiate proceedings by
3103 joining in the filing of a petition in the circuit court,
3104 requesting the substitution of the proposed substitute fiduciary
3105 for the original fiduciary as to such fiduciary account or
3106 accounts. The petition may be filed in the county in which the
3107 main office of the original fiduciary is located and, except to
3108 the extent inconsistent with the provisions of this section,
3109 shall be governed by the Florida Rules of Civil Procedure;
3110 however, if any fiduciary account is then the subject of a

3111 proceeding in a court in this state pursuant to the Florida
3112 Probate Code, the Florida Guardianship Law, chapter 736 ~~737~~, or
3113 chapter 747, the petition relating to such fiduciary account
3114 shall be filed in that proceeding and shall be governed by the
3115 procedural or other relevant rules applicable to such proceeding
3116 except to the extent inconsistent with the provisions of this
3117 section.
3118 (3) Unless a waiver or consent shall be filed in the
3119 proceedings as provided in subsection (4), the provisions of s.
3120 731.301(1) and (2) shall apply with respect to notice of the
3121 proceedings to all persons who are then cofiduciaries with the
3122 original fiduciary, other than a person joining as a petitioner
3123 in the proceedings; to all persons named in the governing
3124 instrument as substitutes or successors to the fiduciary
3125 capacity of the original fiduciary; to the persons then living
3126 who are entitled under the governing instrument to appoint a
3127 substitute or successor to act in the fiduciary capacity of the
3128 original fiduciary; to all vested beneficiaries of the fiduciary
3129 account; and to all then-living originators of the governing
3130 instrument. Unless a waiver or consent shall be filed in the
3131 proceedings as provided in subsection (4), the provisions of s.
3132 731.301 shall apply with respect to notice to all contingent
3133 beneficiaries of the fiduciary account. Only the persons or
3134 classes of persons described in the foregoing provisions of this
3135 subsection shall be deemed to be interested persons for the
3136 purposes of this section and the proceedings and notices
3137 provided for in this section; and the provisions of ss.
3138 731.301(3) and 731.303(3) and~~,~~ (4)~~,~~ and ~~(5),~~ part III of chapter

3139 736, relating to notice requirements, the effect of notice, and
3140 representation of interests, shall apply to the proceedings
3141 provided for in this section.
3142 (9) Unless previously or otherwise barred by adjudication,
3143 waiver, consent, limitation, or the provisions of subsection
3144 (8), an action for breach of trust or breach of fiduciary duties
3145 or responsibilities against an original fiduciary in whose place
3146 and stead another trust company or trust department has been
3147 substituted pursuant to the provisions of this section is barred
3148 for any beneficiary who has received a trust disclosure document
3149 adequately disclosing the matter unless a proceeding to assert
3150 the claim is commenced within 6 months after receipt of the
3151 trust disclosure document or the limitation notice that applies
3152 to the trust disclosure document, whichever is received later.
3153 In any event, and notwithstanding lack of adequate disclosure,
3154 all claims against such original fiduciary which has complied
3155 with the requirements of s. 736.1008 ~~issued a final trust~~
3156 ~~disclosure document received by the beneficiary and has informed~~
3157 ~~the beneficiary of the location and availability of records for~~
3158 ~~his or her examination~~ are barred as provided in chapter 95.
3159 Section 736.1008(4)(a) and (c) ~~737.307(2) and (3)~~ applies to
3160 this subsection.
3161 (10) A beneficiary has received a final trust disclosure
3162 document or a limitation notice if, when the beneficiary is an
3163 adult, it is received by him or her or if, when the beneficiary
3164 is a minor or a disabled person, it is received by his or her
3165 representative as provided in part III of chapter 736 ~~defined in~~
3166 ~~s. 731.303~~.

3167 Section 19. Section 660.418, Florida Statutes, is amended
3168 to read:
3169 660.418 Investment of fiduciary funds in syndicate
3170 securities.--Notwithstanding any other provision of law, any
3171 financial institution with fiduciary powers may, in its
3172 fiduciary capacity, purchase bonds or other securities
3173 underwritten or otherwise distributed by the financial
3174 institution or by a syndicate that includes the financial
3175 institution, or an affiliate of the financial institution,
3176 provided that such purchase is made through a licensed
3177 securities dealer, is otherwise prudent, and is not prohibited
3178 by the instrument governing the fiduciary relationship and that
3179 disclosure is made at least annually to those persons entitled
3180 to a statement of accounts pursuant to s. 736.0813 ~~737.303(4)~~
3181 indicating that such securities have been or may be purchased.
3182 This section applies to purchases of bonds or other securities
3183 made at the time of the initial offering of such bonds or
3184 securities or at any time after such initial offering.
3185 Section 20. Subsection (5) of section 689.071, Florida
3186 Statutes, is amended to read:
3187 689.071 Land trusts transferring interests in real estate;
3188 ownership vests in trustee.--
3189 (5) In addition to any other limitation on personal
3190 liability existing pursuant to statute or otherwise, the
3191 provisions of s. 736.1013 ~~737.306~~ apply to the trustee of a land
3192 trust created pursuant to this section.
3193 Section 21. Subsections (1) and (4) of section 689.075,
3194 Florida Statutes, are amended to read:

3195 689.075 Inter vivos trusts; powers retained by settlor.--
3196 (1) A trust which is otherwise valid and which complies
3197 with s. 736.0403 ~~737.111~~, including, but not limited to, a trust
3198 the principal of which is composed of real property, intangible
3199 personal property, tangible personal property, the possible
3200 expectancy of receiving as a named beneficiary death benefits as
3201 described in s. 733.808, or any combination thereof, and which
3202 has been created by a written instrument shall not be held
3203 invalid or an attempted testamentary disposition for any one or
3204 more of the following reasons:
3205 (a) Because the settlor or another person or both possess
3206 the power to revoke, amend, alter, or modify the trust in whole
3207 or in part;
3208 (b) Because the settlor or another person or both possess
3209 the power to appoint by deed or will the persons and
3210 organizations to whom the income shall be paid or the principal
3211 distributed;
3212 (c) Because the settlor or another person or both possess
3213 the power to add to, or withdraw from, the trust all or any part
3214 of the principal or income at one time or at different times;
3215 (d) Because the settlor or another person or both possess
3216 the power to remove the trustee or trustees and appoint a
3217 successor trustee or trustees;
3218 (e) Because the settlor or another person or both possess
3219 the power to control the trustee or trustees in the
3220 administration of the trust;

3221 (f) Because the settlor has retained the right to receive
3222 all or part of the income of the trust during her or his life or
3223 for any part thereof; or
3224 (g) Because the settlor is, at the time of the execution
3225 of the instrument, or thereafter becomes, sole trustee.
3226 (4) This section shall be applicable to trusts executed
3227 before or after July 1, 1969, by persons who are living on or
3228 after said date. ~~However, the requirement of conformity with the~~
3229 ~~formalities for the execution of wills as found in paragraph~~
3230 ~~(1)(g) shall not be imposed upon any trust executed prior to~~
3231 ~~July 1, 1969.~~
3232 Section 22. Section 689.175, Florida Statutes, is created
3233 to read:
3234 689.175 Worthier title doctrine abolished.--The doctrine
3235 of worthier title is abolished as a rule of law and as a rule of
3236 construction. Language in a governing instrument describing the
3237 beneficiaries of a disposition as the transferor's "heirs,"
3238 "heirs at law," "next of kin," "distributees," "relatives," or
3239 "family," or language of similar import, does not create or
3240 presumptively create a reversionary interest in the transferor.
3241 Section 23. Subsection (8) of section 709.08, Florida
3242 Statutes, is amended to read:
3243 709.08 Durable power of attorney.--
3244 (8) STANDARD OF CARE.--Except as otherwise provided in
3245 paragraph (4)(e), an attorney in fact is a fiduciary who must
3246 observe the standards of care applicable to trustees as
3247 described in s. 736.0901 ~~737.302~~. The attorney in fact is not
3248 liable to third parties for any act pursuant to the durable

3249 power of attorney if the act was authorized at the time. If the
3250 exercise of the power is improper, the attorney in fact is
3251 liable to interested persons as described in s. 731.201 for
3252 damage or loss resulting from a breach of fiduciary duty by the
3253 attorney in fact to the same extent as the trustee of an express
3254 trust.
3255 Section 24. Paragraph (c) of subsection (2) of section
3256 721.08, Florida Statutes, is amended to read:
3257 721.08 Escrow accounts; nondisturbance instruments;
3258 alternate security arrangements; transfer of legal title.--
3259 (2) One hundred percent of all funds or other property
3260 which is received from or on behalf of purchasers of the
3261 timeshare plan or timeshare interest prior to the occurrence of
3262 events required in this subsection shall be deposited pursuant
3263 to an escrow agreement approved by the division. The funds or
3264 other property may be released from escrow only as follows:
3265 (c) Compliance with conditions.--
3266 1. Timeshare licenses.--If the timeshare plan is one in
3267 which timeshare licenses are to be sold and no cancellation or
3268 default has occurred, the escrow agent may release the escrowed
3269 funds or other property to or on the order of the developer upon
3270 presentation of:
3271 a. An affidavit by the developer that all of the following
3272 conditions have been met:
3273 (I) Expiration of the cancellation period.
3274 (II) Completion of construction.
3275 (III) Closing.
3276 (IV) Either:

3277 (A) Execution, delivery, and recordation by each
3278 interestholder of the nondisturbance and notice to creditors
3279 instrument, as described in this section; or
3280 (B) Transfer by the developer of legal title to the
3281 subject accommodations and facilities, or all use rights
3282 therein, into a trust satisfying the requirements of
3283 subparagraph 4. and the execution, delivery, and recordation by
3284 each other interestholder of the nondisturbance and notice to
3285 creditors instrument, as described in this section.
3286 b. A certified copy of each recorded nondisturbance and
3287 notice to creditors instrument.
3288 c. One of the following:
3289 (I) A copy of a memorandum of agreement, as defined in s.
3290 721.05, together with satisfactory evidence that the original
3291 memorandum of agreement has been irretrievably delivered for
3292 recording to the appropriate official responsible for
3293 maintaining the public records in the county in which the
3294 subject accommodations and facilities are located. The original
3295 memorandum of agreement must be recorded within 180 days after
3296 the date on which the purchaser executed her or his purchase
3297 agreement.
3298 (II) A notice delivered for recording to the appropriate
3299 official responsible for maintaining the public records in each
3300 county in which the subject accommodations and facilities are
3301 located notifying all persons of the identity of an independent
3302 escrow agent or trustee satisfying the requirements of
3303 subparagraph 4. that shall maintain separate books and records,
3304 in accordance with good accounting practices, for the timeshare

3305 plan in which timeshare licenses are to be sold. The books and
3306 records shall indicate each accommodation and facility that is
3307 subject to such a timeshare plan and each purchaser of a
3308 timeshare license in the timeshare plan.
3309 2. Timeshare estates.--If the timeshare plan is one in
3310 which timeshare estates are to be sold and no cancellation or
3311 default has occurred, the escrow agent may release the escrowed
3312 funds or other property to or on the order of the developer upon
3313 presentation of:
3314 a. An affidavit by the developer that all of the following
3315 conditions have been met:
3316 (I) Expiration of the cancellation period.
3317 (II) Completion of construction.
3318 (III) Closing.
3319 b. If the timeshare estate is sold by agreement for deed,
3320 a certified copy of the recorded nondisturbance and notice to
3321 creditors instrument, as described in this section.
3322 c. Evidence that each accommodation and facility:
3323 (I) Is free and clear of the claims of any
3324 interestholders, other than the claims of interestholders that,
3325 through a recorded instrument, are irrevocably made subject to
3326 the timeshare instrument and the use rights of purchasers made
3327 available through the timeshare instrument;
3328 (II) Is the subject of a recorded nondisturbance and
3329 notice to creditors instrument that complies with subsection (3)
3330 and s. 721.17; or
3331 (III) Has been transferred into a trust satisfying the
3332 requirements of subparagraph 4.

3333 d. Evidence that the timeshare estate:
3334 (I) Is free and clear of the claims of any
3335 interestholders, other than the claims of interestholders that,
3336 through a recorded instrument, are irrevocably made subject to
3337 the timeshare instrument and the use rights of purchasers made
3338 available through the timeshare instrument; or
3339 (II) Is the subject of a recorded nondisturbance and
3340 notice to creditors instrument that complies with subsection (3)
3341 and s. 721.17.
3342 3. Personal property timeshare interests.--If the
3343 timeshare plan is one in which personal property timeshare
3344 interests are to be sold and no cancellation or default has
3345 occurred, the escrow agent may release the escrowed funds or
3346 other property to or on the order of the developer upon
3347 presentation of:
3348 a. An affidavit by the developer that all of the following
3349 conditions have been met:
3350 (I) Expiration of the cancellation period.
3351 (II) Completion of construction.
3352 (III) Closing.
3353 b. If the personal property timeshare interest is sold by
3354 agreement for transfer, evidence that the agreement for transfer
3355 complies fully with s. 721.06 and this section.
3356 c. Evidence that one of the following has occurred:
3357 (I) Transfer by the owner of the underlying personal
3358 property of legal title to the subject accommodations and
3359 facilities or all use rights therein into a trust satisfying the
3360 requirements of subparagraph 4.; or

3361 (II) Transfer by the owner of the underlying personal
3362 property of legal title to the subject accommodations and
3363 facilities or all use rights therein into an owners' association
3364 satisfying the requirements of subparagraph 5.
3365 d. Evidence of compliance with the provisions of
3366 subparagraph 6., if required.
3367 e. If a personal property timeshare plan is created with
3368 respect to accommodations and facilities that are located on or
3369 in an oceangoing vessel, including a "documented vessel" or a
3370 "foreign vessel," as defined and governed by 46 U.S.C., chapter
3371 301:
3372 (I) In making the transfer required in sub-subparagraph
3373 c., the developer shall use as its transfer instrument a
3374 document that establishes and protects the continuance of the
3375 use rights in the subject accommodations and facilities in a
3376 manner that is enforceable by the trust or owners' association.
3377 (II) The transfer instrument shall comply fully with the
3378 provisions of this chapter, shall be part of the timeshare
3379 instrument, and shall contain specific provisions that:
3380 (A) Prohibit the vessel owner, the developer, any manager
3381 or operator of the vessel, the owners' association or the
3382 trustee, the managing entity, or any other person from incurring
3383 any liens against the vessel except for liens that are required
3384 for the operation and upkeep of the vessel, including liens for
3385 fuel expenditures, repairs, crews' wages, and salvage, and
3386 except as provided in sub-sub-subparagraphs 4.b.(III) and
3387 5.b.(III). All expenses, fees, and taxes properly incurred in
3388 connection with the creation, satisfaction, and discharge of any

3389 such permitted lien, or a prorated portion thereof if less than
3390 all of the accommodations on the vessel are subject to the
3391 timeshare plan, shall be common expenses of the timeshare plan.
3392 (B) Grant a lien against the vessel in favor of the
3393 owners' association or trustee to secure the full and faithful
3394 performance of the vessel owner and developer of all of their
3395 obligations to the purchasers.
3396 (C) Establish governing law in a jurisdiction that
3397 recognizes and will enforce the timeshare instrument and the
3398 laws of the jurisdiction of registry of the vessel.
3399 (D) Require that a description of the use rights of
3400 purchasers be posted and displayed on the vessel in a manner
3401 that will give notice of such rights to any party examining the
3402 vessel. This notice must identify the owners' association or
3403 trustee and include a statement disclosing the limitation on
3404 incurring liens against the vessel described in sub-sub-sub-
3405 subparagraph (A).
3406 (E) Include the nondisturbance and notice to creditors
3407 instrument for the vessel owner and any other interestholders.
3408 (F) The owners' association created under subparagraph 5.
3409 or trustee created under subparagraph 4. shall have access to
3410 any certificates of classification in accordance with the
3411 timeshare instrument.
3412 (III) If the vessel is a foreign vessel, the vessel must
3413 be registered in a jurisdiction that permits a filing evidencing
3414 the use rights of purchasers in the subject accommodations and
3415 facilities, offers protection for such use rights against
3416 unfiled and inferior claims, and recognizes the document or

3417 instrument creating such use rights as a lien against the
3418 vessel.
3419 (IV) In addition to the disclosures required by s.
3420 721.07(5), the public offering statement and purchase contract
3421 must contain a disclosure in conspicuous type in substantially
3422 the following form:
3423
3424 The laws of the State of Florida govern the offering of this
3425 timeshare plan in this state. There are inherent risks in
3426 purchasing a timeshare interest in this timeshare plan because
3427 the accommodations and facilities of the timeshare plan are
3428 located on a vessel that will sail into international waters and
3429 into waters governed by many different jurisdictions. Therefore,
3430 the laws of the State of Florida cannot fully protect your
3431 purchase of an interest in this timeshare plan. Specifically,
3432 management and operational issues may need to be addressed in
3433 the jurisdiction in which the vessel is registered, which is
3434 (insert jurisdiction in which vessel is registered) . Concerns
3435 of purchasers may be sent to (insert name of applicable
3436 regulatory agency and address) .
3437
3438 4. Trust.--
3439 a. If the subject accommodations or facilities, or all use
3440 rights therein, are to be transferred into a trust in order to
3441 comply with this paragraph, such transfer shall take place
3442 pursuant to this subparagraph.
3443 b. Prior to the transfer by each interestholder of the
3444 subject accommodations and facilities, or all use rights

3445 therein, to a trust, any lien or other encumbrance against such
3446 accommodations and facilities, or use rights therein, shall be
3447 made subject to a nondisturbance and notice to creditors
3448 instrument pursuant to subsection (3). No transfer pursuant to
3449 this subparagraph shall become effective until the trustee
3450 accepts such transfer and the responsibilities set forth herein.
3451 A trust established pursuant to this subparagraph shall comply
3452 with the following provisions:
3453 (I) The trustee shall be an individual or a business
3454 entity authorized and qualified to conduct trust business in
3455 this state. Any corporation authorized to do business in this
3456 state may act as trustee in connection with a timeshare plan
3457 pursuant to this chapter. The trustee must be independent from
3458 any developer or managing entity of the timeshare plan or any
3459 interestholder of any accommodation or facility of such plan.
3460 (II) The trust shall be irrevocable so long as any
3461 purchaser has a right to occupy any portion of the timeshare
3462 property pursuant to the timeshare plan.
3463 (III) The trustee shall not convey, hypothecate, mortgage,
3464 assign, lease, or otherwise transfer or encumber in any fashion
3465 any interest in or portion of the timeshare property with
3466 respect to which any purchaser has a right of use or occupancy
3467 unless the timeshare plan is terminated pursuant to the
3468 timeshare instrument, or such conveyance, hypothecation,
3469 mortgage, assignment, lease, transfer, or encumbrance is
3470 approved by a vote of two-thirds of all voting interests of the
3471 timeshare plan and such decision is declared by a court of
3472 competent jurisdiction to be in the best interests of the

3473 purchasers of the timeshare plan. The trustee shall notify the
3474 division in writing within 10 days after receiving notice of the
3475 filing of any petition relating to obtaining such a court order.
3476 The division shall have standing to advise the court of the
3477 division's interpretation of the statute as it relates to the
3478 petition.
3479 (IV) All purchasers of the timeshare plan or the owners'
3480 association of the timeshare plan shall be the express
3481 beneficiaries of the trust. The trustee shall act as a fiduciary
3482 to the beneficiaries of the trust. The personal liability of the
3483 trustee shall be governed by ss. 736.08125, 736.08163, 736.1013,
3484 and 736.1015 ~~s. 737.306~~. The agreement establishing the trust
3485 shall set forth the duties of the trustee. The trustee shall be
3486 required to furnish promptly to the division upon request a copy
3487 of the complete list of the names and addresses of the owners in
3488 the timeshare plan and a copy of any other books and records of
3489 the timeshare plan required to be maintained pursuant to s.
3490 721.13 that are in the possession, custody, or control of the
3491 trustee. All expenses reasonably incurred by the trustee in the
3492 performance of its duties, together with any reasonable
3493 compensation of the trustee, shall be common expenses of the
3494 timeshare plan.
3495 (V) The trustee shall not resign upon less than 90 days'
3496 prior written notice to the managing entity and the division. No
3497 resignation shall become effective until a substitute trustee,
3498 approved by the division, is appointed by the managing entity
3499 and accepts the appointment.

3500 (VI) The documents establishing the trust arrangement
3501 shall constitute a part of the timeshare instrument.
3502 (VII) For trusts holding property in a timeshare plan
3503 located outside this state, the trust and trustee holding such
3504 property shall be deemed in compliance with the requirements of
3505 this subparagraph if such trust and trustee are authorized and
3506 qualified to conduct trust business under the laws of such
3507 jurisdiction and the agreement or law governing such trust
3508 arrangement provides substantially similar protections for the
3509 purchaser as are required in this subparagraph for trusts
3510 holding property in a timeshare plan in this state.
3511 (VIII) The trustee shall have appointed a registered agent
3512 in this state for service of process. In the event such a
3513 registered agent is not appointed, service of process may be
3514 served pursuant to s. 721.265.
3515 5. Owners' association.--
3516 a. If the subject accommodations or facilities, or all use
3517 rights therein, are to be transferred into an owners'
3518 association in order to comply with this paragraph, such
3519 transfer shall take place pursuant to this subparagraph.
3520 b. Prior to the transfer by each interestholder of the
3521 subject accommodations and facilities, or all use rights
3522 therein, to an owners' association, any lien or other
3523 encumbrance against such accommodations and facilities, or use
3524 rights therein, shall be made subject to a nondisturbance and
3525 notice to creditors instrument pursuant to subsection (3). No
3526 transfer pursuant to this subparagraph shall become effective
3527 until the owners' association accepts such transfer and the

3528 responsibilities set forth herein. An owners' association
3529 established pursuant to this subparagraph shall comply with the
3530 following provisions:
3531 (I) The owners' association shall be a business entity
3532 authorized and qualified to conduct business in this state.
3533 Control of the board of directors of the owners' association
3534 must be independent from any developer or managing entity of the
3535 timeshare plan or any interestholder.
3536 (II) The bylaws of the owners' association shall provide
3537 that the corporation may not be voluntarily dissolved without
3538 the unanimous vote of all owners of personal property timeshare
3539 interests so long as any purchaser has a right to occupy any
3540 portion of the timeshare property pursuant to the timeshare
3541 plan.
3542 (III) The owners' association shall not convey,
3543 hypothecate, mortgage, assign, lease, or otherwise transfer or
3544 encumber in any fashion any interest in or portion of the
3545 timeshare property with respect to which any purchaser has a
3546 right of use or occupancy, unless the timeshare plan is
3547 terminated pursuant to the timeshare instrument, or unless such
3548 conveyance, hypothecation, mortgage, assignment, lease,
3549 transfer, or encumbrance is approved by a vote of two-thirds of
3550 all voting interests of the association and such decision is
3551 declared by a court of competent jurisdiction to be in the best
3552 interests of the purchasers of the timeshare plan. The owners'
3553 association shall notify the division in writing within 10 days
3554 after receiving notice of the filing of any petition relating to
3555 obtaining such a court order. The division shall have standing

3556 to advise the court of the division's interpretation of the
3557 statute as it relates to the petition.
3558 (IV) All purchasers of the timeshare plan shall be members
3559 of the owners' association and shall be entitled to vote on
3560 matters requiring a vote of the owners' association as provided
3561 in this chapter or the timeshare instrument. The owners'
3562 association shall act as a fiduciary to the purchasers of the
3563 timeshare plan. The articles of incorporation establishing the
3564 owners' association shall set forth the duties of the owners'
3565 association. All expenses reasonably incurred by the owners'
3566 association in the performance of its duties, together with any
3567 reasonable compensation of the officers or directors of the
3568 owners' association, shall be common expenses of the timeshare
3569 plan.
3570 (V) The documents establishing the owners' association
3571 shall constitute a part of the timeshare instrument.
3572 (VI) For owners' associations holding property in a
3573 timeshare plan located outside this state, the owners'
3574 association holding such property shall be deemed in compliance
3575 with the requirements of this subparagraph if such owners'
3576 association is authorized and qualified to conduct owners'
3577 association business under the laws of such jurisdiction and the
3578 agreement or law governing such arrangement provides
3579 substantially similar protections for the purchaser as are
3580 required in this subparagraph for owners' associations holding
3581 property in a timeshare plan in this state.
3582 (VII) The owners' association shall have appointed a
3583 registered agent in this state for service of process. In the

3584 event such a registered agent cannot be located, service of
3585 process may be made pursuant to s. 721.265.
3586 6. Personal property subject to certificate of title.--If
3587 any personal property that is an accommodation or facility of a
3588 timeshare plan is subject to a certificate of title in this
3589 state pursuant to chapter 319 or chapter 328, the following
3590 notation must be made on such certificate of title pursuant to
3591 s. 319.27(1) or s. 328.15(1):
3592
3593 The further transfer or encumbrance of the property subject to
3594 this certificate of title, or any lien or encumbrance thereon,
3595 is subject to the requirements of section 721.17, Florida
3596 Statutes, and the transferee or lienor agrees to be bound by all
3597 of the obligations set forth therein.
3598 7. If the developer has previously provided a certified
3599 copy of any document required by this paragraph, she or he may
3600 for all subsequent disbursements substitute a true and correct
3601 copy of the certified copy, provided no changes to the document
3602 have been made or are required to be made.
3603 8. In the event that use rights relating to an
3604 accommodation or facility are transferred into a trust pursuant
3605 to subparagraph 4. or into an owners' association pursuant to
3606 subparagraph 5., all other interestholders, including the owner
3607 of the underlying fee or underlying personal property, must
3608 execute a nondisturbance and notice to creditors instrument
3609 pursuant to subsection (3).
3610 Section 25. Paragraph (e) of subsection (1) of section
3611 721.53, Florida Statutes, is amended to read:

3612 721.53 Subordination instruments; alternate security
3613 arrangements.--
3614 (1) With respect to each accommodation or facility of a
3615 multisite timeshare plan, the developer shall provide the
3616 division with satisfactory evidence that one of the following
3617 has occurred with respect to each interestholder prior to
3618 offering the accommodation or facility as a part of the
3619 multisite timeshare plan:
3620 (e) The interestholder has transferred the subject
3621 accommodation or facility or all use rights therein to a trust
3622 that complies with this paragraph. Prior to such transfer, any
3623 lien or other encumbrance against such accommodation or facility
3624 shall be made subject to a nondisturbance and notice to
3625 creditors instrument pursuant to paragraph (a) or a
3626 subordination and notice to creditors instrument pursuant to
3627 paragraph (b). No transfer pursuant to this paragraph shall
3628 become effective until the trust accepts such transfer and the
3629 responsibilities set forth herein. A trust established pursuant
3630 to this paragraph shall comply with the following provisions:
3631 1. The trustee shall be an individual or a business entity
3632 authorized and qualified to conduct trust business in this
3633 state. Any corporation authorized to do business in this state
3634 may act as trustee in connection with a timeshare plan pursuant
3635 to this chapter. The trustee must be independent from any
3636 developer or managing entity of the timeshare plan or any
3637 interestholder of any accommodation or facility of such plan.
3638 The same trustee may hold the accommodations and facilities, or

3639 use rights therein, for one or more of the component sites of
3640 the timeshare plan.
3641 2. The trust shall be irrevocable so long as any purchaser
3642 has a right to occupy any portion of the timeshare property
3643 pursuant to the timeshare plan.
3644 3. The trustee shall not convey, hypothecate, mortgage,
3645 assign, lease, or otherwise transfer or encumber in any fashion
3646 any interests in or portion of the timeshare property with
3647 respect to which any purchaser has a right of use or occupancy
3648 unless the timeshare plan is terminated pursuant to the
3649 timeshare instrument, or the timeshare property held in trust is
3650 deleted from a multisite timeshare plan pursuant to s.
3651 721.552(3), or such conveyance, hypothecation, mortgage,
3652 assignment, lease, transfer, or encumbrance is approved by vote
3653 of two-thirds of all voting interests of the timeshare plan and
3654 such decision is declared by a court of competent jurisdiction
3655 to be in the best interests of the purchasers of the timeshare
3656 plan.
3657 4. All purchasers of the timeshare plan or the owners'
3658 association of the timeshare plan shall be express beneficiaries
3659 of the trust. The trustee shall act as a fiduciary to the
3660 beneficiaries of the trust. The personal liability of the
3661 trustee shall be governed by ss. 736.08125, 736.08163, 736.1013,
3662 and 736.1015 ~~s. 737.306~~. The agreement establishing the trust
3663 shall set forth the duties of the trustee. The trustee shall be
3664 required to furnish promptly to the division upon request a copy
3665 of the complete list of the names and addresses of the owners in
3666 the timeshare plan and a copy of any other books and records of

3667 the timeshare plan required to be maintained pursuant to s.
3668 721.13 that are in the possession of the trustee. All expenses
3669 reasonably incurred by the trustee in the performance of its
3670 duties, together with any reasonable compensation of the
3671 trustee, shall be common expenses of the timeshare plan.
3672 5. The trustee shall not resign upon less than 90 days'
3673 prior written notice to the managing entity and the division. No
3674 resignation shall become effective until a substitute trustee,
3675 approved by the division, is appointed by the managing entity
3676 and accepts the appointment.
3677 6. The documents establishing the trust arrangement shall
3678 constitute a part of the timeshare instrument.
3679 7. For trusts holding property in component sites located
3680 outside this state, the trust holding such property shall be
3681 deemed in compliance with the requirements of this paragraph, if
3682 such trust is authorized and qualified to conduct trust business
3683 under the laws of such jurisdiction and the agreement or law
3684 governing such trust arrangement provides substantially similar
3685 protections for the purchaser as are required in this paragraph
3686 for trusts holding property in a component site located in this
3687 state.
3688 8. The trustee shall have appointed a registered agent in
3689 this state for service of process. In the event such a
3690 registered agent is not appointed, service of process may be
3691 served pursuant to s. 721.265.
3692 Section 26. Section 731.103, Florida Statutes, is amended
3693 to read:

3694 731.103 Evidence as to death or status.--In proceedings
3695 under this code and under chapter 736, the ~~rules of evidence in~~
3696 ~~civil actions are applicable unless specifically changed by the~~
3697 ~~code. The~~ following additional rules relating to determination
3698 of death and status are applicable:
3699 (1) An authenticated copy of a death certificate issued by
3700 an official or agency of the place where the death purportedly
3701 occurred is prima facie proof of the fact, place, date, and time
3702 of death and the identity of the decedent.
3703 (2) A copy of any record or report of a governmental
3704 agency, domestic or foreign, that a person is alive, missing,
3705 detained, or, from the facts related, presumed dead is prima
3706 facie evidence of the status and of the dates, circumstances,
3707 and places disclosed by the record or report.
3708 (3) A person who is absent from the place of his or her
3709 last known domicile for a continuous period of 5 years and whose
3710 absence is not satisfactorily explained after diligent search
3711 and inquiry is presumed to be dead. The person's death is
3712 presumed to have occurred at the end of the period unless there
3713 is evidence establishing that death occurred earlier. Evidence
3714 showing that the absent person was exposed to a specific peril
3715 of death may be a sufficient basis for the court determining at
3716 any time after such exposure that he or she died less than 5
3717 years after the date on which his or her absence commenced. A
3718 petition for this determination shall be filed in the county in
3719 Florida where the decedent maintained his or her domicile or in
3720 any county of this state if the decedent was not a resident of
3721 Florida at the time his or her absence commenced.

3722 (4) This section does not preclude the establishment of
3723 death by direct or circumstantial evidence prior to expiration
3724 of the 5-year time period set forth in subsection (3).
3725 Section 27. Section 731.1035, Florida Statutes, is created
3726 to read:
3727 731.1035 Applicable rules of evidence.--In proceedings
3728 under this code, the rules of evidence in civil actions are
3729 applicable unless specifically changed by the code.
3730 Section 28. Section 731.201, Florida Statutes, is amended
3731 to read:
3732 731.201 General definitions.--Subject to additional
3733 definitions in subsequent chapters that are applicable to
3734 specific chapters or parts, and unless the context otherwise
3735 requires, in this code, in s. 409.9101, and in chapters 736 ~~737~~,
3736 738, 739, and 744, the term:
3737 (1) "Authenticated," when referring to copies of documents
3738 or judicial proceedings required to be filed with the court
3739 under this code, means a certified copy or a copy authenticated
3740 according to the Federal Rules of Civil Procedure.
3741 (2) "Beneficiary" means heir at law in an intestate estate
3742 and devisee in a testate estate. The term "beneficiary" does not
3743 apply to an heir at law or a devisee after that person's
3744 interest in the estate has been satisfied. In the case of a
3745 devise to an existing trust or trustee, or to a trust or trustee
3746 described by will, the trustee is a beneficiary of the estate.
3747 Except as otherwise provided in this subsection, the beneficiary
3748 of the trust is not a beneficiary of the estate of which that
3749 trust or the trustee of that trust is a beneficiary. However, if

3750 each trustee is also a personal representative of the estate,
3751 each qualified beneficiary ~~the beneficiary or beneficiaries~~ of
3752 the trust as defined in s. 736.0103(14) ~~737.303(4)(b)~~ shall be
3753 regarded as a beneficiary of the estate.
3754 (3) "Child" includes a person entitled to take as a child
3755 under this code by intestate succession from the parent whose
3756 relationship is involved, and excludes any person who is only a
3757 stepchild, a foster child, a grandchild, or a more remote
3758 descendant.
3759 (4) "Claim" means a liability of the decedent, whether
3760 arising in contract, tort, or otherwise~~,~~ and funeral expense.
3761 The term does not include an expense of administration or
3762 estate, inheritance, succession, or other death taxes.
3763 (5) "Clerk" means the clerk or deputy clerk of the court.
3764 (6) "Court" means the circuit court.
3765 (7) "Curator" means a person appointed by the court to
3766 take charge of the estate of a decedent until letters are
3767 issued.
3768 (8) "Devise," when used as a noun, means a testamentary
3769 disposition of real or personal property and, when used as a
3770 verb, means to dispose of real or personal property by will or
3771 trust. The term includes "gift," "give," "bequeath," "bequest,"
3772 and "legacy." A devise is subject to charges for debts,
3773 expenses, and taxes as provided in this code, the will, or the
3774 trust.
3775 (9) "Devisee" means a person designated in a will or trust
3776 to receive a devise. Except as otherwise provided in this
3777 subsection, in the case of a devise to an existing trust or

3778 trustee, or to a trust or trustee of a trust described by will,
3779 the trust or trustee, rather than the beneficiaries of the
3780 trust, is the devisee. However, if each trustee is also a
3781 personal representative of the estate, each qualified
3782 beneficiary ~~the beneficiary or beneficiaries~~ of the trust as
3783 defined in s. 736.0103(14) ~~737.303(4)(b)~~ shall be regarded as a
3784 devisee.
3785 (10) "Distributee" means a person who has received estate
3786 property from a personal representative or other fiduciary other
3787 than as a creditor or purchaser. A testamentary trustee is a
3788 distributee only to the extent of distributed assets or
3789 increments to them remaining in the trustee's hands. A
3790 beneficiary of a testamentary trust to whom the trustee has
3791 distributed property received from a personal representative is
3792 a distributee. For purposes of this provision, "testamentary
3793 trustee" includes a trustee to whom assets are transferred by
3794 will, to the extent of the devised assets.
3795 (11) "Domicile" means a person's usual place of dwelling
3796 and shall be synonymous with residence.
3797 (12) "Estate" means the property of a decedent that is the
3798 subject of administration.
3799 (13) "Exempt property" means the property of a decedent's
3800 estate which is described in s. 732.402.
3801 (14) "File" means to file with the court or clerk.
3802 (15) "Foreign personal representative" means a personal
3803 representative of another state or a foreign country.
3804 (16) "Formal notice" means formal notice under the Florida
3805 Probate Rules.

3806 (17) "Grantor" means one who creates or adds to a trust
3807 and includes "settlor" or "trustor" and a testator who creates
3808 or adds to a trust.
3809 (18) "Heirs" or "heirs at law" means those persons,
3810 including the surviving spouse, who are entitled under the
3811 statutes of intestate succession to the property of a decedent.
3812 (19) "Incompetent" means a minor or a person adjudicated
3813 incompetent.
3814 (20) "Informal notice" or "notice" means informal notice
3815 under the Florida Probate Rules.
3816 (21) "Interested person" means any person who may
3817 reasonably be expected to be affected by the outcome of the
3818 particular proceeding involved. In any proceeding affecting the
3819 estate or the rights of a beneficiary in the estate, the
3820 personal representative of the estate shall be deemed to be an
3821 interested person. In any proceeding affecting the expenses of
3822 the administration and obligations of a decedent's estate, or
3823 any claims described in s. 733.702(1), the trustee of a trust
3824 described in s. 733.707(3) is an interested person in the
3825 administration of the grantor's estate. The term does not
3826 include a beneficiary who has received complete distribution.
3827 The meaning, as it relates to particular persons, may vary from
3828 time to time and must be determined according to the particular
3829 purpose of, and matter involved in, any proceedings.
3830 (22) "Letters" means authority granted by the court to the
3831 personal representative to act on behalf of the estate of the
3832 decedent and refers to what has been known as letters

3833 testamentary and letters of administration. All letters shall be
3834 designated "letters of administration."
3835 (23) "Other state" means any state of the United States
3836 other than Florida and includes the District of Columbia, the
3837 Commonwealth of Puerto Rico, and any territory or possession
3838 subject to the legislative authority of the United States.
3839 (24) "Parent" excludes any person who is only a
3840 stepparent, foster parent, or grandparent.
3841 (25) "Personal representative" means the fiduciary
3842 appointed by the court to administer the estate and refers to
3843 what has been known as an administrator, administrator cum
3844 testamento annexo, administrator de bonis non, ancillary
3845 administrator, ancillary executor, or executor.
3846 (26) "Petition" means a written request to the court for
3847 an order.
3848 (27) "Power of appointment" means an authority, other than
3849 as an incident of the beneficial ownership of property, to
3850 designate recipients of beneficial interests in property.
3851 (28) ~~(27)~~ "Probate of will" means all steps necessary to
3852 establish the validity of a will and to admit a will to probate.
3853 (29) ~~(28)~~ "Property" means both real and personal property
3854 or any interest in it and anything that may be the subject of
3855 ownership.
3856 (30) ~~(29)~~ "Protected homestead" means the property
3857 described in s. 4(a)(1), Art. X of the State Constitution on
3858 which at the death of the owner the exemption inures to the
3859 owner's surviving spouse or heirs under s. 4(b), Art. X of the

3860 State Constitution. For purposes of the code, real property
3861 owned as tenants by the entirety is not protected homestead.
3862 (31) ~~(30)~~ "Residence" means a person's place of dwelling.
3863 (32) ~~(31)~~ "Residuary devise" means a devise of the assets
3864 of the estate which remain after the provision for any devise
3865 which is to be satisfied by reference to a specific property or
3866 type of property, fund, sum, or statutory amount. If the will
3867 contains no devise which is to be satisfied by reference to a
3868 specific property or type of property, fund, sum, or statutory
3869 amount, "residuary devise" or "residue" means a devise of all
3870 assets remaining after satisfying the obligations of the estate.
3871 (33) ~~(32)~~ "Security" means a security as defined in s.
3872 517.021.
3873 (34) ~~(33)~~ "Security interest" means a security interest as
3874 defined in s. 671.201.
3875 (35) ~~(34)~~ "Trust" means an express trust, private or
3876 charitable, with additions to it, wherever and however created.
3877 It also includes a trust created or determined by a judgment or
3878 decree under which the trust is to be administered in the manner
3879 of an express trust. "Trust" excludes other constructive trusts,
3880 and it excludes resulting trusts; conservatorships; custodial
3881 arrangements pursuant to the Florida Uniform Transfers to Minors
3882 Act; business trusts providing for certificates to be issued to
3883 beneficiaries; common trust funds; land trusts under s. 689.05;
3884 trusts created by the form of the account or by the deposit
3885 agreement at a financial institution; voting trusts; security
3886 arrangements; liquidation trusts; trusts for the primary purpose
3887 of paying debts, dividends, interest, salaries, wages, profits,

3888 pensions, or employee benefits of any kind; and any arrangement
3889 under which a person is nominee or escrowee for another.
3890 (36) ~~(35)~~ "Trustee" includes an original, additional,
3891 surviving, or successor trustee, whether or not appointed or
3892 confirmed by court.
3893 (37) ~~(36)~~ "Will" means an instrument, including a codicil,
3894 executed by a person in the manner prescribed by this code,
3895 which disposes of the person's property on or after his or her
3896 death and includes an instrument which merely appoints a
3897 personal representative or revokes or revises another will.
3898 Section 29. Paragraph (a) of subsection (1) and subsection
3899 (5) of section 731.303, Florida Statutes, are amended to read:
3900 731.303 Representation.--In the administration of or in
3901 judicial proceedings involving estates of decedents or trusts,
3902 the following apply:
3903 (1) Persons are bound by orders binding others in the
3904 following cases:
3905 (a)1. Orders binding the sole holder or all coholders of a
3906 power of revocation or a general, special, or limited power of
3907 appointment, including one in the form of a power of amendment
3908 or revocation to the extent that the power has not become
3909 unexercisable in fact, bind all persons to the extent that their
3910 interests, as persons who may take by virtue of the exercise or
3911 nonexercise of the power, are subject to the power.
3912 2. Subparagraph 1. does not apply to:
3913 a. Any matter determined by the court to involve fraud or
3914 bad faith by the trustee;
3915 b. A power of a trustee to distribute trust property; or

3916 c. A power of appointment held by a person while the
3917 person is the sole trustee.
3918 (5) The holder of a power of appointment over property not
3919 held in trust may represent and bind persons whose interests, as
3920 permissible appointees, takers in default, or otherwise, are
3921 subject to the power. Representation under this subsection does
3922 not apply to:
3923 (a) Any matter determined by the court to involve fraud or
3924 bad faith by the trustee;
3925 (b) A power of a trustee to distribute trust property; or
3926 (c) A power of appointment held by a person while the
3927 person is the sole trustee ~~When a sole holder or coholder of a~~
3928 ~~general, special, or limited power of appointment, including an~~
3929 ~~exercisable power of amendment or revocation over property in an~~
3930 ~~estate or trust, is bound by:~~
3931 ~~(a) Agreements, waivers, consents, or approvals; or~~
3932 ~~(b) Accounts, trust accountings, or other written reports~~
3933 ~~that adequately disclose matters set forth therein,~~
3934
3935 ~~then all persons who may take by virtue of, and whose interests~~
3936 ~~are subject to, the exercise or nonexercise of the power are~~
3937 ~~also bound, but only to the extent of their interests which~~
3938 ~~could otherwise be affected by the exercise or nonexercise of~~
3939 ~~the power~~.
3940 Section 30. Subsection (5) of section 732.2075, Florida
3941 Statutes, is amended to read:
3942 732.2075 Sources from which elective share payable;
3943 abatement.--

3944 (5) Unless otherwise provided in the trust instrument or,
3945 in the decedent's will if there is no provision in the trust
3946 instrument, any amount to be satisfied from trust property shall
3947 be paid from the assets of the trust in the order provided for
3948 claims under s. 736.05053 ~~737.3054~~(2) and (3). A direction in
3949 the decedent's will is effective only for revocable trusts.
3950 Section 31. Subsection (2) of section 732.513, Florida
3951 Statutes, is amended to read:
3952 732.513 Devises to trustee.--
3953 (2) The devise shall not be invalid for any or all of the
3954 following reasons:
3955 (a) Because the trust is amendable or revocable, or both,
3956 by any person.
3957 (b) Because the trust has been amended or revoked in part
3958 after execution of the will or a codicil to it.
3959 ~~(c) Because the trust instrument or any amendment to it~~
3960 ~~was not executed in the manner required for wills.~~
3961 (c) ~~(d)~~ Because the only res of the trust is the possible
3962 expectancy of receiving, as a named beneficiary, a devise under
3963 a will or death benefits as described in s. 733.808, and even
3964 though the testator or other person has reserved any or all
3965 rights of ownership in the death benefit policy, contract, or
3966 plan, including the right to change the beneficiary.
3967 (d) ~~(e)~~ Because of any of the provisions of s. 689.075.
3968 Section 32. Section 732.603, Florida Statutes, is amended
3969 to read:
3970 (Substantial rewording of section. See
3971 s. 732.603, F.S., for present text.)

3972 732.603 Antilapse; deceased devisee; class gifts.--
3973 (1) Unless a contrary intent appears in the will, if a
3974 devisee who is a grandparent, or a descendant of a grandparent,
3975 of the testator:
3976 (a) Is dead at the time of the execution of the will;
3977 (b) Fails to survive the testator; or
3978 (c) Is required by the will or by operation of law to be
3979 treated as having predeceased the testator,
3980
3981 a substitute gift is created in the devisee's surviving
3982 descendants who take per stirpes the property to which the
3983 devisee would have been entitled had the devisee survived the
3984 testator.
3985 (2) When a power of appointment is exercised by will,
3986 unless a contrary intent appears in the document creating the
3987 power of appointment or in the testator's will, if an appointee
3988 who is a grandparent, or a descendant of a grandparent, of the
3989 donor of the power:
3990 (a) Is dead at the time of the execution of the will or
3991 the creation of the power;
3992 (b) Fails to survive the testator; or
3993 (c) Is required by the will, the document creating the
3994 power, or by operation of law to be treated as having
3995 predeceased the testator,
3996
3997 a substitute gift is created in the appointee's surviving
3998 descendants who take per stirpes the property to which the
3999 appointee would have been entitled had the appointee survived

4000 the testator. Unless the language creating a power of
4001 appointment expressly excludes the substitution of the
4002 descendants of an object of a power for the object, a surviving
4003 descendant of a deceased object of a power of appointment may be
4004 substituted for the object whether or not the descendant is an
4005 object of the power.
4006 (3) In the application of this section:
4007 (a) Words of survivorship in a devise or appointment to an
4008 individual, such as "if he survives me," or to "my surviving
4009 children," are a sufficient indication of an intent contrary to
4010 the application of subsections (1) and (2). Words of
4011 survivorship used by the donor of the power in a power to
4012 appoint to an individual, such as "if he survives the donee," or
4013 in a power to appoint to the donee's "then surviving children,"
4014 are a sufficient indication of an intent contrary to the
4015 application of subsection (2).
4016 (b) The term:
4017 1. "Appointment" includes an alternative appointment and
4018 an appointment in the form of a class gift.
4019 2. "Appointee" includes:
4020 a. A class member if the appointment is in the form of a
4021 class gift.
4022 b. An individual or class member who was deceased at the
4023 time the testator executed his or her will as well as an
4024 individual or class member who was then living but who failed to
4025 survive the testator.
4026 3. "Devise" also includes an alternative devise and a
4027 devise in the form of a class gift.

4028 4. "Devisee" also includes:
4029 a. A class member if the devise is in the form of a class
4030 gift.
4031 b. An individual or class member who was deceased at the
4032 time the testator executed his or her will as well as an
4033 individual or class member who was then living but who failed to
4034 survive the testator.
4035 (4) This section applies only to outright devises and
4036 appointments. Devises and appointments in trust, including to a
4037 testamentary trust, are subject to s. 736.1106.
4038 Section 33. Section 732.604, Florida Statutes, is amended
4039 to read:
4040 732.604 Failure of testamentary provision.--
4041 (1) Except as provided in s. 732.603, if a devise other
4042 than a residuary devise fails for any reason, it becomes a part
4043 of the residue.
4044 (2) Except as provided in s. 732.603, if the residue is
4045 devised to two or more persons, the share of a residuary devisee
4046 that fails for any reason ~~and the devise to one of the residuary~~
4047 ~~devisees fails for any reason, that devise~~ passes to the other
4048 residuary devisee, or to the other residuary devisees in
4049 proportion to the ~~their~~ interests of each in the remaining part
4050 of the residue.
4051 Section 34. Section 732.611, Florida Statutes, is amended
4052 to read:
4053 732.611 Devises to multigeneration classes to be per
4054 stirpes.--Unless the will provides otherwise, all devises to

4055 descendants, issue, and other multigeneration classes shall be
4056 per stirpes.
4057 Section 35. Subsection (1) of section 733.212, Florida
4058 Statutes, is amended to read:
4059 733.212 Notice of administration; filing of objections.--
4060 (1) The personal representative shall promptly serve a
4061 copy of the notice of administration on the following persons
4062 who are known to the personal representative:
4063 (a) The decedent's surviving spouse;
4064 (b) Beneficiaries;
4065 (c) The trustee of any trust described in s. 733.707(3)
4066 and each qualified beneficiary of the trust as defined in s.
4067 736.0103(14) ~~737.303(4)(b)~~, if each trustee is also a personal
4068 representative of the estate; and
4069 (d) Persons who may be entitled to exempt property
4070
4071 in the manner provided for service of formal notice, unless
4072 served under s. 733.2123. The personal representative may
4073 similarly serve a copy of the notice on any devisees under a
4074 known prior will or heirs or others who claim or may claim an
4075 interest in the estate.
4076 Section 36. Subsection (1) of section 733.602, Florida
4077 Statutes, is amended to read:
4078 733.602 General duties.--
4079 (1) A personal representative is a fiduciary who shall
4080 observe the standards of care applicable to trustees as
4081 described by part VII of chapter 736 ~~s. 737.302~~. A personal
4082 representative is under a duty to settle and distribute the

4083 estate of the decedent in accordance with the terms of the
4084 decedent's will and this code as expeditiously and efficiently
4085 as is consistent with the best interests of the estate. A
4086 personal representative shall use the authority conferred by
4087 this code, the authority in the will, if any, and the authority
4088 of any order of the court, for the best interests of interested
4089 persons, including creditors.
4090 Section 37. Subsection (4) of section 733.805, Florida
4091 Statutes, is amended to read:
4092 733.805 Order in which assets abate.--
4093 (4) In determining the contribution required under s.
4094 733.607(2), subsections (1)-(3) of this section and s. 736.05053
4095 ~~737.3054~~(2) shall be applied as if the beneficiaries of the
4096 estate and the beneficiaries of a trust described in s.
4097 733.707(3), other than the estate or trust itself, were taking
4098 under a common instrument.
4099 Section 38. Paragraph (j) of subsection (1) of section
4100 733.817, Florida Statutes, is amended to read:
4101 733.817 Apportionment of estate taxes.--
4102 (1) For purposes of this section:
4103 (j) "Residuary devise" has the meaning set forth in s.
4104 731.201~~(31)~~.
4105 Section 39. Paragraphs (a) and (f) of subsection (8) and
4106 paragraphs (a) and (d) of subsection (9) of section 738.104,
4107 Florida Statutes, are amended to read:
4108 738.104 Trustee's power to adjust.--
4109 (8) With respect to a trust in existence on January 1,
4110 2003:

4111 (a) A trustee shall not have the power to adjust under
4112 this section until the statement required in subsection (9) is
4113 provided and either no objection is made or any objection which
4114 is made has been terminated.
4115 1. An objection is made if, within 60 days after the date
4116 of the statement required in subsection (9), a super majority of
4117 the eligible ~~trust~~ beneficiaries deliver to the trustee a
4118 written objection to the application of this section to such
4119 trust. An objection shall be deemed to be delivered to the
4120 trustee on the date the objection is mailed to the mailing
4121 address listed in the notice provided in subsection (9).
4122 2. An objection is terminated upon the earlier of the
4123 receipt of consent from a super majority of eligible ~~trust~~
4124 beneficiaries of the class that made the objection, or the
4125 resolution of the objection pursuant to paragraph (c).
4126 (f) The objection of a super majority of eligible
4127 beneficiaries under this subsection shall be valid for a period
4128 of 1 year after the date of the notice set forth in subsection
4129 (9). Upon expiration of the objection, the trustee may
4130 thereafter give a new notice under subsection (9).
4131 (9)(a) A trustee of a trust in existence on January 1,
4132 2003, that is not prohibited under subsection (3) from
4133 exercising the power to adjust shall, any time prior to
4134 initially exercising the power, provide to all eligible
4135 ~~reasonably ascertainable current~~ beneficiaries ~~described in s.~~
4136 ~~737.303(4)(b)1. and all reasonably ascertainable remainder~~
4137 ~~beneficiaries described in s. 737.303(4)(b)2.~~ a statement
4138 containing the following:

4139 1. The name, telephone number, street address, and mailing
4140 address of the trustee and of any individuals who may be
4141 contacted for further information;
4142 2. A statement that unless a super majority of the
4143 eligible beneficiaries objects to the application of this
4144 section to the trust within 60 days after the date the statement
4145 pursuant to this subsection was served, s. 738.104 shall apply
4146 to the trust; and
4147 3. A statement that, if s. 738.104 applies to the trust,
4148 the trustee will have the power to adjust between income and
4149 principal and that such a power may have an effect on the
4150 distributions to such beneficiary from the trust.
4151 (d) For purposes of subsection (8) and this subsection,
4152 the term:
4153 1. "Eligible beneficiaries" means:
4154 a. If at the time the determination is made there is one
4155 or more beneficiaries described in s. 736.0103(14)(c), the
4156 beneficiaries described in s. 736.0103(14)(a) and (c); or
4157 b. If there is no beneficiary described in s.
4158 736.0103(14)(c), the beneficiaries described in s.
4159 736.0103(14)(a) and (b).
4160 2. ~~A~~ "Super majority of the eligible ~~trust~~ beneficiaries"
4161 means:
4162 a. If at the time the determination is made there is one
4163 or more beneficiaries described in s. 736.0103(14)(c), at least
4164 two-thirds in interest of the ~~reasonably ascertainable current~~
4165 beneficiaries described in s. 736.0103(14)(a) ~~737.303(4)(b)1.~~ or
4166 two-thirds in interest of the ~~reasonably ascertainable remainder~~

4167 beneficiaries described in s. 736.0103(14)(c) ~~737.303(4)(b)2.~~,
4168 if the interests of the beneficiaries are reasonably
4169 ascertainable; otherwise, it means two-thirds in number of
4170 either such class; or
4171 b. If there is no beneficiary described in s.
4172 736.0103(14)(c), at least two-thirds in interest of the
4173 beneficiaries described in s. 736.0103(14)(a) or two-thirds in
4174 interest of the beneficiaries described in s. 736.0103(14)(b),
4175 if the interests of the beneficiaries are reasonably
4176 ascertainable, otherwise, two-thirds in number of either such
4177 class.
4178 Section 40. Subsection (4) of section 738.1041, Florida
4179 Statutes, is amended to read:
4180 738.1041 Total return unitrust.--
4181 (4) All determinations made pursuant to sub-subparagraph
4182 (2)(b)2.b. shall be conclusive if reasonable and made in good
4183 faith. Such determination shall be conclusively presumed to have
4184 been made reasonably and in good faith unless proven otherwise
4185 in a proceeding commenced by or on behalf of a person interested
4186 in the trust within the time provided in s. 736.1008 ~~737.307~~.
4187 The burden will be on the objecting interested party to prove
4188 that the determinations were not made reasonably and in good
4189 faith.
4190 Section 41. Subsection (5) of section 738.202, Florida
4191 Statutes, is amended to read:
4192 738.202 Distribution to residuary and remainder
4193 beneficiaries.--

4194 (5) The value of trust assets shall be determined on an
4195 asset-by-asset basis and shall be conclusive if reasonable and
4196 determined in good faith. Determinations based on appraisals
4197 performed within 2 years before or after the valuation date
4198 shall be presumed reasonable. The value of trust assets shall be
4199 conclusively presumed to be reasonable and determined in good
4200 faith unless proven otherwise in a proceeding commenced by or on
4201 behalf of a person interested in the trust within the time
4202 provided in s. 736.1008 ~~737.307~~.
4203 Section 42. Paragraph (a) of subsection (12) of section
4204 739.102, Florida Statutes, is amended to read:
4205 739.102 Definitions.--As used in this chapter, the term:
4206 (12) "Trust" means:
4207 (a) An express trust (including an honorary trust or a
4208 trust under s. 736.0408 ~~737.116~~), charitable or noncharitable,
4209 with additions thereto, whenever and however created; and
4210
4211 As used in this chapter, the term "trust" does not include a
4212 constructive trust or a resulting trust.
4213 Section 43. Paragraphs (b) and (f) of subsection (6) of
4214 section 744.331, Florida Statutes, are amended to read:
4215 744.331 Procedures to determine incapacity.--
4216 (6) ORDER DETERMINING INCAPACITY.--If, after making
4217 findings of fact on the basis of clear and convincing evidence,
4218 the court finds that a person is incapacitated with respect to
4219 the exercise of a particular right, or all rights, the court
4220 shall enter a written order determining such incapacity. A

4221 person is determined to be incapacitated only with respect to
4222 those rights specified in the order.
4223 (b) When an order determines that a person is incapable of
4224 exercising delegable rights, the court must consider and find
4225 whether there is an alternative to guardianship which will
4226 sufficiently address the problems of the incapacitated person. A
4227 guardian must be appointed to exercise the incapacitated
4228 person's delegable rights unless the court finds there is an
4229 alternative. A guardian may not be appointed if the court finds
4230 there is an alternative to guardianship which will sufficiently
4231 address the problems of the incapacitated person. ~~In any order~~
4232 ~~declaring a person incapacitated the court must find that~~
4233 ~~alternatives to guardianship were considered and that no~~
4234 ~~alternative to guardianship will sufficiently address the~~
4235 ~~problems of the ward.~~
4236 (f) Upon the filing of a verified statement by an
4237 interested person stating:
4238 1. That he or she has a good faith belief that the alleged
4239 incapacitated person's trust, trust amendment, or durable power
4240 of attorney is invalid; and
4241 2. A reasonable factual basis for that belief,
4242
4243 the trust, trust amendment, or durable power of attorney shall
4244 not be deemed to be an alternative to the appointment of a
4245 guardian. The appointment of a guardian does not limit the
4246 court's power to determine that certain authority granted by a
4247 durable power of attorney is to remain exercisable by the
4248 attorney in fact. ~~When an order is entered which determines that~~

4249 ~~a person is incapable of exercising delegable rights, a guardian~~
4250 ~~must be appointed to exercise those rights.~~
4251 Section 44. Paragraph (a) of subsection (6) of section
4252 744.361, Florida Statutes, is amended to read:
4253 744.361 Powers and duties of guardian.--
4254 (6) A guardian who is given authority over any property of
4255 the ward shall:
4256 (a) Protect and preserve the property and invest it
4257 prudently as provided in chapter 518 ~~defined in s. 737.302~~,
4258 apply it as provided in s. 744.397, and account for it
4259 faithfully.
4260 Section 45. Subsections (11) and (18) of section 744.441,
4261 Florida Statutes, are amended to read:
4262 744.441 Powers of guardian upon court approval.--After
4263 obtaining approval of the court pursuant to a petition for
4264 authorization to act, a plenary guardian of the property, or a
4265 limited guardian of the property within the powers granted by
4266 the order appointing the guardian or an approved annual or
4267 amended guardianship report, may:
4268 (11) Prosecute or defend claims or proceedings in any
4269 jurisdiction for the protection of the estate and of the
4270 guardian in the performance of his or her duties. Before
4271 authorizing a guardian to bring an action described in s.
4272 736.0207, the court shall first find that the action appears to
4273 be in the ward's best interests during the ward's probable
4274 lifetime. If the court denies a request that a guardian be
4275 authorized to bring an action described in s. 736.0207, the

4276 court shall review the continued need for a guardian and the
4277 extent of the need for delegation of the ward's rights.
4278 (18) When the ward's will evinces an objective to obtain a
4279 United States estate tax charitable deduction by use of a split
4280 interest trust (as that term is defined in s. 736.1201 ~~737.501~~),
4281 but the maximum charitable deduction otherwise allowable will
4282 not be achieved in whole or in part, execute a codicil on the
4283 ward's behalf amending said will to obtain the maximum
4284 charitable deduction allowable without diminishing the aggregate
4285 value of the benefits of any beneficiary under such will.
4286 Section 46. Section 744.462, Florida Statutes, is created
4287 to read:
4288 744.462 Determination regarding alternatives to
4289 guardianship.--Any judicial determination concerning the
4290 validity of the ward's durable power of attorney, trust, or
4291 trust amendment shall be promptly reported in the guardianship
4292 proceeding by the guardian of the property. If the instrument
4293 has been judicially determined to be valid or if, after the
4294 appointment of a guardian, a petition is filed alleging that
4295 there is an alternative to guardianship which will sufficiently
4296 address the problems of the ward, the court shall review the
4297 continued need for a guardian and the extent of the need for
4298 delegation of the ward's rights.
4299 Section 47. Sections 737.101, 737.105, 737.106, 737.111,
4300 737.115, 737.116, 737.201, 737.202, 737.203, 737.2035, 737.204,
4301 737.2041, 737.205, 737.206, 737.2065, 737.207, 737.208, 737.209,
4302 737.301, 737.302, 737.303, 737.3035, 737.304, 737.305, 737.3053,
4303 737.3054, 737.3055, 737.306, 737.3061, 737.307, 737.308,

4304 737.309, 737.401, 737.402, 737.4025, 737.403, 737.4031,
4305 737.4032, 737.4033, 737.404, 737.405, 737.406, 737.501, 737.502,
4306 737.503, 737.504, 737.505, 737.506, 737.507, 737.508, 737.509,
4307 737.510, 737.511, 737.512, 737.6035, 737.621, 737.622, 737.623,
4308 737.624, 737.625, 737.626, and 737.627, Florida Statutes, are
4309 repealed.
4310 Section 48. This act shall take effect July 1, 2007.

Bill No. **HB 0425**

1

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

---

1 Council/Committee hearing bill: Civil Justice Committee
2 Representative(s) Mahon offered the following:
3
4 **Amendment (with title amendment)**
5 Remove everything after the enacting clause and insert:
6 Section 1. Part I of chapter 736, Florida Statutes,
7 consisting of sections 736.0101, 736.0102, 736.0103, 736.0104,
8 736.0105, 736.0106, 736.0107, 736.0108, 736.0109, 736.0110,
9 736.0111, and 736.0112, is created to read:
10
11 PART I
12 GENERAL PROVISIONS AND DEFINITIONS
13
14 736.0101 Short title.--This chapter may be cited as the
15 "Florida Trust Code" and for purposes of this chapter is
16 referred to as the "code."
17 736.0102 Scope.--This code applies to express trusts,
18 charitable or noncharitable, and trusts created pursuant to a
19 law, judgment, or decree that requires the trust to be
20 administered in the manner of an express trust. This code does
21 not apply to constructive or resulting trusts; conservatorships;
22 custodial arrangements pursuant to the Florida Uniform Transfers

23 to Minors Act; business trusts providing for certificates to be
24 issued to beneficiaries; common trust funds; land trusts under
25 s. 689.05; trusts created by the form of the account or by the
26 deposit agreement at a financial institution; voting trusts;
27 security arrangements; liquidation trusts; trusts for the
28 primary purpose of paying debts, dividends, interest, salaries,
29 wages, profits, pensions, or employee benefits of any kind; and
30 any arrangement under which a person is nominee or escrowee for
31 another.
32 736.0103 Definitions.--Unless the context otherwise
33 requires, in this code:
34 (1) "Action," with respect to an act of a trustee,
35 includes a failure to act.
36 (2) "Affiliate" means any person or entity that directly or
37 indirectly through one or more intermediaries owns or controls,
38 is owned or controlled by, or is under common control or
39 ownership, with the fiduciary. An affiliate may include, but is
40 not limited to, an investment adviser, administrator, broker,
41 custodian, transfer agent, placement agent, servicing agent,
42 registrar, custodian, underwriter, sponsor, distributor, or
43 manager.
44 (3) "Ascertainable standard" means a standard relating to
45 an individual's health, education, support, or maintenance
46 within the meaning of s. 2041(b)(1)(A) or s. 2514(c)(1) of the
47 Internal Revenue Code of 1986, as amended.
48 (4) "Beneficiary" means a person who:
49 (a) Has a present or future beneficial interest in a
50 trust, vested or contingent; or
51 (b) Holds a power of appointment over trust property in a
52 capacity other than that of trustee.

53 (5) "Charitable trust" means a trust, or portion of a
54 trust, created for a charitable purpose as described in s.
55 736.0405(1).
56 (6) "Environmental law" means a federal, state, or local
57 law, rule, regulation, or ordinance that relates to protection
58 of the environment or human health.
59 (7) "General power of appointment" means a power of
60 appointment exercisable in favor of the holder of the power, the
61 power holder's creditors, the power holder's estate, or the
62 creditors of the power holder's estate.
63 (8) "Guardian of the person" means a person appointed by
64 the court to make decisions regarding the support, care,
65 education, health, and welfare of a minor or an incapacitated
66 adult. The term does not include a guardian ad litem.
67 (9) "Guardian of the property" means a person appointed by
68 the court to administer the estate of a minor or incapacitated
69 adult.
70 (10) "Interests of the beneficiaries" means the beneficial
71 interests provided in the terms of the trust.
72 (11) "Jurisdiction" with respect to a geographic area,
73 includes a state or country.
74 (12) "Power of withdrawal" means a presently exercisable
75 general power of appointment other than a power:
76 (a) Exercisable by a trustee and limited by an
77 ascertainable standard; or
78 (b) Exercisable by another person only upon consent of the
79 trustee or a person holding an adverse interest.
80 (13) "Property" means anything that may be the subject of
81 ownership, real or personal, legal or equitable, or any interest
82 therein.

83 (14) "Qualified beneficiary" means a living beneficiary
84 who, on the date the beneficiary's qualification is determined:
85 (a) Is a distributee or permissible distributee of trust
86 income or principal;
87 (b) Would be a distributee or permissible distributee of
88 trust income or principal if the interests of the distributees
89 described in paragraph (a) terminated on that date without
90 causing the trust to terminate; or
91 (c) Would be a distributee or permissible distributee of
92 trust income or principal if the trust terminated in accordance
93 with its terms on that date.
94 (15) "Revocable," as applied to a trust, means revocable
95 by the settlor without the consent of the trustee or a person
96 holding an adverse interest.
97 (16) "Settlor" means a person, including a testator, who
98 creates or contributes property to a trust. If more than one
99 person creates or contributes property to a trust, each person
100 is a settlor of the portion of the trust property attributable
101 to that person's contribution except to the extent another
102 person has the power to revoke or withdraw that portion.
103 (17) "Spendthrift provision" means a term of a trust that
104 restrains both voluntary and involuntary transfer of a
105 beneficiary's interest.
106 (18) "State" means any state of the United States and
107 includes the District of Columbia, the Commonwealth of Puerto
108 Rico, and any territory or possession subject to the legislative
109 authority of the United States.
110 (19) "Terms of a trust" means the manifestation of the
111 settlor's intent regarding a trust's provisions as expressed in
112 the trust instrument or as may be established by other evidence
113 that would be admissible in a judicial proceeding.

114 (20) "Trust instrument" means an instrument executed by a
115 settlor that contains terms of the trust, including any
116 amendments to the trust.
117 (21) "Trustee" means the original trustee and includes any
118 additional trustee, any successor trustee, and any cotrustee.
119 736.0104 Knowledge.--
120 (1) Subject to subsection (2), a person has knowledge of a
121 fact if the person:
122 (a) Has actual knowledge of the fact;
123 (b) Has received a notice or notification of the fact; or
124 (c) Has reason to know the fact from all the other facts
125 and circumstances known to the person at the time in question.
126 (2) An organization that conducts activities through
127 employees has notice or knowledge of a fact involving a trust
128 only from the time the information was received by an employee
129 having responsibility to act on matters involving the trust, or
130 would have been brought to the employee's attention if the
131 organization had exercised reasonable diligence. An organization
132 exercises reasonable diligence if the organization maintains
133 reasonable routines for communicating significant information to
134 the employee having responsibility to act on matters involving
135 the trust and there is reasonable compliance with the routines.
136 Reasonable diligence does not require an employee of the
137 organization to communicate information unless the communication
138 is part of the individual's regular duties or the individual
139 knows a matter involving the trust would be materially affected
140 by the information.
141 736.0105 Default and mandatory rules.--
142 (1) Except as otherwise provided in the terms of the
143 trust, this code governs the duties and powers of a trustee,

144 relations among trustees, and the rights and interests of a
145 beneficiary.
146 (2) The terms of a trust prevail over any provision of
147 this code except:
148 (a) The requirements for creating a trust.
149 (b) The duty of the trustee to act in good faith and in
150 accordance with the terms and purposes of the trust and the
151 interests of the beneficiaries.
152 (c) The requirement that a trust and its terms be for the
153 benefit of the trust's beneficiaries, and that the trust have a
154 purpose that is lawful, not contrary to public policy, and
155 possible to achieve.
156 (d) The periods of limitation for commencing a judicial
157 proceeding.
158 (e) The power of the court to take such action and
159 exercise such jurisdiction as may be necessary in the interests
160 of justice.
161 (f) The requirements under s. 736.0108(1) for the
162 designation of a principal place of administration of the trust.
163 (g) The jurisdiction and venue provisions in ss. 736.0202,
164 736.0203, and 736.0204.
165 (h) The restrictions on the designation of representative
166 under s. 736.0306.
167 (i) The formalities required under s. 736.0403(2) for the
168 execution of a trust.
169 (j) The power of the court to modify or terminate a trust
170 under ss. 736.0410-736.04115, except as provided in s.
171 736.04115(3)(b), and under ss. 736.0413, 736.0415, and 736.0416.
172 (k) The ability to modify a trust under s. 736.0412,
173 except as provided in s. 736.0412(4)(b).

174 (l) The effect of a spendthrift provision and the rights
175 of certain creditors and assignees to reach a trust as provided
176 in part V.
177 (m) The trustee's duty under s. 736.05053 to pay expenses
178 and obligations of the settlor's estate.
179 (n) The trustee's duty under s. 736.05055 to file a notice
180 of trust at the settlor's death.
181 (o) The right of a trustee under s. 736.0701 to decline a
182 trusteeship and the right of a trustee under s. 736.0705 to
183 resign a trusteeship.
184 (p) The power of the court under s. 736.0702 to require,
185 dispense with, modify, or terminate a bond.
186 (q) The power of the court under s. 736.0708(2) to adjust
187 a trustee's compensation specified in the terms of the trust
188 that is unreasonably low or high.
189 (r) The duty under s. 736.0813(1)(a) and (b) to notify
190 qualified beneficiaries of an irrevocable trust of the existence
191 of the trust, of the identity of the trustee, and of their
192 rights to trust accountings.
193 (s) The duty under s. 736.0813(1)(c) and (d) to provide a
194 complete copy of the trust instrument and to account to
195 qualified beneficiaries.
196 (t) The duty under s. 736.0813(1)(e) to respond to the
197 request of a qualified beneficiary of an irrevocable trust for
198 relevant information about the assets and liabilities of the
199 trust and the particulars relating to trust administration.
200 (u) The effect of an exculpatory term under s. 736.1011.
201 (v) The rights under ss. 736.1013-736.1017 of a person
202 other than a trustee or beneficiary.
203 (w) The effect of a penalty clause for contesting a trust
204 under s. 736.1108.

205 736.0106 Common law of trusts; principles of equity.--The
206 common law of trusts and principles of equity supplement this
207 code, except to the extent modified by this code or another law
208 of this state.
209 736.0107 Governing law.--The meaning and effect of the
210 terms of a trust are determined by:
211 (1) The law of the jurisdiction designated in the terms of
212 the trust, provided there is a sufficient nexus to the
213 designated jurisdiction at the time of creation of the trust or
214 during the trust administration, such as the location of real
215 property held by the trust, or the residence or location of an
216 office of the settlor, trustee, or any beneficiary; or
217 (2) In the absence of a controlling designation in the
218 terms of the trust, the law of the jurisdiction where the
219 settlor resides at the time the trust is first created.
220 (3) Notwithstanding subsections (1) or (2), a designation
221 in the terms of a trust is not controlling as to any matter for
222 which the designation would be contrary to a strong public
223 policy of this state.
224 736.0108 Principal place of administration.--
225 (1) Terms of a trust designating the principal place of
226 administration of the trust are valid only if there is a
227 sufficient connection with the designated jurisdiction. Without
228 precluding other means for establishing a sufficient connection,
229 terms of a trust designating the principal place of
230 administration are valid and controlling if:
231 (a) A trustee's principal place of business is located in
232 or a trustee is a resident of the designated jurisdiction; or
233 (b) All or part of the administration occurs in the
234 designated jurisdiction.

235 (2) Unless otherwise validly designated in the trust
236 instrument, the principal place of administration of a trust is
237 the trustee's usual place of business where the records
238 pertaining to the trust are kept or, if the trustee has no place
239 of business, the trustee's residence. In the case of cotrustees,
240 the principal place of administration is:
241 (a) The usual place of business of the corporate trustee,
242 if there is only one corporate cotrustee;
243 (b) The usual place of business or residence of the
244 individual trustee who is a professional fiduciary, if there is
245 only one such person and no corporate cotrustee; or otherwise
246 (c) The usual place of business or residence of any of the
247 cotrustees as agreed on by the cotrustees.
248 (3) Notwithstanding any other provision of this section,
249 the principal place of administration of a trust, for which a
250 bank, association, or trust company organized under the laws of
251 this state or bank or savings association organized under the
252 laws of the United States with its main office in this state has
253 been appointed trustee, shall not be moved or otherwise affected
254 solely because the trustee engaged in an interstate merger
255 transaction with an out-of-state bank pursuant to s. 658.2953 in
256 which the out-of-state bank is the resulting bank.
257 (4) A trustee is under a continuing duty to administer the
258 trust at a place appropriate to its purposes and its
259 administration.
260 (5) Without precluding the right of the court to order,
261 approve, or disapprove a transfer, the trustee, in furtherance
262 of the duty prescribed by subsection (4), may transfer the
263 trust's principal place of administration to another state or to
264 a jurisdiction outside of the United States.

265 (6) The trustee shall notify the qualified beneficiaries
266 of a proposed transfer of a trust's principal place of
267 administration not less than 60 days before initiating the
268 transfer. The notice of proposed transfer must include:
269 (a) The name of the jurisdiction to which the principal
270 place of administration is to be transferred.
271 (b) The address and telephone number at the new location
272 at which the trustee can be contacted.
273 (c) An explanation of the reasons for the proposed
274 transfer.
275 (d) The date on which the proposed transfer is anticipated
276 to occur.
277 (e) The date, not less than 60 days after the notice is
278 provided, by which the qualified beneficiary must notify the
279 trustee of an objection to the proposed transfer.
280 (7) The authority of a trustee to act under this section
281 without court approval to transfer a trust's principal place of
282 administration is suspended if a qualified beneficiary files a
283 lawsuit objecting to the proposed transfer on or before the date
284 specified in the notice. The suspension is effective until the
285 lawsuit is dismissed or withdrawn.
286 (8) In connection with a transfer of the trust's principal
287 place of administration, the trustee may transfer any of the
288 trust property to a successor trustee designated in the terms of
289 the trust or appointed pursuant to s. 736.0704.
290 736.0109 Methods and waiver of notice.--
291 (1) Notice to a person under this code or the sending of a
292 document to a person under this code must be accomplished in a
293 manner reasonably suitable under the circumstances and likely to
294 result in receipt of the notice or document. Permissible methods
295 of notice or for sending a document include first-class mail,

296 personal delivery, delivery to the person's last known place of
297 residence or place of business, or a properly directed facsimile
298 or other electronic message.
299 (2) Notice otherwise required under this code or a
300 document otherwise required to be sent under this code need not
301 be provided to a person whose identity or location is unknown to
302 and not reasonably ascertainable by the trustee.
303 (3) Notice under this code or the sending of a document
304 under this code may be waived by the person to be notified or to
305 whom the document is to be sent.
306 (4) Notice of a judicial proceeding must be given as
307 provided in the Florida Rules of Civil Procedure.
308 736.0110 Others treated as qualified beneficiaries.--
309 (1) A charitable organization expressly designated to
310 receive distributions under the terms of a charitable trust has
311 the rights of a qualified beneficiary under this code if the
312 charitable organization, on the date the charitable
313 organization's qualification is being determined:
314 (a) Is a distributee or permissible distributee of trust
315 income or principal;
316 (b) Would be a distributee or permissible distributee of
317 trust income or principal on termination of the interests of
318 other distributees or permissible distributees then receiving or
319 eligible to receive distributions; or
320 (c) Would be a distributee or permissible distributee of
321 trust income or principal if the trust terminated on that date.
322 (2) A person appointed to enforce a trust created for the
323 care of an animal or another noncharitable purpose as provided
324 in s. 736.0408 or s. 736.0409 has the rights of a qualified
325 beneficiary under this code.

326 (3) The Attorney General may assert the rights of a
327 qualified beneficiary with respect to a charitable trust having
328 its principal place of administration in this state.
329 736.0111 Nonjudicial settlement agreements.--
330 (1) For purposes of this section, the term "interested
331 persons" means persons whose interest would be affected by a
332 settlement agreement.
333 (2) Except as otherwise provided in subsection (3),
334 interested persons may enter into a binding nonjudicial
335 settlement agreement with respect to any matter involving a
336 trust.
337 (3) A nonjudicial settlement agreement among the trustee
338 and trust beneficiaries is valid only to the extent the terms
339 and conditions could be properly approved by the court. A
340 nonjudicial settlement may not be used to produce a result not
341 authorized by other provisions of this code, including, but not
342 limited to, terminating or modifying a trust in an impermissible
343 manner.
344 (4) Matters that may be resolved by a nonjudicial
345 settlement agreement include:
346 (a) The interpretation or construction of the terms of the
347 trust.
348 (b) The approval of a trustee's report or accounting.
349 (c) The direction to a trustee to refrain from performing
350 a particular act or the grant to a trustee of any necessary or
351 desirable power.
352 (d) The resignation or appointment of a trustee and the
353 determination of a trustee's compensation.
354 (e) The transfer of a trust's principal place of
355 administration.

356 (f) The liability of a trustee for an action relating to
357 the trust.
358 (5) Any interested person may request the court to approve
359 or disapprove a nonjudicial settlement agreement.
360 736.0112 Qualification of foreign trustee.--Unless
361 otherwise doing business in this state, local qualification by a
362 foreign trustee is not required for the trustee to receive
363 distribution from a local estate. Nothing in this chapter shall
364 affect the provisions of s. 660.41.
365 Section 2. Part II of chapter 736, Florida Statutes,
366 consisting of sections 736.0201, 736.0202, 736.0203, 736.0204,
367 736.0205, 736.0206, and 736.0207, is created to read:
368
369 PART II
370 JUDICIAL PROCEEDINGS
371
372 736.0201 Role of court in trust proceedings.--
373 (1) Except as provided in subsection (5) and s. 736.0206,
374 proceedings concerning trusts shall be commenced by filing a
375 complaint and shall be governed by the Florida Rules of Civil
376 Procedure.
377 (2) The court may intervene in the administration of a
378 trust to the extent the court's jurisdiction is invoked by an
379 interested person or as provided by law.
380 (3) A trust is not subject to continuing judicial
381 supervision unless ordered by the court.
382 (4) A judicial proceeding involving a trust may relate to
383 the validity, administration, or distribution of a trust,
384 including proceedings to:
385 (a) Determine the validity of all or part of a trust;
386 (b) Appoint or remove a trustee;

387 (c) Review trustees' fees;
388 (d) Review and settle interim or final accounts;
389 (e) Ascertain beneficiaries; determine any question
390 arising in the administration or distribution of any trust,
391 including questions of construction of trust instruments;
392 instruct trustees; and determine the existence or nonexistence
393 of any immunity, power, privilege, duty, or right;
394 (f) Obtain a declaration of rights; or
395 (g) Determine any other matters involving trustees and
396 beneficiaries.
397 (5) A proceeding for the construction of a testamentary
398 trust may be filed in the probate proceeding for the testator's
399 estate. The proceeding shall be governed by the Florida Probate
400 Rules.
401 736.0202 Jurisdiction over trustee and beneficiary.--
402 (1) By accepting the trusteeship of a trust having its
403 principal place of administration in this state or by moving the
404 principal place of administration to this state, the trustee
405 submits personally to the jurisdiction of the courts of this
406 state regarding any matter involving the trust.
407 (2) With respect to their interests in the trust, the
408 beneficiaries of a trust having its principal place of
409 administration in this state are subject to the jurisdiction of
410 the courts of this state regarding any matter involving the
411 trust. By accepting a distribution from such a trust, the
412 recipient submits personally to the jurisdiction of the courts
413 of this state regarding any matter involving the distribution.
414 (3) This section does not preclude other methods of
415 obtaining jurisdiction over a trustee, beneficiary, or other
416 person receiving property from the trust.

417 736.0203 Subject-matter jurisdiction.--The circuit court
418 has original jurisdiction in this state of all proceedings
419 arising under this code.
420 736.0204 Venue.--Venue for actions and proceedings
421 concerning trusts, including those under s. 736.0201, may be
422 laid in:
423 (1) Any county where the venue is proper under chapter 47;
424 (2) Any county where the beneficiary suing or being sued
425 resides or has its principal place of business; or
426 (3) The county where the trust has its principal place of
427 administration.
428 736.0205 Trust proceedings; dismissal of matters relating
429 to foreign trusts.--Over the objection of a party, the court
430 shall not entertain proceedings under s. 736.0201 for a trust
431 registered, or having its principal place of administration, in
432 another state unless all interested parties could not be bound
433 by litigation in the courts of the state where the trust is
434 registered or has its principal place of administration. The
435 court may condition a stay or dismissal of a proceeding under
436 this section on the consent of any party to jurisdiction of the
437 state where the trust is registered or has its principal place
438 of business, or the court may grant a continuance or enter any
439 other appropriate order.
440 736.0206 Proceedings for review of employment of agents
441 and review of compensation of trustee and employees of trust.--
442 (1) After notice to all interested persons, the court may
443 review the propriety of the employment by a trustee of any
444 person, including any attorney, auditor, investment adviser, or
445 other specialized agent or assistant, and the reasonableness of
446 any compensation paid to that person or to the trustee.

447 (2) If the settlor's estate is being probated, and the
448 settlor's trust or the trustee of the settlor's trust is a
449 beneficiary under the settlor's will, the trustee, any person
450 employed by the trustee, or any interested person may have the
451 propriety of employment and the reasonableness of the
452 compensation of the trustee or any person employed by the
453 trustee determined in the probate proceeding.
454 (3) The burden of proof of the propriety of the employment
455 and the reasonableness of the compensation shall be on the
456 trustee and the person employed by the trustee. Any person who
457 is determined to have received excessive compensation from a
458 trust for services rendered may be ordered to make appropriate
459 refunds.
460 (4) Court proceedings to determine reasonable compensation
461 of a trustee or any person employed by a trustee, if required,
462 are a part of the trust administration process. The costs,
463 including attorney's fees, of the person assuming the burden of
464 proof of propriety of the employment and reasonableness of the
465 compensation shall be determined by the court and paid from the
466 assets of the trust unless the court finds the compensation paid
467 or requested to be substantially unreasonable. The court shall
468 direct from which part of the trust assets the compensation
469 shall be paid.
470 (5) The court may determine reasonable compensation for a
471 trustee or any person employed by a trustee without receiving
472 expert testimony. Any party may offer expert testimony after
473 notice to interested persons. If expert testimony is offered, a
474 reasonable expert witness fee shall be awarded by the court and
475 paid from the assets of the trust. The court shall direct from
476 which part of the trust assets the fee shall be paid.

477 (6) Persons given notice as provided in this section shall
478 be bound by all orders entered on the complaint.
479 (7) In a proceeding pursuant to subsection (2), the
480 petitioner may serve formal notice as provided in the Florida
481 Probate Rules, and such notice shall be sufficient for the court
482 to acquire jurisdiction over the person receiving the notice to
483 the extent of the person's interest in the trust.
484 736.0207 Trust contests.--An action to contest the
485 validity of all or part of a trust may not be commenced until
486 the trust becomes irrevocable, except this section does not
487 prohibit such action by the guardian of the property of an
488 incapacitated settlor.
489 Section 3. Part III of chapter 736, Florida Statutes,
490 consisting of sections 736.0301, 736.0302, 736.0303, 736.0304,
491 736.0305, and 736.0306, is created to read:
492
493 PART III
494 REPRESENTATION
495
496 736.0301 Representation; basic effect.--
497 (1) Notice, information, accountings, or reports given to
498 a person who may represent and bind another person under this
499 part may serve as a substitute for and have the same effect as
500 notice, information, accountings, or reports given directly to
501 the other person.
502 (2) Actions taken by a person who represents the interests
503 of another person under this part are binding on the person
504 whose interests are represented to the same extent as if the
505 actions had been taken by the person whose interests are
506 represented.

507 (3) Except as otherwise provided in s. 736.0602, a person
508 under this part who represents a settlor lacking capacity may
509 receive notice and give a binding consent on the settlor's
510 behalf.
511 (4) A trustee is not liable for giving notice,
512 information, accountings, or reports to a beneficiary who is
513 represented by another person under this part and nothing in
514 this part prohibits the trustee from giving notice, information,
515 accountings, or reports to the person represented.
516 736.0302 Representation by holder of power of
517 appointment.--
518 (1) The holder of a power of appointment may represent and
519 bind persons whose interests, as permissible appointees, takers
520 in default, or otherwise, are subject to the power.
521 (2) Subsection (1) does not apply to:
522 (a) Any matter determined by the court to involve fraud or
523 bad faith by the trustee;
524 (b) A power of a trustee to distribute trust property; or
525 (c) A power of appointment held by a person while the
526 person is the sole trustee.
527 736.0303 Representation by fiduciaries and parents.--To
528 the extent there is no conflict of interest between the
529 representative and the person represented or among those being
530 represented with respect to a particular question or dispute:
531 (1) A guardian of the property may represent and bind the
532 estate that the guardian of the property controls.
533 (2) An agent having authority to act with respect to the
534 particular question or dispute may represent and bind the
535 principal.
536 (3) A trustee may represent and bind the beneficiaries of
537 the trust.

538 (4) A personal representative of a decedent's estate may
539 represent and bind persons interested in the estate.
540 (5) A parent may represent and bind the parent's unborn
541 child, or the parent's minor child if a guardian of the property
542 for the minor child has not been appointed.
543 736.0304 Representation by person having substantially
544 identical interest.--Unless otherwise represented, a minor,
545 incapacitated, or unborn individual, or a person whose identity
546 or location is unknown and not reasonably ascertainable, may be
547 represented by and bound by another person having a
548 substantially identical interest with respect to the particular
549 question or dispute, but only to the extent there is no conflict
550 of interest between the representative and the person
551 represented.
552 736.0305 Appointment of representative.--
553 (1) If the court determines that an interest is not
554 represented under this part, or that the otherwise available
555 representation might be inadequate, the court may appoint a
556 representative to receive notice, give consent, and otherwise
557 represent, bind, and act on behalf of a minor, incapacitated, or
558 unborn individual, or a person whose identity or location is
559 unknown. If not precluded by a conflict of interest, a
560 representative may be appointed to represent several persons or
561 interests.
562 (2) A representative may act on behalf of the individual
563 represented with respect to any matter arising under this code,
564 whether or not a judicial proceeding concerning the trust is
565 pending.
566 (3) In making decisions, a representative may consider
567 general benefits accruing to the living members of the
568 represented individual's family.

569 736.0306 Designated representative.--
570 (1) If authorized in the trust instrument, one or more
571 persons may be designated to represent and bind a beneficiary
572 and receive any notice, information, accounting, or report.
573 (2) Except as otherwise provided in this code, a person
574 designated, as provided in subsection (1) may not represent and
575 bind a beneficiary while that person is serving as trustee.
576 (3) Except as otherwise provided in this code, a person
577 designated, as provided in subsection (1) may not represent and
578 bind another beneficiary if the person designated also is a
579 beneficiary, unless:
580 (a) That person was named by the settlor; or
581 (b) That person is the beneficiary's spouse or a
582 grandparent or descendant of a grandparent of the beneficiary or
583 the beneficiary's spouse.
584 (4) No person designated, as provided in subsection (1) is
585 liable to the beneficiary whose interests are represented, or to
586 anyone claiming through that beneficiary, for any actions or
587 omissions to act made in good faith.
588 Section 4. Part IV of chapter 736, Florida Statutes,
589 consisting of sections 736.0401, 736.0402, 736.0403, 736.0404,
590 736.0405, 736.0406, 736.0407, 736.0408, 736.0409, 736.0410,
591 736.04113, 736.04115, 736.0412, 736.0413, 736.0414, 736.0415,
592 736.0416, and 736.0417, is created to read:
593
594 PART IV
595 CREATION, VALIDITY, MODIFICATION, AND TERMINATION
596
597 736.0401 Methods of creating trust.--A trust may be
598 created by:

599 (1) Transfer of property to another person as trustee
600 during the settlor's lifetime or by will or other disposition
601 taking effect on the settlor's death;
602 (2) Declaration by the owner of property that the owner
603 holds identifiable property as trustee; or
604 (3) Exercise of a power of appointment in favor of a
605 trustee.
606 736.0402 Requirements for creation.--
607 (1) A trust is created only if:
608 (a) The settlor has capacity to create a trust.
609 (b) The settlor indicates an intent to create the trust.
610 (c) The trust has a definite beneficiary or is:
611 1. A charitable trust;
612 2. A trust for the care of an animal, as provided in s.
613 736.0408; or
614 3. A trust for a noncharitable purpose, as provided in s.
615 736.0409.
616 (d) The trustee has duties to perform.
617 (e) The same person is not the sole trustee and sole
618 beneficiary.
619 (2) A beneficiary is definite if the beneficiary can be
620 ascertained now or in the future, subject to any applicable rule
621 against perpetuities.
622 (3) A power of a trustee to select a beneficiary from an
623 indefinite class is valid. If the power is not exercised within
624 a reasonable time, the power fails and the property subject to
625 the power passes to the persons who would have taken the
626 property had the power not been conferred.
627 736.0403 Trusts created in other jurisdictions;
628 formalities required for revocable trusts.--

629 (1) A trust not created by will is validly created if the
630 creation of the trust complies with the law of the jurisdiction
631 in which the trust instrument was executed or the law of the
632 jurisdiction in which, at the time of creation, the settlor was
633 domiciled.
634 (2) Notwithstanding subsection (1):
635 (a) No trust or confidence of or in any messuages, lands,
636 tenements, or hereditaments shall arise or result unless the
637 trust complies with the provisions of s. 689.05.
638 (b) The testamentary aspects of a revocable trust,
639 executed by a settlor who is a domiciliary of this state at the
640 time of execution, are invalid unless the trust instrument is
641 executed by the settlor with the formalities required for the
642 execution of a will in this state. For purposes of this
643 subsection, the term "testamentary aspects" means those
644 provisions of the trust instrument that dispose of the trust
645 property on or after the death of the settlor other than to the
646 settlor's estate.
647 (3) This section does not apply to trusts established as
648 part of an employee annuity described in s. 403 of the Internal
649 Revenue Code of 1986, as amended, an individual retirement
650 account as described in s. 408 of the Internal Revenue Code of
651 1986, as amended, a Keogh (HR-10) Plan, or a retirement or other
652 plan that is qualified under s. 401 of the Internal Revenue Code
653 of 1986, as amended.
654 (4) This section applies to trusts created on or after the
655 effective date of this code. Section 737.111, as in effect prior
656 to the effective date of this code, continues to apply to trusts
657 created before the effective date of this code.
658 736.0404 Trust purposes.--A trust may be created only to
659 the extent the purposes of the trust are lawful, not contrary to

660 public policy, and possible to achieve. A trust and its terms
661 must be for the benefit of its beneficiaries.
662 736.0405 Charitable purposes; enforcement.--
663 (1) A trust may be created for charitable purposes.
664 Charitable purposes include, but are not limited to, the relief
665 of poverty; the advancement of arts, sciences, education, or
666 religion; and the promotion of health, governmental, or
667 municipal purposes.
668 (2) If the terms of a charitable trust do not indicate a
669 particular charitable purpose or beneficiary, the court may
670 select one or more charitable purposes or beneficiaries. The
671 selection must be consistent with the settlor's intent to the
672 extent such intent can be ascertained.
673 (3) The settlor of a charitable trust, among others, has
674 standing to enforce the trust.
675 736.0406 Effect of fraud, duress, mistake, or undue
676 influence.--A trust is void if the creation of the trust is
677 procured by fraud, duress, mistake, or undue influence. Any part
678 of the trust is void if procured by such means, but the
679 remainder of the trust not procured by such means is valid if
680 the remainder is not invalid for other reasons.
681 736.0407 Evidence of oral trust.--Except as required by s.
682 736.0403 or a law other than this code, a trust need not be
683 evidenced by a trust instrument but the creation of an oral
684 trust and its terms may be established only by clear and
685 convincing evidence.
686 736.0408 Trust for care of an animal.--
687 (1) A trust may be created to provide for the care of an
688 animal alive during the settlor's lifetime. The trust terminates
689 on the death of the animal or, if the trust was created to

690 provide for the care of more than one animal alive during the
691 settlor's lifetime, on the death of the last surviving animal.
692 (2) A trust authorized by this section may be enforced by
693 a person appointed in the terms of the trust or, if no person is
694 appointed, by a person appointed by the court. A person having
695 an interest in the welfare of the animal may request the court
696 to appoint a person to enforce the trust or to remove a person
697 appointed.
698 (3) Property of a trust authorized by this section may be
699 applied only to the intended use of the property, except to the
700 extent the court determines that the value of the trust property
701 exceeds the amount required for the intended use. Except as
702 otherwise provided in the terms of the trust, property not
703 required for the intended use must be distributed to the
704 settlor, if then living, otherwise as part of the settlor's
705 estate.
706 736.0409 Noncharitable trust without ascertainable
707 beneficiary.--Except as otherwise provided in s. 736.0408 or by
708 another provision of law, the following rules apply:
709 (1) A trust may be created for a noncharitable purpose
710 without a definite or definitely ascertainable beneficiary or
711 for a noncharitable but otherwise valid purpose to be selected
712 by the trustee. The trust may not be enforced for more than 21
713 years.
714 (2) A trust authorized by this section may be enforced by
715 a person appointed in the terms of the trust or, if no person is
716 appointed, by a person appointed by the court.
717 (3) Property of a trust authorized by this section may be
718 applied only to the intended use of the property, except to the
719 extent the court determines that the value of the trust property
720 exceeds the amount required for the intended use. Except as

721 otherwise provided in the terms of the trust, property not
722 required for the intended use must be distributed to the
723 settlor, if then living, otherwise as part of the settlor's
724 estate.
725 736.0410 Modification or termination of trust; proceedings
726 for disapproval of nonjudicial acts.--
727 (1) In addition to the methods of termination prescribed
728 by ss. 736.04113-736.0414, a trust terminates to the extent the
729 trust expires or is revoked or is properly distributed pursuant
730 to the terms of the trust.
731 (2) A proceeding to disapprove a proposed modification or
732 termination under s. 736.0412 or a trust combination or division
733 under s. 736.0417 may be commenced by any beneficiary.
734 (3) A proceeding to disapprove a proposed termination
735 under s. 736.0414(1) may be commenced by any qualified
736 beneficiary.
737 736.04113 Judicial modification of irrevocable trust when
738 modification is not inconsistent with settlor's purpose.--
739 (1) Upon the application of a trustee of the trust or any
740 qualified beneficiary, a court at any time may modify the terms
741 of a trust that is not then revocable in the manner provided in
742 subsection (2), if:
743 (a) The purposes of the trust have been fulfilled or have
744 become illegal, impossible, wasteful, or impracticable to
745 fulfill;
746 (b) Because of circumstances not anticipated by the
747 settlor, compliance with the terms of the trust would defeat or
748 substantially impair the accomplishment of a material purpose of
749 the trust; or
750 (c) A material purpose of the trust no longer exists.
751 (2) In modifying a trust under this section, a court may:

752 (a) Amend or change the terms of the trust, including
753 terms governing distribution of the trust income or principal or
754 terms governing administration of the trust;
755 (b) Terminate the trust in whole or in part;
756 (c) Direct or permit the trustee to do acts that are not
757 authorized or that are prohibited by the terms of the trust; or
758 (d) Prohibit the trustee from performing acts that are
759 permitted or required by the terms of the trust.
760 (3) In exercising discretion to modify a trust under this
761 section:
762 (a) The court shall consider the terms and purposes of the
763 trust, the facts and circumstances surrounding the creation of
764 the trust, and extrinsic evidence relevant to the proposed
765 modification.
766 (b) The court shall consider spendthrift provisions as a
767 factor in making a decision but the court is not precluded from
768 modifying a trust because the trust contains spendthrift
769 provisions.
770 (4) The provisions of this section are in addition to, and
771 not in derogation of, rights under the common law to modify,
772 amend, terminate, or revoke trusts.
773 736.04115 Judicial modification of irrevocable trust when
774 modification is in best interest of beneficiaries.--
775 (1) Without regard to the reasons for modification
776 provided in s. 736.04113, if compliance with the terms of a
777 trust is not in the best interests of the beneficiaries, upon
778 the application of a trustee or any qualified beneficiary, a
779 court may at any time modify a trust that is not then revocable
780 as provided in s. 736.04113(2).
781 (2) In exercising discretion to modify a trust under this
782 section:

783 (a) The court shall exercise discretion in a manner that
784 conforms to the extent possible with the intent of the settlor,
785 taking into account the current circumstances and best interests
786 of the beneficiaries.
787 (b) The court shall consider the terms and purposes of the
788 trust, the facts and circumstances surrounding the creation of
789 the trust, and extrinsic evidence relevant to the proposed
790 modification.
791 (c) The court shall consider spendthrift provisions as a
792 factor in making a decision but the court is not precluded from
793 modifying a trust because the trust contains spendthrift
794 provisions.
795 (3) This section shall not apply to:
796 (a) Any trust created prior to January 1, 2001.
797 (b) Any trust created after December 31, 2000, if:
798 1. Under the terms of the trust, all beneficial interests
799 in the trust must vest or terminate within the period prescribed
800 by the rule against perpetuities in s. 689.225(2),
801 notwithstanding s. 689.225(2)(f).
802 2. The terms of the trust expressly prohibit judicial
803 modification.
804 (4) For purposes of subsection (3), a revocable trust
805 shall be treated as created when the right of revocation
806 terminates.
807 (5) The provisions of this section are in addition to, and
808 not in derogation of, rights under the common law to modify,
809 amend, terminate, or revoke trusts.
810 736.0412 Nonjudicial modification of irrevocable trust.--
811 (1) After the settlor's death, a trust may be modified at
812 any time as provided in s. 736.04113(2) upon the unanimous
813 agreement of the trustee and all qualified beneficiaries.

814 (2) Modification of a trust as authorized in this section
815 is not prohibited by a spendthrift clause or by a provision in
816 the trust instrument that prohibits amendment or revocation of
817 the trust.
818 (3) An agreement to modify a trust under this section is
819 binding on a beneficiary whose interest is represented by
820 another person under part III of this code.
821 (4) This section shall not apply to:
822 (a) Any trust created prior to January 1, 2001.
823 (b) Any trust created after December 31, 2000, if, under
824 the terms of the trust, all beneficial interests in the trust
825 must vest or terminate within the period prescribed by the rule
826 against perpetuities in s. 689.225(2), notwithstanding s.
827 689.225(2)(f), unless the terms of the trust expressly authorize
828 nonjudicial modification.
829 (c) Any trust for which a charitable deduction is allowed
830 or allowable under the Internal Revenue Code until the
831 termination of all charitable interests in the trust.
832 (5) For purposes of subsection (4), a revocable trust
833 shall be treated as created when the right of revocation
834 terminates.
835 (6) The provisions of this section are in addition to, and
836 not in derogation of, rights under the common law to modify,
837 amend, terminate, or revoke trusts.
838 736.0413 Cy pres.--
839 (1) If a particular charitable purpose becomes unlawful,
840 impracticable, impossible to achieve, or wasteful, the court may
841 apply the doctrine of cy pres to modify or terminate the trust
842 by directing that the trust property be applied or distributed,
843 in whole or in part, in a manner consistent with the settlor's
844 charitable purposes.

845 (2) A proceeding to modify or terminate a trust under this
846 section may be commenced by a settlor, a trustee, or any
847 qualified beneficiary.
848 736.0414 Modification or termination of uneconomic
849 trust.--
850 (1) After notice to the qualified beneficiaries, the
851 trustee of a trust consisting of trust property having a total
852 value less than $50,000 may terminate the trust if the trustee
853 concludes that the value of the trust property is insufficient
854 to justify the cost of administration.
855 (2) Upon application of a trustee or any qualified
856 beneficiary, the court may modify or terminate a trust or remove
857 the trustee and appoint a different trustee if the court
858 determines that the value of the trust property is insufficient
859 to justify the cost of administration.
860 (3) Upon termination of a trust under this section, the
861 trustee shall distribute the trust property in a manner
862 consistent with the purposes of the trust. The trustee may enter
863 into agreements or make such other provisions that the trustee
864 deems necessary or appropriate to protect the interests of the
865 beneficiaries and the trustee and to carry out the intent and
866 purposes of the trust.
867 (4) The existence of a spendthrift provision in the trust
868 does not make this section inapplicable unless the trust
869 instrument expressly provides that the trustee may not terminate
870 the trust pursuant to this section.
871 (5) This section does not apply to an easement for
872 conservation or preservation.
873 736.0415 Reformation to correct mistakes.--Upon
874 application of a settlor or any interested person, the court may
875 reform the terms of a trust, even if unambiguous, to conform the

876 terms to the settlor's intent if it is proved by clear and
877 convincing evidence that both the accomplishment of the
878 settlor's intent and the terms of the trust were affected by a
879 mistake of fact or law, whether in expression or inducement. In
880 determining the settlor's original intent, the court may
881 consider evidence relevant to the settlor's intent even though
882 the evidence contradicts an apparent plain meaning of the trust
883 instrument.
884 736.0416 Modification to achieve settlor's tax
885 objectives.--Upon application of any interested person, to
886 achieve the settlor's tax objectives the court may modify the
887 terms of a trust in a manner that is not contrary to the
888 settlor's probable intent. The court may provide that the
889 modification has retroactive effect.
890 736.0417 Combination and division of trusts.--
891 (1) After notice to the qualified beneficiaries, a trustee
892 may combine two or more trusts into a single trust or divide a
893 trust into two or more separate trusts, if the result does not
894 impair rights of any beneficiary or adversely affect achievement
895 of the purposes of the trusts or trust, respectively.
896 (2) Subject to the terms of the trust, the trustee may
897 take into consideration differences in federal tax attributes
898 and other pertinent factors in administering the trust property
899 of any separate account or trust, in making applicable tax
900 elections, and in making distributions. A separate trust created
901 by severance must be treated as a separate trust for all
902 purposes from the date on which the severance is effective. The
903 effective date of the severance may be retroactive to a date
904 before the date on which the trustee exercises such power.
905 Section 5. Part V of chapter 736, Florida Statutes,
906 consisting of sections 736.0501, 736.0502, 736.0503, 736.0504,

907 736.0505, 736.05053, 736.05055, 736.0506, and 736.0507, is
908 created to read:
909
910 PART V
911 CREDITORS' CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS
912
913 736.0501 Rights of beneficiary's creditor or assignee.--To
914 the extent a beneficiary's interest is not subject to a
915 spendthrift provision, the court may authorize a creditor or
916 assignee of the beneficiary to reach the beneficiary's interest
917 by attachment of present or future distributions to or for the
918 benefit of the beneficiary or by other means. The court may
919 limit the award to such relief as is appropriate under the
920 circumstances.
921 736.0502 Spendthrift provision.--
922 (1) A spendthrift provision is valid only if the provision
923 restrains both voluntary and involuntary transfer of a
924 beneficiary's interest. This subsection does not apply to any
925 trust in existence on the effective date of this code.
926 (2) A term of a trust providing that the interest of a
927 beneficiary is held subject to a spendthrift trust, or words of
928 similar import, is sufficient to restrain both voluntary and
929 involuntary transfer of the beneficiary's interest.
930 (3) A beneficiary may not transfer an interest in a trust
931 in violation of a valid spendthrift provision and, except as
932 otherwise provided in this part, a creditor or assignee of the
933 beneficiary may not reach the interest or a distribution by the
934 trustee before receipt of the interest or distribution by the
935 beneficiary.

936 (4) A valid spendthrift provision does not prevent the
937 appointment of interests through the exercise of a power of
938 appointment.
939 736.0503 Exceptions to spendthrift provision.--
940 (1) As used in this section, the term "child" includes any
941 person for whom an order or judgment for child support has been
942 entered in this or any other state.
943 (2) To the extent provided in subsection (3), a
944 spendthrift provision is unenforceable against:
945 (a) A beneficiary's child, spouse, or former spouse who
946 has a judgment or court order against the beneficiary for
947 support or maintenance.
948 (b) A judgment creditor who has provided services for the
949 protection of a beneficiary's interest in the trust.
950 (c) A claim of this state or the United States to the
951 extent a law of this state or a federal law so provides.
952 (3) Except as otherwise provided in this subsection, a
953 claimant against which a spendthrift provision may not be
954 enforced may obtain from a court, or pursuant to the Uniform
955 Interstate Family Support Act, an order attaching present or
956 future distributions to or for the benefit of the beneficiary.
957 The court may limit the award to such relief as is appropriate
958 under the circumstances. Notwithstanding this subsection, the
959 remedies provided in this subsection apply to a claim by a
960 beneficiary's child, spouse, former spouse, or a judgment
961 creditor described in paragraph (2)(a) or paragraph (2)(b) only
962 as a last resort upon an initial showing that traditional
963 methods of enforcing the claim are insufficient.
964 736.0504 Discretionary trusts; effect of standard.--
965 (1) Whether or not a trust contains a spendthrift
966 provision, a creditor of a beneficiary may not compel a

967 distribution that is subject to the trustee's discretion, even
968 if:
969 (a) The discretion is expressed in the form of a standard
970 of distribution; or
971 (b) The trustee has abused the discretion.
972 (2) If the trustee's discretion to make distributions for
973 the trustee's own benefit is limited by an ascertainable
974 standard, a creditor may not reach or compel distribution of the
975 beneficial interest except to the extent the interest would be
976 subject to the creditor's claim were the beneficiary not acting
977 as trustee.
978 (3) This section does not limit the right of a beneficiary
979 to maintain a judicial proceeding against a trustee for an abuse
980 of discretion or failure to comply with a standard for
981 distribution.
982 736.0505 Creditors' claims against settlor.--
983 (1) Whether or not the terms of a trust contain a
984 spendthrift provision, the following rules apply:
985 (a) The property of a revocable trust is subject to the
986 claims of the settlor's creditors during the settlor's lifetime,
987 to the extent the property would not otherwise be exempt by law
988 if owned directly by the settlor.
989 (b) With respect to an irrevocable trust, a creditor or
990 assignee of the settlor may reach the maximum amount that can be
991 distributed to or for the settlor's benefit. If a trust has more
992 than one settlor, the amount the creditor or assignee of a
993 particular settlor may reach may not exceed the settlor's
994 interest in the portion of the trust attributable to that
995 settlor's contribution.
996 (2) For purposes of this section:

997 (a) During the period the power may be exercised, the
998 holder of a power of withdrawal is treated in the same manner as
999 the settlor of a revocable trust to the extent of the property
1000 subject to the power.
1001 (b) Upon the lapse, release, or waiver of the power, the
1002 holder is treated as the settlor of the trust only to the extent
1003 the value of the property affected by the lapse, release, or
1004 waiver exceeds the greater of the amount specified in:
1005 1. Section 2041(b)(2) or s. 2514(e); or
1006 2. Section 2503(b),
1007
1008 of the Internal Revenue Code of 1986, as amended.
1009 736.05053 Trustee's duty to pay expenses and obligations
1010 of settlor's estate.--
1011 (1) A trustee of a trust described in s. 733.707(3) shall
1012 pay to the personal representative of a settlor's estate any
1013 amounts that the personal representative certifies in writing to
1014 the trustee are required to pay the expenses of the
1015 administration and obligations of the settlor's estate. Payments
1016 made by a trustee, unless otherwise provided in the trust
1017 instrument, must be charged as expenses of the trust without a
1018 contribution from anyone. The interests of all beneficiaries of
1019 such a trust are subject to the provisions of this subsection;
1020 however, the payments must be made from assets, property, or the
1021 proceeds of the assets or property, other than assets proscribed
1022 in s. 733.707(3), that are included in the settlor's gross
1023 estate for federal estate tax purposes.
1024 (2) Unless a settlor provides by will, or designates in a
1025 trust described in s. 733.707(3) funds or property passing under
1026 the trust to be used as designated, the expenses of the

1027 administration and obligations of the settlor's estate must be
1028 paid from the trust in the following order:
1029 (a) Property of the residue of the trust remaining after
1030 all distributions that are to be satisfied by reference to a
1031 specific property or type of property, fund, or sum.
1032 (b) Property that is not to be distributed from specified
1033 or identified property or a specified or identified item of
1034 property.
1035 (c) Property that is to be distributed from specified or
1036 identified property or a specified or identified item of
1037 property.
1038 (3) Trust distributions that are to be satisfied from
1039 specified or identified property must be classed as
1040 distributions to be satisfied from the general assets of the
1041 trust and not otherwise disposed of in the trust instrument on
1042 the failure or insufficiency of funds or property from which
1043 payment should be made, to the extent of the insufficiency.
1044 Trust distributions given for valuable consideration abate with
1045 other distributions of the same class only to the extent of the
1046 excess over the value of the consideration until all others of
1047 the same class are exhausted. Except as provided in this
1048 section, trust distributions abate equally and ratably and
1049 without preference or priority between real and personal
1050 property. When a specified or identified item of property that
1051 has been designated for distribution in the trust instrument or
1052 that is charged with a distribution is sold or taken by the
1053 trustee, other beneficiaries shall contribute according to their
1054 respective interests to the beneficiary whose property has been
1055 sold or taken. Before distribution, the trustee shall determine
1056 the amounts of the respective contributions and such amounts
1057 must be paid or withheld before distribution is made.

1058 (4) The trustee shall pay the expenses of trust
1059 administration, including compensation of trustees and attorneys
1060 of the trustees, before and in preference to the expenses of the
1061 administration and obligations of the settlor's estate.
1062 736.05055 Notice of trust.--
1063 (1) Upon the death of a settlor of a trust described in s.
1064 733.707(3), the trustee must file a notice of trust with the
1065 court of the county of the settlor's domicile and the court
1066 having jurisdiction of the settlor's estate.
1067 (2) The notice of trust must contain the name of the
1068 settlor, the settlor's date of death, the title of the trust, if
1069 any, the date of the trust, and the name and address of the
1070 trustee.
1071 (3) If the settlor's probate proceeding has been
1072 commenced, the clerk shall notify the trustee in writing of the
1073 date of the commencement of the probate proceeding and the file
1074 number.
1075 (4) The clerk shall file and index the notice of trust in
1076 the same manner as a caveat unless there exists a probate
1077 proceeding for the settlor's estate, in which case the notice of
1078 trust must be filed in the probate proceeding and the clerk
1079 shall send a copy to the personal representative.
1080 (5) The clerk shall send a copy of any caveat filed
1081 regarding the settlor to the trustee, and the notice of trust to
1082 any caveator, unless there is a probate proceeding pending and
1083 the personal representative and the trustee are the same.
1084 (6) Any proceeding affecting the expenses of the
1085 administration or obligations of the settlor's estate prior to
1086 the trustee filing a notice of trust are binding on the trustee.
1087 (7) The trustee's failure to file the notice of trust does
1088 not affect the trustee's obligation to pay expenses of

1089 administration and obligations of the settlor's estate as
1090 provided in s. 733.607(2).
1091 736.0506 Overdue distribution.--
1092 (1) As used in this section, the term "mandatory
1093 distribution" means a distribution of income or principal the
1094 trustee is required to make to a beneficiary under the terms of
1095 the trust, including a distribution on termination of the trust.
1096 The term does not include a distribution subject to the exercise
1097 of the trustee's discretion even if:
1098 (a) The discretion is expressed in the form of a standard
1099 of distribution; or
1100 (b) The terms of the trust authorizing a distribution
1101 couple language of discretion with language of direction.
1102 (2) A creditor or assignee of a beneficiary may reach a
1103 mandatory distribution of income or principal, including a
1104 distribution upon termination of the trust, if the trustee has
1105 not made the distribution to the beneficiary within a reasonable
1106 time after the designated distribution date, whether or not a
1107 trust contains a spendthrift provision.
1108 736.0507 Personal obligations of trustee.--Except to the
1109 extent of the trustee's interest in the trust other than as a
1110 trustee, trust property is not subject to personal obligations
1111 of the trustee, even if the trustee becomes insolvent or
1112 bankrupt.
1113 Section 6. Part VI of chapter 736, Florida Statutes,
1114 consisting of sections 736.0601, 736.0602, 736.0603, and
1115 736.0604, is created to read:
1116
1117 PART VI
1118 REVOCABLE TRUSTS
1119

1120 736.0601 Capacity of settlor of revocable trust.--The
1121 capacity required to create, amend, revoke, or add property to a
1122 revocable trust, or to direct the actions of the trustee of a
1123 revocable trust, is the same as that required to make a will.
1124 736.0602 Revocation or amendment of revocable trust.--
1125 (1) Unless the terms of a trust expressly provide that the
1126 trust is irrevocable, the settlor may revoke or amend the trust.
1127 This subsection does not apply to a trust created under an
1128 instrument executed before the effective date of this code.
1129 (2) If a revocable trust is created or funded by more than
1130 one settlor:
1131 (a) To the extent the trust consists of community
1132 property, the trust may be revoked by either spouse acting alone
1133 but may be amended only by joint action of both spouses.
1134 (b) To the extent the trust consists of property other
1135 than community property, each settlor may revoke or amend the
1136 trust with regard to the portion of the trust property
1137 attributable to that settlor's contribution.
1138 (c) Upon the revocation or amendment of the trust by fewer
1139 than all of the settlors, the trustee shall promptly notify the
1140 other settlors of the revocation or amendment.
1141 (3) Subject to s. 736.0403(2), the settlor may revoke or
1142 amend a revocable trust:
1143 (a) By substantial compliance with a method provided in
1144 the terms of the trust; or
1145 (b) If the terms of the trust do not provide a method, by:
1146 1. A later will or codicil that expressly refers to the
1147 trust or specifically devises property that would otherwise have
1148 passed according to the terms of the trust; or
1149 2. Any other method manifesting clear and convincing
1150 evidence of the settlor's intent.

1151 (4) Upon revocation of a revocable trust, the trustee
1152 shall deliver the trust property as the settlor directs.
1153 (5) A settlor's powers with respect to revocation,
1154 amendment, or distribution of trust property may be exercised by
1155 an agent under a power of attorney only as authorized by s.
1156 709.08.
1157 (6) A guardian of the property of the settlor may exercise
1158 a settlor's powers with respect to revocation, amendment, or
1159 distribution of trust property only as provided in s. 744.441.
1160 (7) A trustee who does not know that a trust has been
1161 revoked or amended is not liable for distributions made and
1162 other actions taken on the assumption that the trust had not
1163 been amended or revoked.
1164 736.0603 Settlor's powers; powers of withdrawal.--
1165 (1) While a trust is revocable, the duties of the trustee
1166 are owed exclusively to the settlor.
1167 (2) During the period the power may be exercised, the
1168 holder of a power of withdrawal has the rights of a settlor of a
1169 revocable trust under this section to the extent of the property
1170 subject to the power.
1171 736.0604 Limitation on action contesting validity of
1172 revocable trust.--An action to contest the validity of a trust
1173 that was revocable at the settlor's death is barred, if not
1174 commenced within the earlier of:
1175 (1) The time as provided in chapter 95; or
1176 (2) Six months after the trustee sent the person a copy of
1177 the trust instrument and a notice informing the person of the
1178 trust's existence, of the trustee's name and address, and of the
1179 time allowed for commencing a proceeding.
1180 Section 7. Part VII of chapter 736, Florida Statutes,
1181 consisting of sections 736.0701, 736.0702, 736.0703, 736.0704,

1182 736.0705, 736.0706, 736.0707, 736.0708, and 736.0709, is created
1183 to read:
1184
1185 PART VII
1186 OFFICE OF TRUSTEE
1187
1188 736.0701 Accepting or declining trusteeship.--
1189 (1) Except as otherwise provided in subsection (3), a
1190 person designated as trustee accepts the trusteeship:
1191 (a) By substantially complying with a method of acceptance
1192 provided in the terms of the trust; or
1193 (b) If the terms of the trust do not provide a method or
1194 the method provided in the terms is not expressly made
1195 exclusive, by accepting delivery of the trust property,
1196 exercising powers or performing duties as trustee, or otherwise
1197 indicating acceptance of the trusteeship.
1198 (2) A person designated as trustee who has not accepted
1199 the trusteeship may decline the trusteeship. A designated
1200 trustee who does not accept the trusteeship within a reasonable
1201 time after knowing of the designation is deemed to have declined
1202 the trusteeship.
1203 (3) A person designated as trustee may, without accepting
1204 the trusteeship:
1205 (a) Act to preserve the trust property if, within a
1206 reasonable time after acting, the person sends to a qualified
1207 beneficiary a written statement declining the trusteeship.
1208 (b) Inspect or investigate trust property to determine
1209 potential liability under environmental or other law or for any
1210 other purpose.
1211 736.0702 Trustee's bond.--

1212 (1) A trustee shall give bond to secure performance of the
1213 trustee's duties only if the court finds that a bond is needed
1214 to protect the interests of the beneficiaries or is required by
1215 the terms of the trust and the court has not dispensed with the
1216 requirement.
1217 (2) The court may specify the amount of a bond, the
1218 trustee's liabilities under the bond, and whether sureties are
1219 necessary. The court may modify or terminate a bond at any time.
1220 736.0703 Cotrustees.--
1221 (1) Cotrustees who are unable to reach a unanimous
1222 decision may act by majority decision.
1223 (2) If a vacancy occurs in a cotrusteeship, the remaining
1224 cotrustees or a majority of the remaining cotrustees may act for
1225 the trust.
1226 (3) A cotrustee must participate in the performance of a
1227 trustee's function unless the cotrustee is unavailable to
1228 perform the function because of absence, illness,
1229 disqualification under other provision of law, or other
1230 temporary incapacity or the cotrustee has properly delegated the
1231 performance of the function to another cotrustee.
1232 (4) If a cotrustee is unavailable to perform duties
1233 because of absence, illness, disqualification under other law,
1234 or other temporary incapacity, and prompt action is necessary to
1235 achieve the purposes of the trust or to avoid injury to the
1236 trust property, the remaining cotrustee or a majority of the
1237 remaining cotrustees may act for the trust.
1238 (5) A cotrustee may not delegate to another cotrustee the
1239 performance of a function the settlor reasonably expected the
1240 cotrustees to perform jointly. A cotrustee may revoke a
1241 delegation previously made.

1242 (6) Except as otherwise provided in subsection (7), a
1243 cotrustee who does not join in an action of another cotrustee is
1244 not liable for the action.
1245 (7) Each cotrustee shall exercise reasonable care to:
1246 (a) Prevent a cotrustee from committing a breach of trust.
1247 (b) Compel a cotrustee to redress a breach of trust.
1248 (8) A dissenting cotrustee who joins in an action at the
1249 direction of the majority of the cotrustees and who notifies any
1250 cotrustee of the dissent at or before the time of the action is
1251 not liable for the action.
1252 736.0704 Vacancy in trusteeship; appointment of
1253 successor.--
1254 (1) A vacancy in a trusteeship occurs if:
1255 (a) A person designated as trustee declines the
1256 trusteeship;
1257 (b) A person designated as trustee cannot be identified or
1258 does not exist;
1259 (c) A trustee resigns;
1260 (d) A trustee is disqualified or removed;
1261 (e) A trustee dies; or
1262 (f) A trustee is adjudicated to be incapacitated.
1263 (2) If one or more cotrustees remain in office, a vacancy
1264 in a trusteeship need not be filled. A vacancy in a trusteeship
1265 must be filled if the trust has no remaining trustee.
1266 (3) A vacancy in a trusteeship of a noncharitable trust
1267 that is required to be filled must be filled in the following
1268 order of priority:
1269 (a) By a person named or designated pursuant to the terms
1270 of the trust to act as successor trustee.
1271 (b) By a person appointed by unanimous agreement of the
1272 qualified beneficiaries.

1273 (c) By a person appointed by the court.
1274 (4) A vacancy in a trusteeship of a charitable trust that
1275 is required to be filled must be filled in the following order
1276 of priority:
1277 (a) By a person named or designated pursuant to the terms
1278 of the trust to act as successor trustee.
1279 (b) By a person selected by unanimous agreement of the
1280 charitable organizations expressly designated to receive
1281 distributions under the terms of the trust.
1282 (c) By a person appointed by the court.
1283 (5) The court may appoint an additional trustee or special
1284 fiduciary whenever the court considers the appointment necessary
1285 for the administration of the trust, whether or not a vacancy in
1286 a trusteeship exists or is required to be filled.
1287 736.0705 Resignation of trustee.--
1288 (1) A trustee may resign:
1289 (a) Upon at least 30 days' notice to the qualified
1290 beneficiaries, the settlor, if living, and all cotrustees; or
1291 (b) With the approval of the court.
1292 (2) In approving a resignation, the court may issue orders
1293 and impose conditions reasonably necessary for the protection of
1294 the trust property.
1295 (3) Any liability of a resigning trustee or of any
1296 sureties on the trustee's bond for acts or omissions of the
1297 trustee is not discharged or affected by the trustee's
1298 resignation.
1299 736.0706 Removal of trustee.--
1300 (1) The settlor, a cotrustee, or a beneficiary may request
1301 the court to remove a trustee or a trustee may be removed by the
1302 court on the court's own initiative.
1303 (2) The court may remove a trustee if:

1304 (a) The trustee has committed a serious breach of trust;
1305 (b) The lack of cooperation among cotrustees substantially
1306 impairs the administration of the trust;
1307 (c) Due to the unfitness, unwillingness, or persistent
1308 failure of the trustee to administer the trust effectively, the
1309 court determines that removal of the trustee best serves the
1310 interests of the beneficiaries; or
1311 (d) There has been a substantial change of circumstances
1312 or removal is requested by all of the qualified beneficiaries,
1313 the court finds that removal of the trustee best serves the
1314 interests of all of the beneficiaries and is not inconsistent
1315 with a material purpose of the trust, and a suitable cotrustee
1316 or successor trustee is available.
1317 (3) Pending a final decision on a request to remove a
1318 trustee, or in lieu of or in addition to removing a trustee, the
1319 court may order such appropriate relief under s. 736.1001(2) as
1320 may be necessary to protect the trust property or the interests
1321 of the beneficiaries.
1322 736.0707 Delivery of property by former trustee.--
1323 (1) Unless a cotrustee remains in office or the court
1324 otherwise orders and until the trust property is delivered to a
1325 successor trustee or other person entitled to the property, a
1326 trustee who has resigned or been removed has the duties of a
1327 trustee and the powers necessary to protect the trust property.
1328 (2) A trustee who has resigned or been removed shall
1329 within a reasonable time deliver the trust property within the
1330 trustee's possession to the cotrustee, successor trustee, or
1331 other person entitled to the property, subject to the right of
1332 the trustee to retain a reasonable reserve for the payment of
1333 debts, expenses, and taxes. The provisions of this subsection

1334 are in addition to and are not in derogation of the rights of a
1335 removed or resigning trustee under the common law.
1336 736.0708 Compensation of trustee.--
1337 (1) If the terms of a trust do not specify the trustee's
1338 compensation, a trustee is entitled to compensation that is
1339 reasonable under the circumstances.
1340 (2) If the terms of a trust specify the trustee's
1341 compensation, the trustee is entitled to be compensated as
1342 specified but the court may allow more or less compensation if:
1343 (a) The duties of the trustee are substantially different
1344 from those contemplated when the trust was created; or
1345 (b) The compensation specified by the terms of the trust
1346 would be unreasonably low or high.
1347 (3) If the trustee has rendered other services in
1348 connection with the administration of the trust, the trustee
1349 shall also be allowed reasonable compensation for the other
1350 services rendered in addition to reasonable compensation as
1351 trustee.
1352 736.0709 Reimbursement of expenses.--
1353 (1) A trustee is entitled to be reimbursed out of the
1354 trust property, with interest as appropriate, for reasonable
1355 expenses that were properly incurred in the administration of
1356 the trust.
1357 (2) An advance by the trustee of money for the protection
1358 of the trust gives rise to a lien against trust property to
1359 secure reimbursement with reasonable interest.
1360 Section 8. Part VIII of chapter 736, Florida Statutes,
1361 consisting of sections 736.0801, 736.0802, 736.0803, 736.0804,
1362 736.0805, 736.0806, 736.0807, 736.0808, 736.0809, 736.0810,
1363 736.08105, 736.0811, 736.0812, 736.08125, 736.0813, 736.08135,

1364 736.0814, 736.08147, 736.0815, 736.0816, 736.08163, 736.08165,
1365 and 736.0817, is created to read:
1366
1367 PART VIII
1368 DUTIES AND POWERS OF TRUSTEE
1369
1370 736.0801 Duty to administer trust.--Upon acceptance of a
1371 trusteeship, the trustee shall administer the trust in good
1372 faith, in accordance with its terms and purposes and the
1373 interests of the beneficiaries, and in accordance with this
1374 code.
1375 736.0802 Duty of loyalty.--
1376 (1) As between a trustee and the beneficiaries, a trustee
1377 shall administer the trust solely in the interests of the
1378 beneficiaries.
1379 (2) Subject to the rights of persons dealing with or
1380 assisting the trustee as provided in s. 736.1016, a sale,
1381 encumbrance, or other transaction involving the investment or
1382 management of trust property entered into by the trustee for the
1383 trustee's own personal account or which is otherwise affected by
1384 a conflict between the trustee's fiduciary and personal
1385 interests is voidable by a beneficiary affected by the
1386 transaction unless:
1387 (a) The transaction was authorized by the terms of the
1388 trust;
1389 (b) The transaction was approved by the court;
1390 (c) The beneficiary did not commence a judicial proceeding
1391 within the time allowed by s. 736.1008;
1392 (d) The beneficiary consented to the trustee's conduct,
1393 ratified the transaction, or released the trustee in compliance
1394 with s. 736.1012;

1395 (e) The transaction involves a contract entered into or
1396 claim acquired by the trustee when that person had not become or
1397 contemplated becoming trustee; or
1398 (f) The transaction was consented to in writing by a
1399 settlor of the trust while the trust was revocable.
1400 (3) A sale, encumbrance, or other transaction involving
1401 the investment or management of trust property is presumed to be
1402 affected by a conflict between personal and fiduciary interests
1403 if the sale, encumbrance, or other transaction is entered into
1404 by the trustee with:
1405 (a) The trustee's spouse;
1406 (b) The trustee's descendants, siblings, parents, or their
1407 spouses;
1408 (c) An officer, director, employee, agent, or attorney of
1409 the trustee; or
1410 (d) A corporation or other person or enterprise in which
1411 the trustee, or a person that owns a significant interest in the
1412 trustee, has an interest that might affect the trustee's best
1413 judgment.
1414 (4) A transaction not concerning trust property in which
1415 the trustee engages in the trustee's individual capacity
1416 involves a conflict between personal and fiduciary interests if
1417 the transaction concerns an opportunity properly belonging to
1418 the trust.
1419 (5)(a) An investment by a trustee authorized by lawful
1420 authority to engage in trust business, as defined in s.
1421 658.12(20), in investment instruments, as defined in s.
1422 660.25(6), that are owned or controlled by the trustee or its
1423 affiliate, or from which the trustee or its affiliate receives
1424 compensation for providing services in a capacity other than as
1425 trustee, is not presumed to be affected by a conflict between

1426 personal and fiduciary interests provided that the investment
1427 otherwise complies with chapters 518 and 660, and the trustee
1428 complies with the disclosure requirements of this subsection.
1429 (b) A trustee who invests trust funds in investment
1430 instruments that are owned or controlled by the trustee or its
1431 affiliate shall disclose the following to all qualified
1432 beneficiaries:
1433 1. Notice that the trustee has invested trust funds in
1434 investment instruments owned or controlled by the trustee or its
1435 affiliate;
1436 2. The identity of the investment instruments; and
1437 3. The identity and relationship to the trustee of any
1438 affiliate that owns or controls the investment instruments.
1439 (c) A trustee who invests trust funds in investment
1440 instruments with respect to which the trustee or its affiliate
1441 receives compensation for providing services in a capacity other
1442 than as trustee shall disclose to all qualified beneficiaries,
1443 all compensation (including but not limited to fees or
1444 commissions) paid or to be paid by the account, and received or
1445 to be received by an affiliate arising from such affiliated
1446 investment.
1447 (d) Disclosure required by this subsection shall be made at
1448 least annually unless there has been no change in the method or
1449 increase in the rate at which such compensation is calculated
1450 since the most recent disclosure. The disclosure may be given in
1451 a trust disclosure document as defined in s.736.1008; in a copy
1452 of the prospectus for the investment instrument; in any other
1453 written disclosure prepared for the investment instrument under
1454 applicable federal or state law; or in a written summary that
1455 includes all compensation received or to be received by the
1456 trustee and any affiliate of the trustee and an explanation of

1457 the manner in which such compensation is calculated (either as a
1458 percentage of the assets invested or by some other method).
1459 (e) This subsection shall apply as follows:
1460 1. This subsection does not apply to qualified investment
1461 instruments or to a trust for which a right of revocation
1462 exists.
1463 2. For investment instruments other than qualified
1464 investment instruments, paragraphs (a), (b), (c), and (d) shall
1465 apply to irrevocable trusts created on or after July 1, 2007 the
1466 assets of which are valued in excess of $5 million on the date
1467 the trust is created.
1468 3. For investment instruments other than qualified
1469 investment instruments, paragraphs (a), (b), (c) and (d) shall
1470 apply to irrevocable trusts not described in subparagraph 2.
1471 only as follows:
1472 a. The paragraphs shall not apply until 60 days after the
1473 statement required in paragraph (f) is provided and either no
1474 objection is made or any objection which is made has been
1475 terminated.
1476 (I) An objection is made if, within 60 days after the date
1477 of the statement required in paragraph (f), a super majority of
1478 the eligible beneficiaries deliver to the trustee written
1479 objections to the application of this subsection to such trust.
1480 An objection shall be deemed to be delivered to the trustee on
1481 the date the objection is mailed to the mailing address listed
1482 in the notice provided in paragraph (f).
1483 (II) An objection is terminated upon the earlier of the
1484 receipt of consent from a super majority of eligible
1485 beneficiaries of the class that made the objection, or the
1486 resolution of the objection pursuant to this subparagraph.

1487 (III) If an objection is delivered to the trustee, the
1488 trustee may petition the court for an order overruling the
1489 objection and authorizing the trustee to make investments under
1490 this subsection. The burden will be on the trustee to show good
1491 cause for the relief sought.
1492 (IV) Any qualified beneficiary may petition the court for
1493 an order to prohibit, limit or restrict a trustee's authority to
1494 make investments under this subsection (5). The burden will be
1495 upon the petitioning beneficiary to show good cause for the
1496 relief sought.
1497 (V) The court may award costs and attorney's fees relating
1498 to any petition under this subparagraph 3. in the same manner as
1499 in chancery actions. When costs and attorney's fees are to be
1500 paid out of the trust, the court may, in its discretion, direct
1501 from which part of the trust they shall be paid.
1502 b. The objection of a super majority of eligible
1503 beneficiaries under this subparagraph 3. may thereafter be
1504 removed by the written consent of a super majority of the class
1505 or classes of those eligible beneficiaries that made the
1506 objection.
1507 (f)1. The trustee of a trust described in subparagraph 3.
1508 of paragraph (e) of this subsection shall, any time prior to
1509 initially investing in any investment instrument described in
1510 this subsection other than a qualified investment instrument,
1511 provide to all qualified beneficiaries a statement containing
1512 the following:
1513 a. The name, telephone number, street address, and mailing
1514 address of the trustee and of any individuals who may be
1515 contacted for further information;
1516 b. A statement that unless a super majority of the eligible
1517 beneficiaries objects to the application of this subsection to

1518 the trust within 60 days after the date the statement pursuant
1519 to this subsection was delivered, then this subsection shall
1520 apply to the trust; and
1521 c. A statement that, if this subsection applies to the
1522 trust, the trustee will have the right to make investments in
1523 investment instruments, as defined in s. 658.12(20), that are
1524 owned or controlled by the trustee or its affiliate, or from
1525 which the trustee or its affiliate receives compensation for
1526 providing services in a capacity other than as trustee and that
1527 the trustee or its affiliate may receive fees in addition to the
1528 trustee's compensation for administering the trust.
1529 d. A statement by the trustee is not delivered if it is
1530 accompanied by another written communication other than a
1531 written communication by the trustee that refers only to the
1532 statement.
1533 2. For purposes of paragraph (e) and this paragraph:
1534 a. "Eligible beneficiaries" means:
1535 (I) If at the time the determination is made there are one
1536 or more beneficiaries described in s. 736.0103(14)(c), the
1537 beneficiaries described in s.736.0103(14)(a) and (c); or
1538 (II) If there is no beneficiary described in s.
1539 736.0103(14)(c), the beneficiaries described in
1540 s.736.0103(14)(a) and (b).
1541 b. A "super majority of the eligible beneficiaries" means:
1542 (I) If at the time the determination is made there are one
1543 or more beneficiaries described in s. 736.0103(14)(c), at least
1544 two-thirds in interest of the beneficiaries described in s.
1545 736.0103(14)(a) or two-thirds in interest of the beneficiaries
1546 described in s. 736.0103(14)(c), if the interests of the
1547 beneficiaries are reasonably ascertainable; otherwise, it means
1548 two-thirds in number of either such class; or

1549 (II) If there is no beneficiary described in s.
1550 736.0103(14)(c), at least two-thirds in interest of the
1551 beneficiaries described in s. 736.0103(14)(a) or two-thirds in
1552 interest of the beneficiaries described in s. 736.0103(14)(b),
1553 if the interests of the beneficiaries are reasonably
1554 ascertainable; otherwise, it means two-thirds in number of
1555 either such class.
1556 c. A "qualified investment instrument" is a mutual fund,
1557 common trust fund or money market fund described in and governed
1558 by s. 736.0816(3).
1559 d. An irrevocable trust is created upon execution of the
1560 trust instrument. If a trust that was revocable when created
1561 thereafter becomes irrevocable, then the irrevocable trust is
1562 created when the right of revocation terminates.
1563 (6) In voting shares of stock or in exercising powers of
1564 control over similar interests in other forms of enterprise, the
1565 trustee shall act in the best interests of the beneficiaries. If
1566 the trust is the sole owner of a corporation or other form of
1567 enterprise, the trustee shall elect or appoint directors or
1568 other managers who will manage the corporation or enterprise in
1569 the best interests of the beneficiaries.
1570 (7) This section does not preclude the following
1571 transactions, if fair to the beneficiaries:
1572 (a) An agreement between a trustee and a beneficiary
1573 relating to the appointment or compensation of the trustee;
1574 (b) A payment of reasonable compensation to the trustee;
1575 (c) A transaction between a trust and another trust, the
1576 decedent's estate, or a guardian of the property of which the
1577 trustee is a fiduciary or in which a beneficiary has an
1578 interest;

1579 (d) A deposit of trust money in a regulated financial-
1580 service institution operated by the trustee; or
1581 (e) An advance by the trustee of money for the protection
1582 of the trust.
1583 (8) This section does not preclude the employment of
1584 persons, including, but not limited to, attorneys, accountants,
1585 investment advisers, or agents, even if they are the trustee, an
1586 affiliate of the trustee, or otherwise associated with the
1587 trustee, to advise or assist the trustee in the exercise of any
1588 of the trustee's powers and to pay reasonable compensation and
1589 costs incurred in connection with such employment from the
1590 assets of the trust; to act without independent investigation on
1591 their recommendations; and, instead of acting personally, to
1592 employ one or more agents to perform any act of administration,
1593 whether or not discretionary.
1594 (9) The court may appoint a special fiduciary to act with
1595 respect to any proposed transaction that might violate this
1596 section if entered into by the trustee.
1597 (10) Payment of costs or attorney's fees incurred in any
1598 trust proceeding from the assets of the trust may be made by the
1599 trustee without the approval of any person and without court
1600 authorization, except that court authorization shall be required
1601 if an action has been filed or defense asserted against the
1602 trustee based upon a breach of trust. Court authorization is not
1603 required if the action or defense is later withdrawn or
1604 dismissed by the party that is alleging a breach of trust or
1605 resolved without a determination by the court that the trustee
1606 has committed a breach of trust.
1607 736.0803 Impartiality.--If a trust has two or more
1608 beneficiaries, the trustee shall act impartially in

1609 administering the trust property, giving due regard to the
1610 beneficiaries' respective interests.
1611 736.0804 Prudent administration.--A trustee shall
1612 administer the trust as a prudent person would, by considering
1613 the purposes, terms, distribution requirements, and other
1614 circumstances of the trust. In satisfying this standard, the
1615 trustee shall exercise reasonable care, skill, and caution.
1616 736.0805 Expenses of administration.--In administering a
1617 trust, the trustee shall only incur expenses that are reasonable
1618 in relation to the trust property, the purposes of the trust,
1619 and the skills of the trustee.
1620 736.0806 Trustee's skills.--A trustee who has special
1621 skills or expertise, or is named trustee in reliance on the
1622 trustee's representation that the trustee has special skills or
1623 expertise, shall use those special skills or expertise.
1624 736.0807 Delegation by trustee.--
1625 (1) A trustee may delegate duties and powers that a
1626 prudent trustee of comparable skills could properly delegate
1627 under the circumstances. The trustee shall exercise reasonable
1628 care, skill, and caution in:
1629 (a) Selecting an agent.
1630 (b) Establishing the scope and terms of the delegation,
1631 consistent with the purposes and terms of the trust.
1632 (c) Reviewing the agent's actions periodically, in order
1633 to monitor the agent's performance and compliance with the terms
1634 of the delegation.
1635 (2) In performing a delegated function, an agent owes a
1636 duty to the trust to exercise reasonable care to comply with the
1637 terms of the delegation.

1638 (3) A trustee who complies with subsection (1) is not
1639 liable to the beneficiaries or to the trust for an action of the
1640 agent to whom the function was delegated.
1641 (4) By accepting a delegation of powers or duties from the
1642 trustee of a trust that is subject to the law of this state, an
1643 agent submits to the jurisdiction of the courts of this state.
1644 736.0808 Powers to direct.--
1645 (1) Subject to ss. 736.0403(2) and 736.0602(3)(a), the
1646 trustee may follow a direction of the settlor that is contrary
1647 to the terms of the trust while a trust is revocable.
1648 (2) If the terms of a trust confer on a person other than
1649 the settlor of a revocable trust, the power to direct certain
1650 actions of the trustee, the trustee shall act in accordance with
1651 an exercise of the power unless the attempted exercise is
1652 manifestly contrary to the terms of the trust or the trustee
1653 knows the attempted exercise would constitute a serious breach
1654 of a fiduciary duty that the person holding the power owes to
1655 the beneficiaries of the trust.
1656 (3) The terms of a trust may confer on a trustee or other
1657 person a power to direct the modification or termination of the
1658 trust.
1659 (4) A person, other than a beneficiary, who holds a power
1660 to direct is presumptively a fiduciary who, as such, is required
1661 to act in good faith with regard to the purposes of the trust
1662 and the interests of the beneficiaries. The holder of a power to
1663 direct is liable for any loss that results from breach of a
1664 fiduciary duty.
1665 736.0809 Control and protection of trust property.--A
1666 trustee shall take reasonable steps to take control of and
1667 protect the trust property.

1668 736.0810 Recordkeeping and identification of trust
1669 property.--
1670 (1) A trustee shall keep clear, distinct, and accurate
1671 records of the administration of the trust.
1672 (2) A trustee shall keep trust property separate from the
1673 trustee's own property.
1674 (3) Except as otherwise provided in subsection (4), a
1675 trustee shall cause the trust property to be designated so that
1676 the interest of the trust, to the extent feasible, appears in
1677 records maintained by a party other than a trustee or
1678 beneficiary.
1679 (4) If the trustee maintains records clearly indicating
1680 the respective interests, a trustee may invest as a whole the
1681 property of two or more separate trusts.
1682 736.08105 Duty to ascertain marketable title of trust real
1683 property.--A trustee holding title to real property received
1684 from a settlor or estate shall not be required to obtain title
1685 insurance or proof of marketable title until a marketable title
1686 is required for a sale or conveyance of the real property.
1687 736.0811 Enforcement and defense of claims.--A trustee
1688 shall take reasonable steps to enforce claims of the trust and
1689 to defend claims against the trust.
1690 736.0812 Collecting trust property.--A trustee shall take
1691 reasonable steps to compel a former trustee or other person to
1692 deliver trust property to the trustee and, except as provided in
1693 s. 736.08125, to redress a breach of trust known to the trustee
1694 to have been committed by a former trustee.
1695 736.08125 Protection of successor trustees.--
1696 (1) A successor trustee is not personally liable for
1697 actions taken by any prior trustee, nor does any successor
1698 trustee have a duty to institute any proceeding against any

1699 prior trustee, or file any claim against any prior trustee's
1700 estate, for any of the prior trustee's actions as trustee under
1701 any of the following circumstances:
1702 (a) As to a successor trustee who succeeds a trustee who
1703 was also the settlor of a trust that was revocable during the
1704 time that the settlor served as trustee;
1705 (b) As to any beneficiary who has waived any accounting
1706 required by s. 736.0813, but only as to the periods included in
1707 the waiver;
1708 (c) As to any beneficiary who has released the successor
1709 trustee from the duty to institute any proceeding or file any
1710 claim;
1711 (d) As to any person who is not an eligible beneficiary;
1712 or
1713 (e) As to any eligible beneficiary:
1714 1. If a supermajority of the eligible beneficiaries have
1715 released the successor trustee;
1716 2. If the eligible beneficiary has not delivered a written
1717 request to the successor trustee to institute an action or file
1718 a claim against the prior trustee within 6 months after the date
1719 of the successor trustee's acceptance of the trust, if the
1720 successor trustee has notified the eligible beneficiary in
1721 writing of acceptance by the successor trustee in accordance
1722 with 736.0813(1)(a) and that writing advises the beneficiary
1723 that, unless the beneficiary delivers the written request within
1724 6 months after the date of acceptance, the right to proceed
1725 against the successor trustee will be barred pursuant to this
1726 section; or
1727 3. For any action or claim that the eligible beneficiary
1728 is barred from bringing against the prior trustee.
1729 (2) For the purposes of this section, the term:

1730 (a) "Eligible beneficiaries" means:
1731 1. At the time the determination is made, if there are one
1732 or more beneficiaries as described in s. 736.0103(14)(c), the
1733 beneficiaries described in s. 736.0103(14)(a) and (c); or
1734 2. If there is no beneficiary as described in s.
1735 736.0103(14)(c), the beneficiaries described in s.
1736 736.0103(14)(a) and (b).
1737 (b) "Supermajority of eligible beneficiaries" means at
1738 least two-thirds in interest of the eligible beneficiaries if
1739 the interests of the eligible beneficiaries are reasonably
1740 ascertainable, otherwise, at least two-thirds in number of the
1741 eligible beneficiaries.
1742 (3) Nothing in this section affects any liability of the
1743 prior trustee or the right of the successor trustee or any
1744 beneficiary to pursue an action or claim against the prior
1745 trustee.
1746 736.0813 Duty to inform and account.--The trustee shall
1747 keep the qualified beneficiaries of the trust reasonably
1748 informed of the trust and its administration.
1749 (1) The trustee's duty to inform and account includes, but
1750 is not limited to, the following:
1751 (a) Within 60 days after acceptance of the trust, the
1752 trustee shall give notice to the qualified beneficiaries of the
1753 acceptance of the trust and the full name and address of the
1754 trustee.
1755 (b) Within 60 days after the date the trustee acquires
1756 knowledge of the creation of an irrevocable trust, or the date
1757 the trustee acquires knowledge that a formerly revocable trust
1758 has become irrevocable, whether by the death of the settlor or
1759 otherwise, the trustee shall give notice to the qualified
1760 beneficiaries of the trust's existence, the identity of the

1761 settlor or settlors, the right to request a copy of the trust
1762 instrument, and the right to accountings under this section.
1763 (c) Upon reasonable request, the trustee shall provide a
1764 qualified beneficiary with a complete copy of the trust
1765 instrument.
1766 (d) A trustee of an irrevocable trust shall provide a
1767 trust accounting, as set forth in s. 736.08135, to each
1768 qualified beneficiary annually and on termination of the trust
1769 or on change of the trustee.
1770 (e) Upon reasonable request, the trustee shall provide a
1771 qualified beneficiary with relevant information about the assets
1772 and liabilities of the trust and the particulars relating to
1773 administration.
1774
1775 Paragraphs (a) and (b) do not apply to an irrevocable trust
1776 created before the effective date of this code, or to a
1777 revocable trust that becomes irrevocable before the effective
1778 date of this code. Paragraph (a) does not apply to a trustee who
1779 accepts a trusteeship before the effective date of this code.
1780 (2) A qualified beneficiary may waive the trustee's duty
1781 to account under paragraph (1)(d). A qualified beneficiary may
1782 withdraw a waiver previously given. Waivers and withdrawals of
1783 prior waivers under this subsection must be in writing.
1784 Withdrawals of prior waivers are effective only with respect to
1785 accountings for future periods.
1786 (3) The representation provisions of part III apply with
1787 respect to all rights of a qualified beneficiary under this
1788 section.
1789 (4) As provided in s. 736.0603(1), the trustee's duties
1790 under this section extend only to the settlor while a trust is
1791 revocable.

1792 (5) This section applies to trust accountings rendered for
1793 accounting periods beginning on or after January 1, 2008.
1794 736.08135 Trust accountings.--
1795 (1) A trust accounting must be a reasonably understandable
1796 report from the date of the last accounting or, if none, from
1797 the date on which the trustee became accountable, that
1798 adequately discloses the information required in subsection (2).
1799 (2)(a) The accounting must begin with a statement
1800 identifying the trust, the trustee furnishing the accounting,
1801 and the time period covered by the accounting.
1802 (b) The accounting must show all cash and property
1803 transactions and all significant transactions affecting
1804 administration during the accounting period, including
1805 compensation paid to the trustee and the trustee's agents. Gains
1806 and losses realized during the accounting period and all
1807 receipts and disbursements must be shown.
1808 (c) To the extent feasible, the accounting must identify
1809 and value trust assets on hand at the close of the accounting
1810 period. For each asset or class of assets reasonably capable of
1811 valuation, the accounting shall contain two values, the asset
1812 acquisition value or carrying value and the estimated current
1813 value. The accounting must identify each known noncontingent
1814 liability with an estimated current amount of the liability if
1815 known.
1816 (d) To the extent feasible, the accounting must show
1817 significant transactions that do not affect the amount for which
1818 the trustee is accountable, including name changes in investment
1819 holdings, adjustments to carrying value, a change of custodial
1820 institutions, and stock splits.
1821 (e) The accounting must reflect the allocation of
1822 receipts, disbursements, accruals, or allowances between income

1823 and principal when the allocation affects the interest of any
1824 beneficiary of the trust.
1825 (f) The trustee shall include in the final accounting a
1826 plan of distribution for any undistributed assets shown on the
1827 final accounting.
1828 (3) This section applies to all trust accountings rendered
1829 for any accounting periods beginning on or after January 1,
1830 2003.
1831 736.0814 Discretionary powers; tax savings.--
1832 (1) Notwithstanding the breadth of discretion granted to a
1833 trustee in the terms of the trust, including the use of such
1834 terms as "absolute," "sole," or "uncontrolled," the trustee
1835 shall exercise a discretionary power in good faith and in
1836 accordance with the terms and purposes of the trust and the
1837 interests of the beneficiaries. A court shall not determine that
1838 a trustee abused its discretion merely because the court would
1839 have exercised the discretion in a different manner or would not
1840 have exercised the discretion.
1841 (2) Subject to subsection (3) and unless the terms of the
1842 trust expressly indicate that a rule in this subsection does not
1843 apply, a person who is a beneficiary and a trustee may not:
1844 (a) Make discretionary distributions of either principal
1845 or income to or for the benefit of that trustee, other than
1846 distributions subject to an ascertainable standard;
1847 (b) Make discretionary allocations of receipts or expenses
1848 as between principal and income, unless the trustee acts in a
1849 fiduciary capacity whereby the trustee has no power to enlarge
1850 or shift any beneficial interest except as an incidental
1851 consequence of the discharge of the trustee's fiduciary duties;

1852 (c) Make discretionary distributions of either principal
1853 or income to satisfy any of the trustee's legal support
1854 obligations; or
1855 (d) Exercise any other power, including, but not limited
1856 to, the right to remove or to replace any trustee, so as to
1857 cause the powers enumerated in paragraph (a), paragraph (b), or
1858 paragraph (c) to be exercised on behalf of, or for the benefit
1859 of, a beneficiary who is also a trustee.
1860 (3) Subsection (2) does not apply to:
1861 (a) A power held by the settlor of the trust;
1862 (b) A power held by the settlor's spouse who is the
1863 trustee of a trust for which a marital deduction, as defined in
1864 s. 2056(a) or s. 2523(a) of the Internal Revenue Code of 1986,
1865 as amended, was previously allowed;
1866 (c) Any trust during any period that the trust may be
1867 revoked or amended by its settlor; or
1868 (d) A trust if contributions to the trust qualify for the
1869 annual exclusion under s. 2503(c) of the Internal Revenue Code
1870 of 1986, as amended.
1871 (4) A power whose exercise is limited or prohibited by
1872 subsection (2) may be exercised by the remaining trustees whose
1873 exercise of the power is not so limited or prohibited. If there
1874 is no trustee qualified to exercise the power, on petition by
1875 any qualified beneficiary, the court may appoint an independent
1876 trustee with authority to exercise the power.
1877 (5) A person who has the right to remove or to replace a
1878 trustee does not possess nor may that person be deemed to
1879 possess, by virtue of having that right, the powers of the
1880 trustee that is subject to removal or to replacement.
1881 736.08147 Duty to distribute trust income.--If a will or
1882 trust instrument granting income to the settlor's or testator's

1883 spouse for life is silent as to the time of distribution of
1884 income and the frequency of distributions, the trustee shall
1885 distribute all net income, as defined in chapter 738, to the
1886 spouse no less frequently than annually. This provision shall
1887 apply to any trust established before, on, or after July 1,
1888 2007, unless the trust instrument expressly directs or permits
1889 net income to be distributed less frequently than annually.
1890 736.0815 General powers of trustee.--
1891 (1) A trustee, without authorization by the court, may,
1892 except as limited or restricted by this code, exercise:
1893 (a) Powers conferred by the terms of the trust.
1894 (b) Except as limited by the terms of the trust:
1895 1. All powers over the trust property that an unmarried
1896 competent owner has over individually owned property.
1897 2. Any other powers appropriate to achieve the proper
1898 investment, management, and distribution of the trust property.
1899 3. Any other powers conferred by this code.
1900 (2) The exercise of a power is subject to the fiduciary
1901 duties prescribed by this code.
1902 736.0816 Specific powers of trustee.--Except as limited or
1903 restricted by this code, a trustee may:
1904 (1) Collect trust property and accept or reject additions
1905 to the trust property from a settlor, including an asset in
1906 which the trustee is personally interested, and hold property in
1907 the name of a nominee or in other form without disclosure of the
1908 trust so that title to the property may pass by delivery but the
1909 trustee is liable for any act of the nominee in connection with
1910 the property so held.
1911 (2) Acquire or sell property, for cash or on credit, at
1912 public or private sale.

1913 (3) Acquire an undivided interest in a trust asset,
1914 including, but not limited to, a money market mutual fund,
1915 mutual fund, or common trust fund, in which asset the trustee
1916 holds an undivided interest in any trust capacity, including any
1917 money market or other mutual fund from which the trustee or any
1918 affiliate or associate of the trustee is entitled to receive
1919 reasonable compensation for providing necessary services as an
1920 investment adviser, portfolio manager, or servicing agent. A
1921 trustee or affiliate or associate of the trustee may receive
1922 compensation for such services in addition to fees received for
1923 administering the trust provided such compensation is fully
1924 disclosed in writing to all qualified beneficiaries.
1925 (4) Exchange, partition, or otherwise change the character
1926 of trust property.
1927 (5) Deposit trust money in an account in a regulated
1928 financial-service institution.
1929 (6) Borrow money, with or without security, and mortgage
1930 or pledge trust property for a period within or extending beyond
1931 the duration of the trust and advance money for the protection
1932 of the trust.
1933 (7) With respect to an interest in a proprietorship,
1934 partnership, limited liability company, business trust,
1935 corporation, or other form of business or enterprise, continue
1936 the business or other enterprise and take any action that may be
1937 taken by shareholders, members, or property owners, including,
1938 but not limited to, merging, dissolving, or otherwise changing
1939 the form of business organization or contributing additional
1940 capital.
1941 (8) With respect to stocks or other securities, exercise
1942 the rights of an absolute owner, including, but not limited to,
1943 the right to:

1944 (a) Vote, or give proxies to vote, with or without power
1945 of substitution, or enter into or continue a voting trust
1946 agreement.
1947 (b) Hold a security in the name of a nominee or in other
1948 form without disclosure of the trust so that title may pass by
1949 delivery.
1950 (c) Pay calls, assessments, and other sums chargeable or
1951 accruing against the securities, and sell or exercise stock
1952 subscription or conversion rights.
1953 (d) Deposit the securities with a depositary or other
1954 regulated financial-service institution.
1955 (9) With respect to an interest in real property,
1956 construct, or make ordinary or extraordinary repairs to,
1957 alterations to, or improvements in, buildings or other
1958 structures, demolish improvements, raze existing or erect new
1959 party walls or buildings, subdivide or develop land, dedicate
1960 land to public use or grant public or private easements, and
1961 make or vacate plats and adjust boundaries.
1962 (10) Enter into a lease for any purpose as lessor or
1963 lessee, including a lease or other arrangement for exploration
1964 and removal of natural resources, with or without the option to
1965 purchase or renew, for a period within or extending beyond the
1966 duration of the trust.
1967 (11) Grant an option involving a sale, lease, or other
1968 disposition of trust property or acquire an option for the
1969 acquisition of property, including an option exercisable beyond
1970 the duration of the trust, and exercise an option so acquired.
1971 (12) Insure the property of the trust against damage or
1972 loss and insure the trustee, trustee's agents, and beneficiaries
1973 against liability arising from the administration of the trust.

1974 (13) Abandon or decline to administer property of no value
1975 or of insufficient value to justify the collection or continued
1976 administration of such property.
1977 (14) Pay or contest any claim, settle a claim by or
1978 against the trust, and release, in whole or in part, a claim
1979 belonging to the trust.
1980 (15) Pay taxes, assessments, compensation of the trustee
1981 and of employees and agents of the trust, and other expenses
1982 incurred in the administration of the trust.
1983 (16) Allocate items of income or expense to trust income
1984 or principal, as provided by law.
1985 (17) Exercise elections with respect to federal, state,
1986 and local taxes.
1987 (18) Select a mode of payment under any employee benefit
1988 or retirement plan, annuity, or life insurance payable to the
1989 trustee, exercise rights under such plan, annuity, or insurance,
1990 including exercise of the right to indemnification for expenses
1991 and against liabilities, and take appropriate action to collect
1992 the proceeds.
1993 (19) Make loans out of trust property, including, but not
1994 limited to, loans to a beneficiary on terms and conditions that
1995 are fair and reasonable under the circumstances, and the trustee
1996 has a lien on future distributions for repayment of those loans.
1997 (20) Employ persons, including, but not limited to,
1998 attorneys, accountants, investment advisers, or agents, even if
1999 they are the trustee, an affiliate of the trustee, or otherwise
2000 associated with the trustee, to advise or assist the trustee in
2001 the exercise of any of the trustee's powers and pay reasonable
2002 compensation and costs incurred in connection with such
2003 employment from the assets of the trust and act without

2004 independent investigation on the recommendations of such
2005 persons.
2006 (21) Pay an amount distributable to a beneficiary who is
2007 under a legal disability or who the trustee reasonably believes
2008 is incapacitated, by paying the amount directly to the
2009 beneficiary or applying the amount for the beneficiary's
2010 benefit, or by:
2011 (a) Paying the amount to the beneficiary's guardian of the
2012 property or, if the beneficiary does not have a guardian of the
2013 property, the beneficiary's guardian of the person;
2014 (b) Paying the amount to the beneficiary's custodian under
2015 a Uniform Transfers to Minors Act or custodial trustee under a
2016 Uniform Custodial Trust Act, and, for that purpose, creating a
2017 custodianship or custodial trust;
2018 (c) Paying the amount to an adult relative or other person
2019 having legal or physical care or custody of the beneficiary, to
2020 be expended on the beneficiary's behalf, if the trustee does not
2021 know of a guardian of the property, guardian of the person,
2022 custodian, or custodial trustee; or
2023 (d) Managing the amount as a separate fund on the
2024 beneficiary's behalf, subject to the beneficiary's continuing
2025 right to withdraw the distribution.
2026 (22) On distribution of trust property or the division or
2027 termination of a trust, make distributions in divided or
2028 undivided interests, allocate particular assets in proportionate
2029 or disproportionate shares, value the trust property for those
2030 purposes, and adjust for resulting differences in valuation.
2031 (23) Prosecute or defend, including appeals, an action,
2032 claim, or judicial proceeding in any jurisdiction to protect
2033 trust property or the trustee in the performance of the
2034 trustee's duties.

2035 (24) Sign and deliver contracts and other instruments that
2036 are useful to achieve or facilitate the exercise of the
2037 trustee's powers.
2038 (25) On termination of the trust, exercise the powers
2039 appropriate to wind up the administration of the trust and
2040 distribute the trust property to the persons entitled to the
2041 property, subject to the right of the trustee to retain a
2042 reasonable reserve for the payment of debts, expenses, and
2043 taxes.
2044 736.08163 Powers of trustees relating to environmental or
2045 human health laws or to trust property contaminated with
2046 hazardous or toxic substances; liability.--
2047 (1) From the creation of a trust until final distribution
2048 of the assets from the trust, the trustee has, without court
2049 authorization, the powers specified in subsection (2).
2050 (2) Unless otherwise provided in the trust instrument, a
2051 trustee has the power, acting reasonably, to:
2052 (a) Inspect or investigate, or cause to be inspected or
2053 investigated, property held by the trustee, including interests
2054 in sole proprietorships, partnerships, or corporations and any
2055 assets owned by any such business entity for the purpose of
2056 determining compliance with an environmental law affecting that
2057 property or to respond to an actual or threatened violation of
2058 an environmental law affecting that property;
2059 (b) Take, on behalf of the trust, any action necessary to
2060 prevent, abate, or otherwise remedy an actual or potential
2061 violation of an environmental law affecting property held by the
2062 trustee, before or after initiation of an enforcement action by
2063 a governmental body;
2064 (c) Refuse to accept property in trust if the trustee
2065 determines that any property to be donated or conveyed to the

2066 trustee is contaminated with a hazardous substance or is being
2067 used or has been used for an activity directly or indirectly
2068 involving a hazardous substance, which circumstance could result
2069 in liability to the trust or trustee or otherwise impair the
2070 value of the assets to be held;
2071 (d) Settle or compromise at any time any claim against the
2072 trust or trustee that may be asserted by a governmental body or
2073 private party that involves the alleged violation of an
2074 environmental law affecting property of any trust over which the
2075 trustee has responsibility;
2076 (e) Disclaim any power granted by any document, law, or
2077 rule of law that, in the sole judgment of the trustee, may cause
2078 the trustee to incur personal liability, or the trust to incur
2079 liability, under any environmental law;
2080 (f) Decline to serve as a trustee, or having undertaken to
2081 serve as a trustee, resign at any time, if the trustee believes
2082 there is or may be a conflict of interest in its fiduciary
2083 capacity and in its individual capacity because of potential
2084 claims or liabilities that may be asserted against the trustee
2085 on behalf of the trust by reason of the type or condition of the
2086 assets held; or
2087 (g) Charge against the income and principal of the trust
2088 the cost of any inspection, investigation, review, abatement,
2089 response, cleanup, or remedial action that this section
2090 authorizes the trustee to take and, if the trust terminates or
2091 closes or the trust property is transferred to another trustee,
2092 hold assets sufficient to cover the cost of cleaning up any
2093 known environmental problem.
2094 (3) A trustee is not personally liable to any beneficiary
2095 or any other person for a decrease in value of assets in a trust
2096 by reason of the trustee's compliance or efforts to comply with

2097 an environmental law, specifically including any reporting
2098 requirement under that law.
2099 (4) A trustee that acquires ownership or control of a
2100 vessel or other property, without having owned, operated, or
2101 materially participated in the management of that vessel or
2102 property before assuming ownership or control as trustee, is not
2103 considered an owner or operator for purposes of liability under
2104 chapter 376, chapter 403, or any other environmental law. A
2105 trustee that willfully, knowingly, or recklessly causes or
2106 exacerbates a release or threatened release of a hazardous
2107 substance is personally liable for the cost of the response, to
2108 the extent that the release or threatened release is
2109 attributable to the trustee's activities. This subsection does
2110 not preclude the filing of claims against the assets that
2111 constitute the trust held by the trustee or the filing of
2112 actions against the trustee in its representative capacity and
2113 in any such action, an award or judgment against the trustee
2114 must be satisfied only from the assets of the trust.
2115 (5) The acceptance by the trustee of the property or a
2116 failure by the trustee to inspect or investigate the property
2117 does not create any inference as to whether there is liability
2118 under an environmental law with respect to that property.
2119 (6) For the purposes of this section, the term "hazardous
2120 substance" means a substance defined as hazardous or toxic, or
2121 any contaminant, pollutant, or constituent thereof, or otherwise
2122 regulated, by an environmental law.
2123 (7) This section does not apply to any trust created under
2124 a document executed before July 1, 1995, unless the trust is
2125 amendable and the settlor amends the trust at any time to
2126 incorporate the provisions of this section.

2127 736.08165 Administration pending outcome of contest or
2128 other proceeding.--
2129 (1) Pending the outcome of a proceeding filed to determine
2130 the validity of all or part of a trust or the beneficiaries of
2131 all or part of a trust, the trustee shall proceed with the
2132 administration of the trust as if no proceeding had been
2133 commenced, except no action may be taken and no distribution may
2134 be made to a beneficiary in contravention of the rights of those
2135 persons who may be affected by the outcome of the proceeding.
2136 (2) Upon motion of a party and after notice to interested
2137 persons, a court, on good cause shown, may make an exception to
2138 the prohibition under subsection (1) and authorize the trustee
2139 to act or to distribute trust assets to a beneficiary subject to
2140 any conditions the court, in the court's discretion, may impose,
2141 including the posting of bond by the beneficiary.
2142 736.0817 Distribution on termination.--Upon the occurrence
2143 of an event terminating or partially terminating a trust, the
2144 trustee shall proceed expeditiously to distribute the trust
2145 property to the persons entitled to the property, subject to the
2146 right of the trustee to retain a reasonable reserve for the
2147 payment of debts, expenses, and taxes. The provisions of this
2148 section are in addition to and are not in derogation of the
2149 rights of a trustee under the common law with respect to final
2150 distribution of a trust.
2151 Section 9. Part IX of chapter 736, Florida Statutes,
2152 consisting of section 736.0901, is created to read:
2153
2154 PART IX
2155 TRUST INVESTMENTS
2156

2157 736.0901 Applicability of chapter 518.--A trustee shall
2158 invest trust property in accordance with chapter 518.
2159 Section 10. Part X of chapter 736, Florida Statutes,
2160 consisting of sections 736.1001, 736.1002, 736.1003, 736.1004,
2161 736.1005, 736.1006, 736.1007, 736.1008, 736.1009, 736.1010,
2162 736.1011, 736.1012, 736.1013, 736.1014, 736.1015, 736.1016,
2163 736.1017, and 736.1018, is created to read:
2164
2165 PART X
2166 LIABILITY OF TRUSTEE AND RIGHTS OF PERSONS DEALING WITH TRUSTEE
2167
2168 736.1001 Remedies for breach of trust.--
2169 (1) A violation by a trustee of a duty the trustee owes to
2170 a beneficiary is a breach of trust.
2171 (2) To remedy a breach of trust that has occurred or may
2172 occur, the court may:
2173 (a) Compel the trustee to perform the trustee's duties;
2174 (b) Enjoin the trustee from committing a breach of trust;
2175 (c) Compel the trustee to redress a breach of trust by
2176 paying money or restoring property or by other means;
2177 (d) Order a trustee to account;
2178 (e) Appoint a special fiduciary to take possession of the
2179 trust property and administer the trust;
2180 (f) Suspend the trustee;
2181 (g) Remove the trustee as provided in s. 736.706;
2182 (h) Reduce or deny compensation to the trustee;
2183 (i) Subject to s. 736.1016, void an act of the trustee,
2184 impose a lien or a constructive trust on trust property, or
2185 trace trust property wrongfully disposed of and recover the
2186 property or its proceeds; or
2187 (j) Order any other appropriate relief.

2188 (3) As an illustration of the remedies available to the
2189 court and without limiting the court's discretion as provided in
2190 subsection (2), if a breach of trust results in the favoring of
2191 any beneficiary to the detriment of any other beneficiary or
2192 consists of an abuse of the trustee's discretion:
2193 (a) To the extent the breach of trust has resulted in no
2194 distribution to a beneficiary or a distribution that is too
2195 small, the court may require the trustee to pay from the trust
2196 to the beneficiary an amount the court determines will restore
2197 the beneficiary, in whole or in part, to his or her appropriate
2198 position.
2199 (b) To the extent the breach of trust has resulted in a
2200 distribution to a beneficiary that is too large, the court may
2201 restore the beneficiaries, the trust, or both, in whole or in
2202 part, to their appropriate positions by requiring the trustee to
2203 withhold an amount from one or more future distributions to the
2204 beneficiary who received the distribution that was too large or
2205 by requiring that beneficiary to return some or all of the
2206 distribution to the trust.
2207 736.1002 Damages for breach of trust.--
2208 (1) A trustee who commits a breach of trust is liable for
2209 the greater of:
2210 (a) The amount required to restore the value of the trust
2211 property and trust distributions to what they would have been if
2212 the breach had not occurred, including lost income, capital
2213 gain, or appreciation that would have resulted from proper
2214 administration; or
2215 (b) The profit the trustee made by reason of the breach.
2216 (2) Except as otherwise provided in this subsection, if
2217 more than one person, including a trustee or trustees, is liable
2218 to the beneficiaries for a breach of trust, each liable person

2219 is entitled to pro rata contribution from the other person or
2220 persons. A person is not entitled to contribution if the person
2221 committed the breach of trust in bad faith. A person who
2222 received a benefit from the breach of trust is not entitled to
2223 contribution from another person to the extent of the benefit
2224 received.
2225 (3) In determining the pro rata shares of liable persons
2226 in the entire liability for a breach of trust:
2227 (a) Their relative degrees of fault shall be the basis for
2228 allocation of liability.
2229 (b) If equity requires, the collective liability of some
2230 as a group shall constitute a single share.
2231 (c) Principles of equity applicable to contribution
2232 generally shall apply.
2233 (4) The right of contribution shall be enforced as
2234 follows:
2235 (a) Contribution may be enforced by separate action,
2236 whether or not judgment has been entered in an action against
2237 two or more liable persons for the same breach of trust.
2238 (b) When a judgment has been entered in an action against
2239 two or more liable persons for the same breach of trust,
2240 contribution may be enforced in that action by judgment in favor
2241 of one judgment defendant against any other judgment defendants
2242 by motion upon notice to all parties to the action.
2243 (c) If there is a judgment for breach of trust against the
2244 liable person seeking contribution, any separate action by that
2245 person to enforce contribution must be commenced within 1 year
2246 after the judgment has become final by lapse of time for appeal
2247 or after appellate review.

2248 (d) If there is no judgment for the breach of trust
2249 against the liable person seeking contribution, the person's
2250 right of contribution is barred unless the person has:
2251 1. Discharged by payment the common liability within the
2252 period of the statute of limitations applicable to the
2253 beneficiary's right of action against the liable person and the
2254 person has commenced an action for contribution within 1 year
2255 after payment, or
2256 2. Agreed, while action is pending against the liable
2257 person, to discharge the common liability and has within 1 year
2258 after the agreement paid the liability and commenced the
2259 person's action for contribution.
2260 (5) The beneficiary's recovery of a judgment for breach of
2261 trust against one liable person does not of itself discharge
2262 other liable persons from liability for the breach of trust
2263 unless the judgment is satisfied. The satisfaction of the
2264 judgment does not impair any right of contribution.
2265 (6) The judgment of the court in determining the liability
2266 of several defendants to the beneficiary for breach of trust is
2267 binding upon such defendants in determining the right of such
2268 defendants to contribution.
2269 (7) Subsection (2) applies to all causes of action for
2270 breach of trust pending on July 1, 2007, under which causes of
2271 action the right of contribution among persons jointly and
2272 severally liable is involved and to all causes of action filed
2273 after July 1, 2007.
2274 736.1003 Damages in absence of breach.--Absent a breach of
2275 trust, a trustee is not liable to a beneficiary for a loss or
2276 depreciation in the value of trust property or for not having
2277 made a profit.
2278 736.1004 Attorney's fees and costs.--

2279 (1)(a) In all actions for breach of fiduciary duty or
2280 challenging the exercise of, or failure to exercise, a trustee's
2281 powers; and
2282 (b) In proceedings arising under ss. 736.0410-736.0417,
2283
2284 the court shall award taxable costs as in chancery actions,
2285 including attorney fees and guardian ad litem fees.
2286 (2) When awarding taxable costs under this section,
2287 including attorney fees and guardian ad litem fees, the court,
2288 in its discretion, may direct payment from a party's interest,
2289 if any, in the trust or enter a judgment that may be satisfied
2290 from other property of the party, or both.
2291 736.1005 Attorney's fees for services to the trust.--
2292 (1) Any attorney who has rendered services to a trust may
2293 be awarded reasonable compensation from the trust. The attorney
2294 may apply to the court for an order awarding attorney's fees
2295 and, after notice and service on the trustee and all
2296 beneficiaries entitled to an accounting under s. 736.0813, the
2297 court shall enter an order on the fee application.
2298 (2) Whenever attorney's fees are to be paid out of the
2299 trust, the court, in its discretion, may direct from what part
2300 of the trust the fees shall be paid.
2301 (3) Except when a trustee's interest may be adverse in a
2302 particular matter, the attorney shall give reasonable notice in
2303 writing to the trustee of the attorney's retention by an
2304 interested person and the attorney's entitlement to fees
2305 pursuant to this section. A court may reduce any fee award for
2306 services rendered by the attorney prior to the date of actual
2307 notice to the trustee, if the actual notice date is later than a
2308 date of reasonable notice. In exercising this discretion, the

2309 court may exclude compensation for services rendered after the
2310 reasonable notice date but prior to the date of actual notice.
2311 736.1006 Costs in trust proceedings.--
2312 (1) In all trust proceedings, costs may be awarded as in
2313 chancery actions.
2314 (2) Whenever costs are to be paid out of the trust, the
2315 court, in its discretion, may direct from what part of the trust
2316 the costs shall be paid.
2317 736.1007 Trustee's attorney's fees.--
2318 (1) If the trustee of a revocable trust retains an
2319 attorney to render legal services in connection with the initial
2320 administration of the trust, the attorney is entitled to
2321 reasonable compensation for those legal services, payable from
2322 the assets of the trust without court order. The trustee and the
2323 attorney may agree to compensation that is determined in a
2324 manner or amount other than the manner or amount provided in
2325 this section. The agreement is not binding on a person who bears
2326 the impact of the compensation unless that person is a party to
2327 or otherwise consents to be bound by the agreement. The
2328 agreement may provide that the trustee is not individually
2329 liable for the attorney's fees and costs.
2330 (2) Unless otherwise agreed, compensation based on the
2331 value of the trust assets immediately following the settlor's
2332 death and the income earned by the trust during initial
2333 administration at the rate of 75 percent of the schedule
2334 provided in s. 733.6171(3)(a)-(h) is presumed to be reasonable
2335 total compensation for ordinary services of all attorneys
2336 employed generally to advise a trustee concerning the trustee's
2337 duties in initial trust administration.
2338 (3) An attorney who is retained to render only limited and
2339 specifically defined legal services shall be compensated as

2340 provided in the retaining agreement. If the amount or method of
2341 determining compensation is not provided in the agreement, the
2342 attorney is entitled to a reasonable fee, taking into account
2343 the factors set forth in subsection (6).
2344 (4) Ordinary services of the attorney in an initial trust
2345 administration include legal advice and representation
2346 concerning the trustee's duties relating to:
2347 (a) Review of the trust instrument and each amendment for
2348 legal sufficiency and interpretation.
2349 (b) Implementation of substitution of the successor
2350 trustee.
2351 (c) Persons who must or should be served with required
2352 notices and the method and timing of such service.
2353 (d) The obligation of a successor to require a former
2354 trustee to provide an accounting.
2355 (e) The trustee's duty to protect, insure, and manage
2356 trust assets and the trustee's liability relating to these
2357 duties.
2358 (f) The trustee's duty regarding investments imposed by
2359 the prudent investor rule.
2360 (g) The trustee's obligation to inform and account to
2361 beneficiaries and the method of satisfaction of such
2362 obligations, the liability of the trust and trustee to the
2363 settlor's creditors, and the advisability or necessity for
2364 probate proceedings to bar creditors.
2365 (h) Contributions due to the personal representative of
2366 the settlor's estate for payment of expenses of administration
2367 and obligations of the settlor's estate.
2368 (i) Identifying tax returns required to be filed by the
2369 trustee, the trustee's liability for payment of taxes, and the
2370 due date of returns.

2371 (j) Filing a nontaxable affidavit, if not filed by a
2372 personal representative.
2373 (k) Order of payment of expenses of administration of the
2374 trust and order and priority of abatement of trust
2375 distributions.
2376 (l) Distribution of income or principal to beneficiaries
2377 or funding of further trusts provided in the governing
2378 instrument.
2379 (m) Preparation of any legal documents required to effect
2380 distribution.
2381 (n) Fiduciary duties, avoidance of self-dealing, conflicts
2382 of interest, duty of impartiality, and obligations to
2383 beneficiaries.
2384 (o) If there is a conflict of interest between a trustee
2385 who is a beneficiary and other beneficiaries of the trust,
2386 advice to the trustee on limitations of certain authority of the
2387 trustee regarding discretionary distributions or exercise of
2388 certain powers and alternatives for appointment of an
2389 independent trustee and appropriate procedures.
2390 (p) Procedures for the trustee's discharge from liability
2391 for administration of the trust on termination or resignation.
2392 (5) In addition to the attorney's fees for ordinary
2393 services, the attorney for the trustee shall be allowed further
2394 reasonable compensation for any extraordinary service. What
2395 constitutes an extraordinary service may vary depending on many
2396 factors, including the size of the trust. Extraordinary services
2397 may include, but are not limited to:
2398 (a) Involvement in a trust contest, trust construction, a
2399 proceeding for determination of beneficiaries, a contested
2400 claim, elective share proceedings, apportionment of estate

2401 taxes, or other adversary proceedings or litigation by or
2402 against the trust.
2403 (b) Representation of the trustee in an audit or any
2404 proceeding for adjustment, determination, or collection of any
2405 taxes.
2406 (c) Tax advice on postmortem tax planning, including, but
2407 not limited to, disclaimer, renunciation of fiduciary
2408 commission, alternate valuation date, allocation of
2409 administrative expenses between tax returns, the QTIP or reverse
2410 QTIP election, allocation of GST exemption, qualification for
2411 Internal Revenue Code ss. 303 and 6166 privileges, deduction of
2412 last illness expenses, distribution planning, asset basis
2413 considerations, throwback rules, handling income or deductions
2414 in respect of a decedent, valuation discounts, special use and
2415 other valuation, handling employee benefit or retirement
2416 proceeds, prompt assessment request, or request for release from
2417 personal liability for payment of tax.
2418 (d) Review of an estate tax return and preparation or
2419 review of other tax returns required to be filed by the trustee.
2420 (e) Preparation of decedent's federal estate tax return.
2421 If this return is prepared by the attorney, a fee of one-half of
2422 1 percent up to a value of $10 million and one-fourth of 1
2423 percent on the value in excess of $10 million, of the gross
2424 estate as finally determined for federal estate tax purposes, is
2425 presumed to be reasonable compensation for the attorney for this
2426 service. These fees shall include services for routine audit of
2427 the return, not beyond the examining agent level, if required.
2428 (f) Purchase, sale, lease, or encumbrance of real property
2429 by the trustee or involvement in zoning, land use,
2430 environmental, or other similar matters.

2431 (g) Legal advice regarding carrying on of decedent's
2432 business or conducting other commercial activity by the trustee.
2433 (h) Legal advice regarding claims for damage to the
2434 environment or related procedures.
2435 (i) Legal advice regarding homestead status of trust real
2436 property or proceedings involving the status.
2437 (j) Involvement in fiduciary, employee, or attorney
2438 compensation disputes.
2439 (k) Considerations of special valuation of trust assets,
2440 including discounts for blockage, minority interests, lack of
2441 marketability, and environmental liability.
2442 (6) Upon petition of any interested person in a proceeding
2443 to review the compensation paid or to be paid to the attorney
2444 for the trustee, the court may increase or decrease the
2445 compensation for ordinary services of the attorney for the
2446 trustee or award compensation for extraordinary services if the
2447 facts and circumstances of the particular administration
2448 warrant. In determining reasonable compensation, the court shall
2449 consider all of the following factors giving such weight to each
2450 as the court may determine to be appropriate:
2451 (a) The promptness, efficiency, and skill with which the
2452 initial administration was handled by the attorney.
2453 (b) The responsibilities assumed by, and potential
2454 liabilities of, the attorney.
2455 (c) The nature and value of the assets that are affected
2456 by the decedent's death.
2457 (d) The benefits or detriments resulting to the trust or
2458 the trust's beneficiaries from the attorney's services.
2459 (e) The complexity or simplicity of the administration and
2460 the novelty of issues presented.

2461 (f) The attorney's participation in tax planning for the
2462 estate, the trust, and the trust's beneficiaries and tax return
2463 preparation or review and approval.
2464 (g) The nature of the trust assets, the expenses of
2465 administration, and the claims payable by the trust and the
2466 compensation paid to other professionals and fiduciaries.
2467 (h) Any delay in payment of the compensation after the
2468 services were furnished.
2469 (i) Any other relevant factors.
2470 (7) The court may determine reasonable attorney's
2471 compensation without receiving expert testimony. Any party may
2472 offer expert testimony after notice to interested persons. If
2473 expert testimony is offered, an expert witness fee may be
2474 awarded by the court and paid from the assets of the trust. The
2475 court shall direct from what part of the trust the fee is to be
2476 paid.
2477 (8) If a separate written agreement regarding compensation
2478 exists between the attorney and the settlor, the attorney shall
2479 furnish a copy to the trustee prior to commencement of
2480 employment and, if employed, shall promptly file and serve a
2481 copy on all interested persons. A separate agreement or a
2482 provision in the trust suggesting or directing the trustee to
2483 retain a specific attorney does not obligate the trustee to
2484 employ the attorney or obligate the attorney to accept the
2485 representation but, if the attorney who is a party to the
2486 agreement or who drafted the trust is employed, the compensation
2487 paid shall not exceed the compensation provided in the
2488 agreement.
2489 (9) Court proceedings to determine compensation, if
2490 required, are a part of the trust administration process and the
2491 costs, including fees for the trustee's attorney, shall be

2492 determined by the court and paid from the assets of the trust
2493 unless the court finds the attorney's fees request to be
2494 substantially unreasonable. The court shall direct from what
2495 part of the trust the fees are to be paid.
2496 (10) As used in this section, the term "initial trust
2497 administration" means administration of a revocable trust during
2498 the period that begins with the death of the settlor and ends on
2499 the final distribution of trust assets outright or to continuing
2500 trusts created under the trust agreement but, if an estate tax
2501 return is required, not until after issuance of an estate tax
2502 closing letter or other evidence of termination of the estate
2503 tax proceeding. This initial period is not intended to include
2504 continued regular administration of the trust.
2505 736.1008 Limitations on proceedings against trustees.--
2506 (1) Except as provided in subsection (2), all claims by a
2507 beneficiary against a trustee for breach of trust are barred as
2508 provided in chapter 95 as to:
2509 (a) All matters adequately disclosed in a trust disclosure
2510 document issued by the trustee, with the limitations period
2511 beginning on the date of receipt of adequate disclosure.
2512 (b) All matters not adequately disclosed in a trust
2513 disclosure document if the trustee has issued a final trust
2514 accounting and has given written notice to the beneficiary of
2515 the availability of the trust records for examination and that
2516 any claims with respect to matters not adequately disclosed may
2517 be barred unless an action is commenced within the applicable
2518 limitations period provided in chapter 95. The limitations
2519 period begins on the date of receipt of the final trust
2520 accounting and notice.
2521 (2) Unless sooner barred by adjudication, consent, or
2522 limitations, a beneficiary is barred from bringing an action

2523 against a trustee for breach of trust with respect to a matter
2524 that was adequately disclosed in a trust disclosure document
2525 unless a proceeding to assert the claim is commenced within 6
2526 months after receipt from the trustee of the trust disclosure
2527 document or a limitation notice that applies to that disclosure
2528 document, whichever is received later.
2529 (3) When a trustee has not issued a final trust accounting
2530 or has not given written notice to the beneficiary of the
2531 availability of the trust records for examination and that
2532 claims with respect to matters not adequately disclosed may be
2533 barred, a claim against the trustee for breach of trust based on
2534 a matter not adequately disclosed in a trust disclosure document
2535 accrues when the beneficiary has actual knowledge of the
2536 trustee's repudiation of the trust or adverse possession of
2537 trust assets, and is barred as provided in chapter 95.
2538 (4) As used in this section, the term:
2539 (a) "Trust disclosure document" means a trust accounting
2540 or any other written report of the trustee. A trust disclosure
2541 document adequately discloses a matter if the document provides
2542 sufficient information so that a beneficiary knows of a claim or
2543 reasonably should have inquired into the existence of a claim
2544 with respect to that matter.
2545 (b) "Trust accounting" means an accounting that adequately
2546 discloses the information required by and that substantially
2547 complies with the standards set forth in s. 736.08135.
2548 (c) "Limitation notice" means a written statement of the
2549 trustee that an action by a beneficiary against the trustee for
2550 breach of trust based on any matter adequately disclosed in a
2551 trust disclosure document may be barred unless the action is
2552 commenced within 6 months after receipt of the trust disclosure
2553 document or receipt of a limitation notice that applies to that

2554 trust disclosure document, whichever is later. A limitation
2555 notice may but is not required to be in the following form: "An
2556 action for breach of trust based on matters disclosed in a trust
2557 accounting or other written report of the trustee may be subject
2558 to a 6-month statute of limitations from the receipt of the
2559 trust accounting or other written report. If you have questions,
2560 please consult your attorney."
2561 (5) For purposes of this section, a limitation notice
2562 applies to a trust disclosure document when the limitation
2563 notice is:
2564 (a) Contained as a part of the trust disclosure document
2565 or as a part of another trust disclosure document received
2566 within 1 year prior to the receipt of the latter trust
2567 disclosure document;
2568 (b) Accompanied concurrently by the trust disclosure
2569 document or by another trust disclosure document that was
2570 received within 1 year prior to the receipt of the latter trust
2571 disclosure document;
2572 (c) Delivered separately within 10 days after the delivery
2573 of the trust disclosure document or of another trust disclosure
2574 document that was received within 1 year prior to the receipt of
2575 the latter trust disclosure document. For purposes of this
2576 paragraph, a limitation notice is not delivered separately if
2577 the notice is accompanied by another written communication,
2578 other than a written communication that refers only to the
2579 limitation notice; or
2580 (d) Received more than 10 days after the delivery of the
2581 trust disclosure document but only if the limitation notice
2582 references that trust disclosure document and:
2583 1. Offers to provide to the beneficiary on request another
2584 copy of that trust disclosure document if the document was

2585 received by the beneficiary within 1 year prior to receipt of
2586 the limitation notice; or
2587 2. Is accompanied by another copy of that trust disclosure
2588 document if the trust disclosure document was received by the
2589 beneficiary 1 year or more prior to the receipt of the
2590 limitation notice.
2591 (6) This section applies to trust accountings for
2592 accounting periods beginning on or after January 1, 2008, and to
2593 written reports, other than trust accountings, received by a
2594 beneficiary on or after January 1, 2008.
2595 736.1009 Reliance on trust instrument.--A trustee who acts
2596 in reasonable reliance on the terms of the trust as expressed in
2597 the trust instrument is not liable to a beneficiary for a breach
2598 of trust to the extent the breach resulted from the reliance.
2599 736.1010 Event affecting administration or
2600 distribution.--If the happening of an event, including marriage,
2601 divorce, performance of educational requirements, or death,
2602 affects the administration or distribution of a trust, a trustee
2603 who has exercised reasonable care to ascertain the happening of
2604 the event is not liable for a loss resulting from the trustee's
2605 lack of knowledge.
2606 736.1011 Exculpation of trustee.--
2607 (1) A term of a trust relieving a trustee of liability for
2608 breach of trust is unenforceable to the extent that the term:
2609 (a) Relieves the trustee of liability for breach of trust
2610 committed in bad faith or with reckless indifference to the
2611 purposes of the trust or the interests of the beneficiaries; or
2612 (b) Was inserted into the trust instrument as the result
2613 of an abuse by the trustee of a fiduciary or confidential
2614 relationship with the settlor.

2615 (2) An exculpatory term drafted or caused to be drafted by
2616 the trustee is invalid as an abuse of a fiduciary or
2617 confidential relationship unless the trustee proves that the
2618 exculpatory term is fair under the circumstances and that the
2619 term's existence and contents were adequately communicated
2620 directly to the settlor.
2621 736.1012 Beneficiary's consent, release, or
2622 ratification.--A trustee is not liable to a beneficiary for
2623 breach of trust if the beneficiary consented to the conduct
2624 constituting the breach, released the trustee from liability for
2625 the breach, or ratified the transaction constituting the breach,
2626 unless:
2627 (1) The consent, release, or ratification of the
2628 beneficiary was induced by improper conduct of the trustee; or
2629 (2) At the time of the consent, release, or ratification,
2630 the beneficiary did not know of the beneficiary's rights or of
2631 the material facts relating to the breach.
2632 736.1013 Limitation on personal liability of trustee.--
2633 (1) Except as otherwise provided in the contract, a
2634 trustee is not personally liable on a contract properly entered
2635 into in the trustee's fiduciary capacity in the course of
2636 administering the trust if the trustee in the contract disclosed
2637 the fiduciary capacity.
2638 (2) A trustee is personally liable for torts committed in
2639 the course of administering a trust or for obligations arising
2640 from ownership or control of trust property only if the trustee
2641 is personally at fault.
2642 (3) A claim based on a contract entered into by a trustee
2643 in the trustee's fiduciary capacity, on an obligation arising
2644 from ownership or control of trust property, or on a tort
2645 committed in the course of administering a trust may be asserted

2646 in a judicial proceeding against the trustee in the trustee's
2647 fiduciary capacity, whether or not the trustee is personally
2648 liable for the claim.
2649 (4) Issues of liability between the trust estate and the
2650 trustee individually may be determined in a proceeding for
2651 accounting, surcharge, or indemnification or in any other
2652 appropriate proceeding.
2653 736.1014 Limitations on actions against certain trusts.--
2654 (1) After the death of a settlor, no creditor of the
2655 settlor may bring, maintain, or continue any direct action
2656 against a trust described in s. 733.707(3), the trustee of the
2657 trust, or any beneficiary of the trust that is dependent on the
2658 individual liability of the settlor. Such claims and causes of
2659 action against the settlor shall be presented and enforced
2660 against the settlor's estate as provided in part VII of chapter
2661 733 and the personal representative of the settlor's estate may
2662 obtain payment from the trustee of a trust described in s.
2663 733.707(3) as provided in ss. 733.607(2), 733.707(3), and
2664 736.05053.
2665 (2) This section does not preclude a direct action against
2666 a trust described in s. 733.707(3), the trustee of the trust, or
2667 a beneficiary of the trust that is not dependent on the
2668 individual liability of the settlor.
2669 (3) This section does not affect the lien of any duly
2670 recorded mortgage or security interest or the lien of any person
2671 in possession of personal property or the right to foreclose and
2672 enforce the mortgage or lien.
2673 736.1015 Interest as general partner.--
2674 (1) Unless personal liability is imposed in the contract,
2675 a trustee who holds an interest as a general partner in a
2676 general or limited partnership is not personally liable on a

2677 contract entered into by the partnership after the trust's
2678 acquisition of the interest if the fiduciary capacity was
2679 disclosed in the contract or in a statement previously filed
2680 pursuant to a Uniform Partnership Act or Uniform Limited
2681 Partnership Act.
2682 (2) A trustee who holds an interest as a general partner
2683 is not personally liable for torts committed by the partnership
2684 or for obligations arising from ownership or control of the
2685 interest unless the trustee is personally at fault.
2686 (3) If the trustee of a revocable trust holds an interest
2687 as a general partner, the settlor is personally liable for
2688 contracts and other obligations of the partnership as if the
2689 settlor were a general partner.
2690 736.1016 Protection of person dealing with trustee.--
2691 (1) A person other than a beneficiary who in good faith
2692 assists a trustee or who in good faith and for value deals with
2693 a trustee, without knowledge that the trustee is exceeding or
2694 improperly exercising the trustee's powers, is protected from
2695 liability as if the trustee properly exercised the power.
2696 (2) A person other than a beneficiary who in good faith
2697 deals with a trustee is not required to inquire into the extent
2698 of the trustee's powers or the propriety of their exercise.
2699 (3) A person who in good faith delivers assets to a
2700 trustee need not ensure their proper application.
2701 (4) A person other than a beneficiary who in good faith
2702 assists a former trustee or who in good faith and for value
2703 deals with a former trustee, without knowledge that the
2704 trusteeship has terminated, is protected from liability as if
2705 the former trustee were still a trustee.
2706 (5) Comparable protective provisions of other laws
2707 relating to commercial transactions or transfer of securities by

2708 fiduciaries prevail over the protection provided by this
2709 section.
2710 736.1017 Certification of trust.--
2711 (1) Instead of furnishing a copy of the trust instrument
2712 to a person other than a beneficiary, the trustee may furnish to
2713 the person a certification of trust containing the following
2714 information:
2715 (a) The trust exists and the date the trust instrument was
2716 executed.
2717 (b) The identity of the settlor.
2718 (c) The identity and address of the currently acting
2719 trustee.
2720 (d) The powers of the trustee.
2721 (e) The revocability or irrevocability of the trust and
2722 the identity of any person holding a power to revoke the trust.
2723 (f) The authority of cotrustees to sign or otherwise
2724 authenticate and whether all or less than all are required in
2725 order to exercise powers of the trustee.
2726 (g) The manner of taking title to trust property.
2727 (2) A certification of trust may be signed or otherwise
2728 authenticated by any trustee.
2729 (3) A certification of trust must state that the trust has
2730 not been revoked, modified, or amended in any manner that would
2731 cause the representations contained in the certification of
2732 trust to be incorrect.
2733 (4) A certification of trust need not contain the
2734 dispositive terms of a trust.
2735 (5) A recipient of a certification of trust may require
2736 the trustee to furnish copies of any excerpts from the original
2737 trust instrument and later amendments that designate the trustee

2738 and confer upon the trustee the power to act in the pending
2739 transaction.
2740 (6) A person who acts in reliance on a certification of
2741 trust without knowledge that the representations contained in
2742 the certification are incorrect is not liable to any person for
2743 so acting and may assume without inquiry the existence of the
2744 facts contained in the certification. Knowledge of the terms of
2745 the trust may not be inferred solely from the fact that a copy
2746 of all or part of the trust instrument is held by the person
2747 relying on the certification.
2748 (7) A person who in good faith enters into a transaction
2749 in reliance on a certification of trust may enforce the
2750 transaction against the trust property as if the representations
2751 contained in the certification were correct.
2752 (8) This section does not limit the right of a person to
2753 obtain a copy of the trust instrument when required to be
2754 furnished by law or in a judicial proceeding concerning the
2755 trust.
2756 736.1018 Improper distribution or payment; liability of
2757 distributee.--Any person who received a distribution or was paid
2758 improperly from a trust shall return the assets or funds
2759 received and the income from those assets or interest on the
2760 funds from the date of distribution or payment unless the
2761 distribution or payment cannot be questioned because of
2762 adjudication, estoppel, or limitations. If the person does not
2763 have the assets or funds, the value of the assets or funds at
2764 the date of disposition, income from the assets or funds, and
2765 gain received by the person from the assets or funds shall be
2766 returned.

2767 Section 11. Part XI of chapter 736, Florida Statutes,
2768 consisting of sections 736.1101, 736.1102, 736.1103, 736.1104,
2769 736.1105, 736.1106, 736.1107, and 736.1108, is created to read:
2770
2771 PART XI
2772 RULES OF CONSTRUCTION
2773
2774 736.1101 Rules of construction; general
2775 provisions.--Except as provided in s. 736.0105(2):
2776 (1) The intent of the settlor as expressed in the terms of
2777 the trust controls the legal effect of the dispositions made in
2778 the trust.
2779 (2) The rules of construction as expressed in this part
2780 shall apply unless a contrary intent is indicated by the terms
2781 of the trust.
2782 736.1102 Construction of generic terms.--Adopted persons
2783 and persons born out of wedlock are included in class gift
2784 terminology and terms of relationship, in accordance with rules
2785 for determining relationships for purposes of intestate
2786 succession.
2787 736.1103 Gifts to multigeneration classes to be per
2788 stirpes.--Class gifts to descendants, issue, and other
2789 multigeneration classes shall be per stirpes.
2790 736.1104 Killer not entitled to receive property or other
2791 benefits by reason of victim's death.--
2792 (1) A beneficiary of a trust who unlawfully and
2793 intentionally kills or unlawfully and intentionally participates
2794 in procuring the death of the settlor or another person on whose
2795 death such beneficiary's interest depends, is not entitled to
2796 any trust interest, including homestead, dependent on the

2797 victim's death and such interest shall devolve as though the
2798 killer had predeceased the victim.
2799 (2) A final judgment of conviction of murder in any degree
2800 is conclusive for the purposes of this section. In the absence
2801 of a murder conviction in any degree, the court may determine by
2802 the greater weight of the evidence whether the killing was
2803 unlawful and intentional for purposes of this section.
2804 736.1105 Dissolution of marriage; effect on revocable
2805 trust.--Unless the trust instrument or the judgment for
2806 dissolution of marriage or divorce expressly provides otherwise,
2807 if a revocable trust is executed by a husband or wife as settlor
2808 prior to annulment of the marriage or entry of a judgment for
2809 dissolution of marriage or divorce of the settlor from the
2810 settlor's spouse, any provision of the trust that affects the
2811 settlor's spouse will become void upon annulment of the marriage
2812 or entry of the judgment of dissolution of marriage or divorce
2813 and any such trust shall be administered and construed as if the
2814 settlor's spouse had died on the date of the annulment or on
2815 entry of the judgment for dissolution of marriage or divorce.
2816 736.1106 Antilapse; survivorship with respect to future
2817 interests under terms of inter vivos and testamentary trusts;
2818 substitute takers.--
2819 (1) As used in this section, the term:
2820 (a) "Beneficiary" means the beneficiary of a future
2821 interest and includes a class member if the future interest is
2822 in the form of a class gift.
2823 (b) "Distribution date," with respect to a future
2824 interest, means the time when the future interest is to take
2825 effect in possession or enjoyment. The distribution date need
2826 not occur at the beginning or end of a calendar day, but can
2827 occur at a time during the course of a day.

2828 (c) "Future interest" includes an alternative future
2829 interest and a future interest in the form of a class gift.
2830 (d) "Future interest under the terms of a trust" means a
2831 future interest created by an inter vivos or testamentary
2832 transfer to an existing trust or creating a trust or by an
2833 exercise of a power of appointment to an existing trust
2834 directing the continuance of an existing trust, designating a
2835 beneficiary of an existing trust, or creating a trust.
2836 (e) "Surviving beneficiary" or "surviving descendant"
2837 means a beneficiary or a descendant who did not predecease the
2838 distribution date or is not deemed to have predeceased the
2839 distribution date by operation of law.
2840 (2) A future interest under the terms of a trust is
2841 contingent upon the beneficiary surviving the distribution date.
2842 Unless a contrary intent appears in the trust instrument, if a
2843 beneficiary of a future interest under the terms of a trust
2844 fails to survive the distribution date, and the deceased
2845 beneficiary leaves surviving descendants, a substitute gift is
2846 created in the beneficiary's surviving descendants. They take
2847 per stirpes the property to which the beneficiary would have
2848 been entitled if the beneficiary had survived the distribution
2849 date.
2850 (3) In the application of this section:
2851 (a) Words of survivorship attached to a future interest
2852 are a sufficient indication of an intent contrary to the
2853 application of this section.
2854 (b) A residuary clause in a will is not a sufficient
2855 indication of an intent contrary to the application of this
2856 section, whether or not the will specifically provides that
2857 lapsed or failed devises are to pass under the residuary clause.

2858 (4) If, after the application of subsections (2) and (3),
2859 there is no surviving taker, the property passes in the
2860 following order:
2861 (a) If the future interest was created by the exercise of
2862 a power of appointment, the property passes under the donor's
2863 gift-in-default clause, if any, which clause is treated as
2864 creating a future interest under the terms of a trust.
2865 (b) If no taker is produced by the application of
2866 paragraph (a) and the trust was created in a nonresiduary devise
2867 or appointment in the transferor's will, the property passes
2868 under the residuary clause in the transferor's will. For
2869 purposes of this section, the residuary clause is treated as
2870 creating a future interest under the terms of a trust.
2871 (c) If no taker is produced by the application of
2872 paragraph (a) or paragraph (b), the property passes to those
2873 persons, including the state, and in such shares as would
2874 succeed to the transferor's intestate estate under the intestate
2875 succession law of the transferor's domicile if the transferor
2876 died when the disposition is to take effect in possession or
2877 enjoyment.
2878
2879 For purposes of paragraphs (b) and (c), the term "transferor"
2880 with respect to a future interest created by the exercise of a
2881 power of appointment, means the donor if the power was a
2882 nongeneral power and the donee if the power was a general power.
2883 (5) This section applies to all trusts other than trusts
2884 that were irrevocable before the effective date of this code.
2885 736.1107 Change in securities; accessions;
2886 nonademption.--A gift of specific securities, rather than their
2887 equivalent value, entitles the beneficiary only to:

2888 (1) As much of the gifted securities of the same issuer
2889 held by the trust estate at the time of the occurrence of the
2890 event entitling the beneficiary to distribution.
2891 (2) Any additional or other securities of the same issuer
2892 held by the trust estate because of action initiated by the
2893 issuer, excluding any acquired by exercise of purchase options.
2894 (3) Securities of another issuer held by the trust estate
2895 as a result of a merger, consolidation, reorganization, or other
2896 similar action initiated by the original issuer.
2897 736.1108 Penalty clause for contest.--
2898 (1) A provision in a trust instrument purporting to
2899 penalize any interested person for contesting the trust
2900 instrument or instituting other proceedings relating to a trust
2901 estate or trust assets is unenforceable.
2902 (2) This section applies to trusts created on or after
2903 October 1, 1993. For purposes of this subsection, a revocable
2904 trust shall be treated as created when the right of revocation
2905 terminates.
2906 Section 12. Part XII of chapter 736, Florida Statutes,
2907 consisting of sections 736.1201, 736.1202, 736.1203, 736.1204,
2908 736.1205, 736.1206, 736.1207, 736.1208, 736.1209, and 736.1210,
2909 is created to read:
2910
2911 PART XII
2912 CHARITABLE TRUSTS
2913
2914 736.1201 Definitions.--As used in this part:
2915 (1) "Charitable organization" means an organization
2916 described in s. 501(c)(3) of the Internal Revenue Code and
2917 exempt from tax under s. 501(a) of the Internal Revenue Code.

2918 (2) "Internal Revenue Code" means the Internal Revenue
2919 Code of 1986, as amended.
2920 (3) "Private foundation trust" means a trust, including a
2921 trust described in s. 4947(a)(1) of the Internal Revenue Code,
2922 as defined in s. 509(a) of the Internal Revenue Code.
2923 (4) "Split interest trust" means a trust for individual
2924 and charitable beneficiaries that is subject to the provisions
2925 of s. 4947(a)(2) of the Internal Revenue Code.
2926 (5) "State attorney" means the state attorney for the
2927 judicial circuit of the principal place of administration of the
2928 trust pursuant to s. 736.0108.
2929 736.1202 Application of this part.--Except as otherwise
2930 provided in the trust, the provisions of this part apply to all
2931 private foundation trusts and split interest trusts, whether
2932 created or established before or after November 1, 1971, and to
2933 all trust assets acquired by the trustee before or after
2934 November 1, 1971.
2935 736.1203 Trustee of a private foundation trust or a split
2936 interest trust.--Except as provided in s. 736.1205, the trustee
2937 of a private foundation trust or a split interest trust has the
2938 duties and powers conferred on the trustee by this part.
2939 736.1204 Powers and duties of trustee of a private
2940 foundation trust or a split interest trust.--
2941 (1) In the exercise of a trustee's powers, including the
2942 powers granted by this part, a trustee has a duty to act with
2943 due regard to the trustee's obligation as a fiduciary, including
2944 a duty not to exercise any power in such a way as to:
2945 (a) Deprive the trust of an otherwise available tax
2946 exemption, deduction, or credit for tax purposes;
2947 (b) Deprive a donor of a trust asset or tax deduction or
2948 credit; or

2949 (c) Operate to impose a tax on a donor, trust, or other
2950 person.
2951
2952 For purposes of this subsection, the term "tax" includes, but is
2953 not limited to, any federal, state, or local excise, income,
2954 gift, estate, or inheritance tax.
2955 (2) Except as provided in s. 736.1205, a trustee of a
2956 private foundation trust shall make distributions at such time
2957 and in such manner as not to subject the trust to tax under s.
2958 4942 of the Internal Revenue Code.
2959 (3) Except as provided in subsection (4) and in s.
2960 736.1205, a trustee of a private foundation trust, or a split
2961 interest trust to the extent that the split interest trust is
2962 subject to the provisions of s. 4947(a)(2) of the Internal
2963 Revenue Code, in the exercise of the trustee's powers shall not:
2964 (a) Engage in any act of self-dealing as defined in s.
2965 4941(d) of the Internal Revenue Code;
2966 (b) Retain any excess business holdings as defined in s.
2967 4943(c) of the Internal Revenue Code;
2968 (c) Make any investments in a manner that subjects the
2969 foundation to tax under s. 4944 of the Internal Revenue Code; or
2970 (d) Make any taxable expenditures as defined in s. 4945(d)
2971 of the Internal Revenue Code.
2972 (4) Paragraphs (3)(b) and (c) shall not apply to a split
2973 interest trust if:
2974 (a) All the interest from income, and none of the
2975 remainder interest, of the trust is devoted solely to one or
2976 more of the purposes described in s. 170(c)(2)(B) of the
2977 Internal Revenue Code, and all amounts in the trust for which a
2978 deduction was allowed under s. 170, s. 545(b)(2), s. 556(b)(2),
2979 s. 642(c), s. 2055, s. 2106(a)(2), or s. 2522 of the Internal

2980 Revenue Code have an aggregate fair market value of not more
2981 than 60 percent of the aggregate fair market value of all
2982 amounts in the trust; or
2983 (b) A deduction was allowed under s. 170, s. 545(b)(2), s.
2984 556(b)(2), s. 642(c), s. 2055, s. 2106(a)(2), or s. 2522 of the
2985 Internal Revenue Code for amounts payable under the terms of the
2986 trust to every remainder beneficiary but not to any income
2987 beneficiary.
2988 736.1205 Notice that this part does not apply.--In the
2989 case of a power to make distributions, if the trustee determines
2990 that the governing instrument contains provisions that are more
2991 restrictive than s. 736.1204(2), or if the trust contains other
2992 powers, inconsistent with the provisions of s. 736.1204(3) that
2993 specifically direct acts by the trustee, the trustee shall
2994 notify the state attorney when the trust becomes subject to this
2995 part. Section 736.1204 does not apply to any trust for which
2996 notice has been given pursuant to this section unless the trust
2997 is amended to comply with the terms of this part.
2998 736.1206 Power to amend trust instrument.--
2999 (1) In the case of a trust that is solely for a named
3000 charitable organization or organizations and for which the
3001 trustee does not possess any discretion concerning the
3002 distribution of income or principal among two or more such
3003 organizations, the trustee may amend the governing instrument to
3004 comply with the provisions of s. 736.1204(2) with the consent of
3005 the named charitable organization or organizations.
3006 (2) In the case of a charitable trust that is not subject
3007 to the provisions of subsection (1), the trustee may amend the
3008 governing instrument to comply with the provisions of s.
3009 736.1204(2) with the consent of the state attorney.

3010 736.1207 Power of court to permit deviation.--This part
3011 does not affect the power of a court to relieve a trustee from
3012 any restrictions on the powers and duties that are placed on the
3013 trustee by the governing instrument or applicable law for cause
3014 shown and on complaint of the trustee, state attorney, or an
3015 affected beneficiary and notice to the affected parties.
3016 736.1208 Release; property and persons affected; manner of
3017 effecting.--
3018 (1) The trustee of a trust, all of the unexpired interests
3019 in which are devoted to one or more charitable purposes, may
3020 release a power to select charitable donees unless the creating
3021 instrument provides otherwise.
3022 (2) The release of a power to select charitable donees may
3023 apply to all or any part of the property subject to the power
3024 and may reduce or limit the charitable organizations, or classes
3025 of charitable organizations, in whose favor the power is
3026 exercisable.
3027 (3) A release shall be effected by a duly acknowledged
3028 written instrument signed by the trustee and delivered as
3029 provided in subsection (4).
3030 (4) Delivery of a release shall be accomplished as
3031 follows:
3032 (a) If the release is accomplished by specifying a
3033 charitable organization or organizations as beneficiary or
3034 beneficiaries of the trust, by delivery of a copy of the release
3035 to each designated charitable organization.
3036 (b) If the release is accomplished by reducing the class
3037 of permissible charitable organizations, by delivery of a copy
3038 of the release to the state attorney.
3039 (5) If a release is accomplished by specifying a public
3040 charitable organization or organizations as beneficiary or

3041 beneficiaries of the trust, the trust at all times thereafter
3042 shall be operated exclusively for the benefit of, and be
3043 supervised by, the specified public charitable organization or
3044 organizations.
3045 736.1209 Election to come under this part.--With the
3046 consent of that organization or organizations, a trustee of a
3047 trust for the benefit of a public charitable organization or
3048 organizations may come under s. 736.0838(5) by filing with the
3049 state attorney an election, accompanied by the proof of required
3050 consent. Thereafter the trust shall be subject to s.
3051 736.1208(5).
3052 736.1210 Interpretation.--This part shall be interpreted
3053 to effectuate the intent of the state to preserve, foster, and
3054 encourage gifts to, or for the benefit of, charitable
3055 organizations.
3056 Section 13. Part XIII of chapter 736, Florida Statutes,
3057 consisting of sections 736.1301, 736.1302, and 736.1303, is
3058 created to read:
3059
3060 PART XIII
3061 MISCELLANEOUS
3062
3063 736.1301 Electronic records and signatures.--Any
3064 provisions of this code governing the legal effect, validity, or
3065 enforceability of electronic records or electronic signatures,
3066 and of contracts formed or performed with the use of such
3067 records or signatures, are deemed to conform to the requirements
3068 of s. 102 of the Electronic Signatures in Global and National
3069 Commerce Act, 15 U.S.C. s. 7002, and supersede, modify, and
3070 limit the requirements of the Electronic Signatures in Global
3071 and National Commerce Act.

3072 736.1302 Severability clause.--If any provision of this
3073 code or its application to any person or circumstances is held
3074 invalid, the invalidity does not affect other provisions or
3075 applications of this code that can be given effect without the
3076 invalid provision or application, and to this end the provisions
3077 of this code are severable.
3078 736.1303 Application to existing relationships.--
3079 (1) Except as otherwise provided in this code, on July 1,
3080 2007:
3081 (a) This code applies to all trusts created before, on, or
3082 after such date.
3083 (b) This code applies to all judicial proceedings
3084 concerning trusts commenced on or after such date.
3085 (c) This code applies to judicial proceedings concerning
3086 trusts commenced before such date, unless the court finds that
3087 application of a particular provision of this code would
3088 substantially interfere with the effective conduct of the
3089 judicial proceedings or prejudice the rights of the parties, in
3090 which case the particular provision of this code does not apply
3091 and the superseded law applies.
3092 (d) Any rule of construction or presumption provided in
3093 this code applies to trust instruments executed before the
3094 effective date of this code unless there is a clear indication
3095 of a contrary intent in the terms of the trust.
3096 (e) An act done before such date is not affected by this
3097 code.
3098 (2) If a right is acquired, extinguished, or barred on the
3099 expiration of a prescribed period that has commenced to run
3100 under any other law before July 1, 2007, that law continues to
3101 apply to the right even if it has been repealed or superseded.

3102 Section 14. Paragraph (a) of subsection (5) of section
3103 497.458, Florida Statutes, is amended to read:
3104 497.458 Disposition of proceeds received on contracts.--
3105 (5) The trustee of the trust established pursuant to this
3106 section shall only have the power to:
3107 (a) Invest in investments as prescribed in s. 215.47 and
3108 exercise the powers set forth in part VIII of chapter 736 ~~part~~
3109 ~~IV of chapter 737~~, provided that the licensing authority may by
3110 order require the trustee to liquidate or dispose of any
3111 investment within 30 days after such order, or within such other
3112 times as the order may direct. The licensing authority may issue
3113 such order if it determines that the investment violates any
3114 provision of this chapter or is not in the best interests of the
3115 preneed contract holders whose contracts are secured by the
3116 trust funds.
3117 Section 15. Section 518.117, Florida Statutes, is created
3118 to read:
3119 518.117 Certain investments of fiduciary funds
3120 permissible.--A fiduciary that is authorized by lawful authority
3121 to engage in trust business as defined in s. 658.12(20) may
3122 invest fiduciary funds in accordance with s. 660.417 so long as
3123 the investment otherwise complies with this chapter.
3124 Section 16. Subsection (2) of section 607.0802, Florida
3125 Statutes, is amended to read:
3126 607.0802 Qualifications of directors.--
3127 (2) In the event that the eligibility to serve as a member
3128 of the board of directors of a condominium association,
3129 cooperative association, homeowners' association, or mobile home
3130 owners' association is restricted to membership in such
3131 association and membership is appurtenant to ownership of a
3132 unit, parcel, or mobile home, a grantor of a trust described in

3133 s. 733.707(3), or a qualified beneficiary as defined in s.
3134 736.0103(14) ~~737.303(4)(b)~~ of a trust which owns a unit, parcel,
3135 or mobile home shall be deemed a member of the association and
3136 eligible to serve as a director of the condominium association,
3137 cooperative association, homeowners' association, or mobile home
3138 owners' association, provided that said beneficiary occupies the
3139 unit, parcel, or mobile home.
3140 Section 17. Subsection (2) of section 617.0802, Florida
3141 Statutes, is amended to read:
3142 617.0802 Qualifications of directors.--
3143 (2) In the event that the eligibility to serve as a member
3144 of the board of directors of a condominium association,
3145 cooperative association, homeowners' association, or mobile home
3146 owners' association is restricted to membership in such
3147 association and membership is appurtenant to ownership of a
3148 unit, parcel, or mobile home, a grantor of a trust described in
3149 s. 733.707(3), or a qualified beneficiary as defined in s.
3150 736.0103(14) ~~737.303(4)(b)~~ of a trust which owns a unit, parcel,
3151 or mobile home shall be deemed a member of the association and
3152 eligible to serve as a director of the condominium association,
3153 cooperative association, homeowners' association, or mobile home
3154 owners' association, provided that said beneficiary occupies the
3155 unit, parcel, or mobile home.
3156 Section 18. Subsection (6) of section 660.25, Florida
3157 Statutes, is amended to read:
3158 660.25 Definitions.--Subject to other definitions
3159 contained in other sections of this code, and unless the context
3160 otherwise requires, in this chapter:
3161 (6) "Investment instrument" means any security as defined
3162 in s. 2(a)(1) of the Securities Act of 1933; any security of an
3163 open-end or closed-end management investment company or

3164 investment trust registered under the Investment Company Act of
3165 1940, 15 U.S.C. ss. 80a-1 et seq., as amended; any contract of
3166 sale of a commodity for future delivery within the meaning of s.
3167 2(i) of the Commodity Exchange Act; or any other interest in
3168 securities, including by way of illustration and not limitation,
3169 shares or interests in a private investment fund (including a
3170 private investment fund organized as a limited partnership, a
3171 limited liability company, a statutory or common law business
3172 trust, a statutory trust, or a real estate investment trust),
3173 joint venture or other general or limited partnership;
3174 derivatives or other interests of any nature in securities such
3175 as options, options on futures and variable forward contracts;
3176 mutual funds; common trust funds; money market funds; hedge
3177 funds; private equity or venture capital funds; insurance
3178 contracts; and other entities or vehicles investing in
3179 securities or interests in securities whether registered or
3180 otherwise.
3181 (7) ~~(6)~~ Terms used but not defined in this chapter, but
3182 which are expressly defined in chapter 518, the financial
3183 institutions codes, chapter 732, chapter 733, chapter 734,
3184 chapter 735, chapter 736 ~~737~~, chapter 738, chapter 744, or
3185 chapter 747, shall in this chapter, unless the context otherwise
3186 requires, have the meanings ascribed to them in said chapters;
3187 and references in any of said chapters to a "trust company" or
3188 to "trust companies" shall include every trust department as
3189 defined in s. 658.12.
3190 Section 19. Section 660.417, Florida Statutes, is amended
3191 to read:
3192 660.417 Investment of fiduciary funds into mutual fund
3193 accounts; permissible activity under certain circumstances.--

3194 (1) In addition to other investments authorized by law for
3195 the investment of funds held by a fiduciary, or by the
3196 instrument governing the fiduciary relationship, ~~and~~
3197 ~~notwithstanding any other provision of law,~~ a bank or trust
3198 company acting as a fiduciary, agent or otherwise may, in the
3199 exercise of its investment discretion or at the direction of
3200 another person authorized to direct investment of funds held by
3201 the bank or trust company as fiduciary, invest and reinvest in
3202 investment instruments ~~the securities of an open-end or closed-~~
3203 ~~end management investment company or investment trust registered~~
3204 ~~under the Investment Company Act of 1940, 15 U.S.C. ss. 80a-1 et~~
3205 ~~seq., as amended,~~ so long as the ~~portfolio of such~~ investment
3206 instruments consist ~~company or investment trust consists~~
3207 substantially of investments not prohibited by the governing
3208 instrument.
3209 (2) The fact that such bank or trust company or an
3210 affiliate of the bank or trust company provides services with
3211 respect to ~~the~~ investment instruments ~~company or investment~~
3212 ~~trust~~ such as that of an investment adviser, administrator,
3213 broker, custodian, transfer agent, placement agent, servicing
3214 agent, registrar, underwriter, sponsor, distributor, manager or
3215 any other capacity, ~~otherwise~~ and is receiving reasonable
3216 compensation for those services, shall not preclude such bank or
3217 trust company from investing or reinvesting in investment
3218 instruments ~~the securities of the open-end or closed-end~~
3219 ~~management investment trust registered under the Investment~~
3220 ~~Company Act of 1940, 15 U.S.C. ss. 80a-1 et seq., as amended~~.
3221 However, with respect to any funds so invested, the basis
3222 (expressed as a percentage of asset value or otherwise) upon
3223 which such compensation is calculated shall be disclosed (by

3224 prospectus, account statement or otherwise) to all persons to
3225 whom statements of such account are rendered.
3226 (3) The fact that such bank or trust company or an
3227 affiliate of the bank or trust company owns or controls
3228 investment instruments shall not preclude the bank or trust
3229 company acting as a fiduciary from investing or reinvesting in
3230 such investment instruments, provided that such investment
3231 instruments:
3232 (a) Are held for sale by the bank or trust company or by an
3233 affiliate of the bank or trust company in the ordinary course of
3234 its business of providing investment services to its customers
3235 and do not include any such interests held by the bank or trust
3236 company or by an affiliate of the bank or trust company for its
3237 own account.
3238 (b) Are sold primarily to accounts for which the bank or
3239 trust company is not acting as a fiduciary upon terms that are
3240 not more favorable to the buyer than the terms upon which they
3241 are sold to accounts for which the bank or trust company is
3242 acting as a fiduciary.
3243 Section 20. Paragraphs (a), (d), and (e) of subsection (1)
3244 and subsections (2), (3), (9), and (10) of section 660.46,
3245 Florida Statutes, are amended to read:
3246 660.46 Substitution of fiduciaries.--
3247 (1) The provisions of this section shall apply to the
3248 transfer of fiduciary accounts by substitution, and for those
3249 purposes these provisions shall constitute alternative
3250 procedures to those provided or required by any other provisions
3251 of law relating to the transfer of fiduciary accounts or the
3252 substitution of persons acting or who are to act in a fiduciary
3253 capacity. In this section, and only for its purposes, the term:

3254 (a) "Limitation notice" has the meaning ascribed in s.
3255 736.1008(4) ~~737.307(3)~~.
3256 (d) "Trust accounting" has the meaning ascribed in s.
3257 736.08135 ~~737.3035~~.
3258 (e) "Trust disclosure document" has the meaning ascribed
3259 in s. 736.1008(4)(a) ~~737.307(2)~~.
3260 (2) Any original fiduciary and any proposed substitute
3261 fiduciary may, with respect to any fiduciary account or accounts
3262 which they shall mutually select, initiate proceedings by
3263 joining in the filing of a petition in the circuit court,
3264 requesting the substitution of the proposed substitute fiduciary
3265 for the original fiduciary as to such fiduciary account or
3266 accounts. The petition may be filed in the county in which the
3267 main office of the original fiduciary is located and, except to
3268 the extent inconsistent with the provisions of this section,
3269 shall be governed by the Florida Rules of Civil Procedure;
3270 however, if any fiduciary account is then the subject of a
3271 proceeding in a court in this state pursuant to the Florida
3272 Probate Code, the Florida Guardianship Law, chapter 736 ~~737~~, or
3273 chapter 747, the petition relating to such fiduciary account
3274 shall be filed in that proceeding and shall be governed by the
3275 procedural or other relevant rules applicable to such proceeding
3276 except to the extent inconsistent with the provisions of this
3277 section.
3278 (3) Unless a waiver or consent shall be filed in the
3279 proceedings as provided in subsection (4), the provisions of s.
3280 731.301(1) and (2) shall apply with respect to notice of the
3281 proceedings to all persons who are then cofiduciaries with the
3282 original fiduciary, other than a person joining as a petitioner
3283 in the proceedings; to all persons named in the governing
3284 instrument as substitutes or successors to the fiduciary

3285 capacity of the original fiduciary; to the persons then living
3286 who are entitled under the governing instrument to appoint a
3287 substitute or successor to act in the fiduciary capacity of the
3288 original fiduciary; to all vested beneficiaries of the fiduciary
3289 account; and to all then-living originators of the governing
3290 instrument. Unless a waiver or consent shall be filed in the
3291 proceedings as provided in subsection (4), the provisions of s.
3292 731.301 shall apply with respect to notice to all contingent
3293 beneficiaries of the fiduciary account. Only the persons or
3294 classes of persons described in the foregoing provisions of this
3295 subsection shall be deemed to be interested persons for the
3296 purposes of this section and the proceedings and notices
3297 provided for in this section; and the provisions of ss.
3298 731.301(3) and 731.303(3) and~~,~~ (4)~~,~~ and ~~(5),~~ part III of chapter
3299 736, relating to notice requirements, the effect of notice, and
3300 representation of interests, shall apply to the proceedings
3301 provided for in this section.
3302 (9) Unless previously or otherwise barred by adjudication,
3303 waiver, consent, limitation, or the provisions of subsection
3304 (8), an action for breach of trust or breach of fiduciary duties
3305 or responsibilities against an original fiduciary in whose place
3306 and stead another trust company or trust department has been
3307 substituted pursuant to the provisions of this section is barred
3308 for any beneficiary who has received a trust disclosure document
3309 adequately disclosing the matter unless a proceeding to assert
3310 the claim is commenced within 6 months after receipt of the
3311 trust disclosure document or the limitation notice that applies
3312 to the trust disclosure document, whichever is received later.
3313 In any event, and notwithstanding lack of adequate disclosure,
3314 all claims against such original fiduciary which has complied
3315 with the requirements of s. 736.1008 ~~issued a final trust~~

3316 ~~disclosure document received by the beneficiary and has informed~~
3317 ~~the beneficiary of the location and availability of records for~~
3318 ~~his or her examination~~ are barred as provided in chapter 95.
3319 Section 736.1008(4)(a) and (c) ~~737.307(2) and (3)~~ applies to
3320 this subsection.
3321 (10) A beneficiary has received a final trust disclosure
3322 document or a limitation notice if, when the beneficiary is an
3323 adult, it is received by him or her or if, when the beneficiary
3324 is a minor or a disabled person, it is received by his or her
3325 representative as provided in part III of chapter 736 ~~defined in~~
3326 ~~s. 731.303~~.
3327 Section 21. Section 660.418, Florida Statutes, is amended
3328 to read:
3329 660.418 Investment of fiduciary funds in syndicate
3330 securities.--Notwithstanding any other provision of law, any
3331 financial institution with fiduciary powers may, in its
3332 fiduciary capacity, purchase bonds or other securities
3333 underwritten or otherwise distributed by the financial
3334 institution or by a syndicate that includes the financial
3335 institution, or an affiliate of the financial institution,
3336 provided that such purchase is made through a licensed
3337 securities dealer, is otherwise prudent, and is not prohibited
3338 by the instrument governing the fiduciary relationship and that
3339 disclosure is made at least annually to those persons entitled
3340 to a statement of accounts pursuant to s. 736.0813 ~~737.303(4)~~
3341 indicating that such securities have been or may be purchased.
3342 This section applies to purchases of bonds or other securities
3343 made at the time of the initial offering of such bonds or
3344 securities or at any time after such initial offering.
3345 Section 22. Subsection (5) of section 689.071, Florida
3346 Statutes, is amended to read:

3347 689.071 Land trusts transferring interests in real estate;
3348 ownership vests in trustee.--
3349 (5) In addition to any other limitation on personal
3350 liability existing pursuant to statute or otherwise, the
3351 provisions of s. 736.1013 ~~737.306~~ apply to the trustee of a land
3352 trust created pursuant to this section.
3353 Section 23. Subsections (1) and (4) of section 689.075,
3354 Florida Statutes, are amended to read:
3355 689.075 Inter vivos trusts; powers retained by settlor.--
3356 (1) A trust which is otherwise valid and which complies
3357 with s. 736.0403 ~~737.111~~, including, but not limited to, a trust
3358 the principal of which is composed of real property, intangible
3359 personal property, tangible personal property, the possible
3360 expectancy of receiving as a named beneficiary death benefits as
3361 described in s. 733.808, or any combination thereof, and which
3362 has been created by a written instrument shall not be held
3363 invalid or an attempted testamentary disposition for any one or
3364 more of the following reasons:
3365 (a) Because the settlor or another person or both possess
3366 the power to revoke, amend, alter, or modify the trust in whole
3367 or in part;
3368 (b) Because the settlor or another person or both possess
3369 the power to appoint by deed or will the persons and
3370 organizations to whom the income shall be paid or the principal
3371 distributed;
3372 (c) Because the settlor or another person or both possess
3373 the power to add to, or withdraw from, the trust all or any part
3374 of the principal or income at one time or at different times;
3375 (d) Because the settlor or another person or both possess
3376 the power to remove the trustee or trustees and appoint a
3377 successor trustee or trustees;

3378 (e) Because the settlor or another person or both possess
3379 the power to control the trustee or trustees in the
3380 administration of the trust;
3381 (f) Because the settlor has retained the right to receive
3382 all or part of the income of the trust during her or his life or
3383 for any part thereof; or
3384 (g) Because the settlor is, at the time of the execution
3385 of the instrument, or thereafter becomes, sole trustee.
3386 (4) This section shall be applicable to trusts executed
3387 before or after July 1, 1969, by persons who are living on or
3388 after said date. ~~However, the requirement of conformity with the~~
3389 ~~formalities for the execution of wills as found in paragraph~~
3390 ~~(1)(g) shall not be imposed upon any trust executed prior to~~
3391 ~~July 1, 1969.~~
3392 Section 24. Section 689.175, Florida Statutes, is created
3393 to read:
3394 689.175 Worthier title doctrine abolished.--The doctrine
3395 of worthier title is abolished as a rule of law and as a rule of
3396 construction. Language in a governing instrument describing the
3397 beneficiaries of a disposition as the transferor's "heirs,"
3398 "heirs at law," "next of kin," "distributees," "relatives," or
3399 "family," or language of similar import, does not create or
3400 presumptively create a reversionary interest in the transferor.
3401 Section 25. Subsection (8) of section 709.08, Florida
3402 Statutes, is amended to read:
3403 709.08 Durable power of attorney.--
3404 (8) STANDARD OF CARE.--Except as otherwise provided in
3405 paragraph (4)(e), an attorney in fact is a fiduciary who must
3406 observe the standards of care applicable to trustees as
3407 described in s. 736.0901 ~~737.302~~. The attorney in fact is not
3408 liable to third parties for any act pursuant to the durable

3409 power of attorney if the act was authorized at the time. If the
3410 exercise of the power is improper, the attorney in fact is
3411 liable to interested persons as described in s. 731.201 for
3412 damage or loss resulting from a breach of fiduciary duty by the
3413 attorney in fact to the same extent as the trustee of an express
3414 trust.
3415 Section 26. Paragraph (c) of subsection (2) of section
3416 721.08, Florida Statutes, is amended to read:
3417 721.08 Escrow accounts; nondisturbance instruments;
3418 alternate security arrangements; transfer of legal title.--
3419 (2) One hundred percent of all funds or other property
3420 which is received from or on behalf of purchasers of the
3421 timeshare plan or timeshare interest prior to the occurrence of
3422 events required in this subsection shall be deposited pursuant
3423 to an escrow agreement approved by the division. The funds or
3424 other property may be released from escrow only as follows:
3425 (c) Compliance with conditions.--
3426 1. Timeshare licenses.--If the timeshare plan is one in
3427 which timeshare licenses are to be sold and no cancellation or
3428 default has occurred, the escrow agent may release the escrowed
3429 funds or other property to or on the order of the developer upon
3430 presentation of:
3431 a. An affidavit by the developer that all of the following
3432 conditions have been met:
3433 (I) Expiration of the cancellation period.
3434 (II) Completion of construction.
3435 (III) Closing.
3436 (IV) Either:
3437 (A) Execution, delivery, and recordation by each
3438 interestholder of the nondisturbance and notice to creditors
3439 instrument, as described in this section; or

3440 (B) Transfer by the developer of legal title to the
3441 subject accommodations and facilities, or all use rights
3442 therein, into a trust satisfying the requirements of
3443 subparagraph 4. and the execution, delivery, and recordation by
3444 each other interestholder of the nondisturbance and notice to
3445 creditors instrument, as described in this section.
3446 b. A certified copy of each recorded nondisturbance and
3447 notice to creditors instrument.
3448 c. One of the following:
3449 (I) A copy of a memorandum of agreement, as defined in s.
3450 721.05, together with satisfactory evidence that the original
3451 memorandum of agreement has been irretrievably delivered for
3452 recording to the appropriate official responsible for
3453 maintaining the public records in the county in which the
3454 subject accommodations and facilities are located. The original
3455 memorandum of agreement must be recorded within 180 days after
3456 the date on which the purchaser executed her or his purchase
3457 agreement.
3458 (II) A notice delivered for recording to the appropriate
3459 official responsible for maintaining the public records in each
3460 county in which the subject accommodations and facilities are
3461 located notifying all persons of the identity of an independent
3462 escrow agent or trustee satisfying the requirements of
3463 subparagraph 4. that shall maintain separate books and records,
3464 in accordance with good accounting practices, for the timeshare
3465 plan in which timeshare licenses are to be sold. The books and
3466 records shall indicate each accommodation and facility that is
3467 subject to such a timeshare plan and each purchaser of a
3468 timeshare license in the timeshare plan.
3469 2. Timeshare estates.--If the timeshare plan is one in
3470 which timeshare estates are to be sold and no cancellation or

3471 default has occurred, the escrow agent may release the escrowed
3472 funds or other property to or on the order of the developer upon
3473 presentation of:
3474 a. An affidavit by the developer that all of the following
3475 conditions have been met:
3476 (I) Expiration of the cancellation period.
3477 (II) Completion of construction.
3478 (III) Closing.
3479 b. If the timeshare estate is sold by agreement for deed,
3480 a certified copy of the recorded nondisturbance and notice to
3481 creditors instrument, as described in this section.
3482 c. Evidence that each accommodation and facility:
3483 (I) Is free and clear of the claims of any
3484 interestholders, other than the claims of interestholders that,
3485 through a recorded instrument, are irrevocably made subject to
3486 the timeshare instrument and the use rights of purchasers made
3487 available through the timeshare instrument;
3488 (II) Is the subject of a recorded nondisturbance and
3489 notice to creditors instrument that complies with subsection (3)
3490 and s. 721.17; or
3491 (III) Has been transferred into a trust satisfying the
3492 requirements of subparagraph 4.
3493 d. Evidence that the timeshare estate:
3494 (I) Is free and clear of the claims of any
3495 interestholders, other than the claims of interestholders that,
3496 through a recorded instrument, are irrevocably made subject to
3497 the timeshare instrument and the use rights of purchasers made
3498 available through the timeshare instrument; or
3499 (II) Is the subject of a recorded nondisturbance and
3500 notice to creditors instrument that complies with subsection (3)
3501 and s. 721.17.

3502 3. Personal property timeshare interests.--If the
3503 timeshare plan is one in which personal property timeshare
3504 interests are to be sold and no cancellation or default has
3505 occurred, the escrow agent may release the escrowed funds or
3506 other property to or on the order of the developer upon
3507 presentation of:
3508 a. An affidavit by the developer that all of the following
3509 conditions have been met:
3510 (I) Expiration of the cancellation period.
3511 (II) Completion of construction.
3512 (III) Closing.
3513 b. If the personal property timeshare interest is sold by
3514 agreement for transfer, evidence that the agreement for transfer
3515 complies fully with s. 721.06 and this section.
3516 c. Evidence that one of the following has occurred:
3517 (I) Transfer by the owner of the underlying personal
3518 property of legal title to the subject accommodations and
3519 facilities or all use rights therein into a trust satisfying the
3520 requirements of subparagraph 4.; or
3521 (II) Transfer by the owner of the underlying personal
3522 property of legal title to the subject accommodations and
3523 facilities or all use rights therein into an owners' association
3524 satisfying the requirements of subparagraph 5.
3525 d. Evidence of compliance with the provisions of
3526 subparagraph 6., if required.
3527 e. If a personal property timeshare plan is created with
3528 respect to accommodations and facilities that are located on or
3529 in an oceangoing vessel, including a "documented vessel" or a
3530 "foreign vessel," as defined and governed by 46 U.S.C., chapter
3531 301:

3532 (I) In making the transfer required in sub-subparagraph
3533 c., the developer shall use as its transfer instrument a
3534 document that establishes and protects the continuance of the
3535 use rights in the subject accommodations and facilities in a
3536 manner that is enforceable by the trust or owners' association.
3537 (II) The transfer instrument shall comply fully with the
3538 provisions of this chapter, shall be part of the timeshare
3539 instrument, and shall contain specific provisions that:
3540 (A) Prohibit the vessel owner, the developer, any manager
3541 or operator of the vessel, the owners' association or the
3542 trustee, the managing entity, or any other person from incurring
3543 any liens against the vessel except for liens that are required
3544 for the operation and upkeep of the vessel, including liens for
3545 fuel expenditures, repairs, crews' wages, and salvage, and
3546 except as provided in sub-sub-subparagraphs 4.b.(III) and
3547 5.b.(III). All expenses, fees, and taxes properly incurred in
3548 connection with the creation, satisfaction, and discharge of any
3549 such permitted lien, or a prorated portion thereof if less than
3550 all of the accommodations on the vessel are subject to the
3551 timeshare plan, shall be common expenses of the timeshare plan.
3552 (B) Grant a lien against the vessel in favor of the
3553 owners' association or trustee to secure the full and faithful
3554 performance of the vessel owner and developer of all of their
3555 obligations to the purchasers.
3556 (C) Establish governing law in a jurisdiction that
3557 recognizes and will enforce the timeshare instrument and the
3558 laws of the jurisdiction of registry of the vessel.
3559 (D) Require that a description of the use rights of
3560 purchasers be posted and displayed on the vessel in a manner
3561 that will give notice of such rights to any party examining the
3562 vessel. This notice must identify the owners' association or

3563 trustee and include a statement disclosing the limitation on
3564 incurring liens against the vessel described in sub-sub-sub-
3565 subparagraph (A).
3566 (E) Include the nondisturbance and notice to creditors
3567 instrument for the vessel owner and any other interestholders.
3568 (F) The owners' association created under subparagraph 5.
3569 or trustee created under subparagraph 4. shall have access to
3570 any certificates of classification in accordance with the
3571 timeshare instrument.
3572 (III) If the vessel is a foreign vessel, the vessel must
3573 be registered in a jurisdiction that permits a filing evidencing
3574 the use rights of purchasers in the subject accommodations and
3575 facilities, offers protection for such use rights against
3576 unfiled and inferior claims, and recognizes the document or
3577 instrument creating such use rights as a lien against the
3578 vessel.
3579 (IV) In addition to the disclosures required by s.
3580 721.07(5), the public offering statement and purchase contract
3581 must contain a disclosure in conspicuous type in substantially
3582 the following form:
3583
3584 The laws of the State of Florida govern the offering of this
3585 timeshare plan in this state. There are inherent risks in
3586 purchasing a timeshare interest in this timeshare plan because
3587 the accommodations and facilities of the timeshare plan are
3588 located on a vessel that will sail into international waters and
3589 into waters governed by many different jurisdictions. Therefore,
3590 the laws of the State of Florida cannot fully protect your
3591 purchase of an interest in this timeshare plan. Specifically,
3592 management and operational issues may need to be addressed in
3593 the jurisdiction in which the vessel is registered, which is

3594 (insert jurisdiction in which vessel is registered) . Concerns
3595 of purchasers may be sent to (insert name of applicable
3596 regulatory agency and address) .
3597
3598 4. Trust.--
3599 a. If the subject accommodations or facilities, or all use
3600 rights therein, are to be transferred into a trust in order to
3601 comply with this paragraph, such transfer shall take place
3602 pursuant to this subparagraph.
3603 b. Prior to the transfer by each interestholder of the
3604 subject accommodations and facilities, or all use rights
3605 therein, to a trust, any lien or other encumbrance against such
3606 accommodations and facilities, or use rights therein, shall be
3607 made subject to a nondisturbance and notice to creditors
3608 instrument pursuant to subsection (3). No transfer pursuant to
3609 this subparagraph shall become effective until the trustee
3610 accepts such transfer and the responsibilities set forth herein.
3611 A trust established pursuant to this subparagraph shall comply
3612 with the following provisions:
3613 (I) The trustee shall be an individual or a business
3614 entity authorized and qualified to conduct trust business in
3615 this state. Any corporation authorized to do business in this
3616 state may act as trustee in connection with a timeshare plan
3617 pursuant to this chapter. The trustee must be independent from
3618 any developer or managing entity of the timeshare plan or any
3619 interestholder of any accommodation or facility of such plan.
3620 (II) The trust shall be irrevocable so long as any
3621 purchaser has a right to occupy any portion of the timeshare
3622 property pursuant to the timeshare plan.
3623 (III) The trustee shall not convey, hypothecate, mortgage,
3624 assign, lease, or otherwise transfer or encumber in any fashion

3625 any interest in or portion of the timeshare property with
3626 respect to which any purchaser has a right of use or occupancy
3627 unless the timeshare plan is terminated pursuant to the
3628 timeshare instrument, or such conveyance, hypothecation,
3629 mortgage, assignment, lease, transfer, or encumbrance is
3630 approved by a vote of two-thirds of all voting interests of the
3631 timeshare plan and such decision is declared by a court of
3632 competent jurisdiction to be in the best interests of the
3633 purchasers of the timeshare plan. The trustee shall notify the
3634 division in writing within 10 days after receiving notice of the
3635 filing of any petition relating to obtaining such a court order.
3636 The division shall have standing to advise the court of the
3637 division's interpretation of the statute as it relates to the
3638 petition.
3639 (IV) All purchasers of the timeshare plan or the owners'
3640 association of the timeshare plan shall be the express
3641 beneficiaries of the trust. The trustee shall act as a fiduciary
3642 to the beneficiaries of the trust. The personal liability of the
3643 trustee shall be governed by ss. 736.08125, 736.08163, 736.1013,
3644 and 736.1015 ~~s. 737.306~~. The agreement establishing the trust
3645 shall set forth the duties of the trustee. The trustee shall be
3646 required to furnish promptly to the division upon request a copy
3647 of the complete list of the names and addresses of the owners in
3648 the timeshare plan and a copy of any other books and records of
3649 the timeshare plan required to be maintained pursuant to s.
3650 721.13 that are in the possession, custody, or control of the
3651 trustee. All expenses reasonably incurred by the trustee in the
3652 performance of its duties, together with any reasonable
3653 compensation of the trustee, shall be common expenses of the
3654 timeshare plan.

3655 (V) The trustee shall not resign upon less than 90 days'
3656 prior written notice to the managing entity and the division. No
3657 resignation shall become effective until a substitute trustee,
3658 approved by the division, is appointed by the managing entity
3659 and accepts the appointment.
3660 (VI) The documents establishing the trust arrangement
3661 shall constitute a part of the timeshare instrument.
3662 (VII) For trusts holding property in a timeshare plan
3663 located outside this state, the trust and trustee holding such
3664 property shall be deemed in compliance with the requirements of
3665 this subparagraph if such trust and trustee are authorized and
3666 qualified to conduct trust business under the laws of such
3667 jurisdiction and the agreement or law governing such trust
3668 arrangement provides substantially similar protections for the
3669 purchaser as are required in this subparagraph for trusts
3670 holding property in a timeshare plan in this state.
3671 (VIII) The trustee shall have appointed a registered agent
3672 in this state for service of process. In the event such a
3673 registered agent is not appointed, service of process may be
3674 served pursuant to s. 721.265.
3675 5. Owners' association.--
3676 a. If the subject accommodations or facilities, or all use
3677 rights therein, are to be transferred into an owners'
3678 association in order to comply with this paragraph, such
3679 transfer shall take place pursuant to this subparagraph.
3680 b. Prior to the transfer by each interestholder of the
3681 subject accommodations and facilities, or all use rights
3682 therein, to an owners' association, any lien or other
3683 encumbrance against such accommodations and facilities, or use
3684 rights therein, shall be made subject to a nondisturbance and
3685 notice to creditors instrument pursuant to subsection (3). No

3686 transfer pursuant to this subparagraph shall become effective
3687 until the owners' association accepts such transfer and the
3688 responsibilities set forth herein. An owners' association
3689 established pursuant to this subparagraph shall comply with the
3690 following provisions:
3691 (I) The owners' association shall be a business entity
3692 authorized and qualified to conduct business in this state.
3693 Control of the board of directors of the owners' association
3694 must be independent from any developer or managing entity of the
3695 timeshare plan or any interestholder.
3696 (II) The bylaws of the owners' association shall provide
3697 that the corporation may not be voluntarily dissolved without
3698 the unanimous vote of all owners of personal property timeshare
3699 interests so long as any purchaser has a right to occupy any
3700 portion of the timeshare property pursuant to the timeshare
3701 plan.
3702 (III) The owners' association shall not convey,
3703 hypothecate, mortgage, assign, lease, or otherwise transfer or
3704 encumber in any fashion any interest in or portion of the
3705 timeshare property with respect to which any purchaser has a
3706 right of use or occupancy, unless the timeshare plan is
3707 terminated pursuant to the timeshare instrument, or unless such
3708 conveyance, hypothecation, mortgage, assignment, lease,
3709 transfer, or encumbrance is approved by a vote of two-thirds of
3710 all voting interests of the association and such decision is
3711 declared by a court of competent jurisdiction to be in the best
3712 interests of the purchasers of the timeshare plan. The owners'
3713 association shall notify the division in writing within 10 days
3714 after receiving notice of the filing of any petition relating to
3715 obtaining such a court order. The division shall have standing

3716 to advise the court of the division's interpretation of the
3717 statute as it relates to the petition.
3718 (IV) All purchasers of the timeshare plan shall be members
3719 of the owners' association and shall be entitled to vote on
3720 matters requiring a vote of the owners' association as provided
3721 in this chapter or the timeshare instrument. The owners'
3722 association shall act as a fiduciary to the purchasers of the
3723 timeshare plan. The articles of incorporation establishing the
3724 owners' association shall set forth the duties of the owners'
3725 association. All expenses reasonably incurred by the owners'
3726 association in the performance of its duties, together with any
3727 reasonable compensation of the officers or directors of the
3728 owners' association, shall be common expenses of the timeshare
3729 plan.
3730 (V) The documents establishing the owners' association
3731 shall constitute a part of the timeshare instrument.
3732 (VI) For owners' associations holding property in a
3733 timeshare plan located outside this state, the owners'
3734 association holding such property shall be deemed in compliance
3735 with the requirements of this subparagraph if such owners'
3736 association is authorized and qualified to conduct owners'
3737 association business under the laws of such jurisdiction and the
3738 agreement or law governing such arrangement provides
3739 substantially similar protections for the purchaser as are
3740 required in this subparagraph for owners' associations holding
3741 property in a timeshare plan in this state.
3742 (VII) The owners' association shall have appointed a
3743 registered agent in this state for service of process. In the
3744 event such a registered agent cannot be located, service of
3745 process may be made pursuant to s. 721.265.

3746 6. Personal property subject to certificate of title.--If
3747 any personal property that is an accommodation or facility of a
3748 timeshare plan is subject to a certificate of title in this
3749 state pursuant to chapter 319 or chapter 328, the following
3750 notation must be made on such certificate of title pursuant to
3751 s. 319.27(1) or s. 328.15(1):
3752
3753 The further transfer or encumbrance of the property subject to
3754 this certificate of title, or any lien or encumbrance thereon,
3755 is subject to the requirements of section 721.17, Florida
3756 Statutes, and the transferee or lienor agrees to be bound by all
3757 of the obligations set forth therein.
3758 7. If the developer has previously provided a certified
3759 copy of any document required by this paragraph, she or he may
3760 for all subsequent disbursements substitute a true and correct
3761 copy of the certified copy, provided no changes to the document
3762 have been made or are required to be made.
3763 8. In the event that use rights relating to an
3764 accommodation or facility are transferred into a trust pursuant
3765 to subparagraph 4. or into an owners' association pursuant to
3766 subparagraph 5., all other interestholders, including the owner
3767 of the underlying fee or underlying personal property, must
3768 execute a nondisturbance and notice to creditors instrument
3769 pursuant to subsection (3).
3770 Section 27. Paragraph (e) of subsection (1) of section
3771 721.53, Florida Statutes, is amended to read:
3772 721.53 Subordination instruments; alternate security
3773 arrangements.--
3774 (1) With respect to each accommodation or facility of a
3775 multisite timeshare plan, the developer shall provide the
3776 division with satisfactory evidence that one of the following

3777 has occurred with respect to each interestholder prior to
3778 offering the accommodation or facility as a part of the
3779 multisite timeshare plan:
3780 (e) The interestholder has transferred the subject
3781 accommodation or facility or all use rights therein to a trust
3782 that complies with this paragraph. Prior to such transfer, any
3783 lien or other encumbrance against such accommodation or facility
3784 shall be made subject to a nondisturbance and notice to
3785 creditors instrument pursuant to paragraph (a) or a
3786 subordination and notice to creditors instrument pursuant to
3787 paragraph (b). No transfer pursuant to this paragraph shall
3788 become effective until the trust accepts such transfer and the
3789 responsibilities set forth herein. A trust established pursuant
3790 to this paragraph shall comply with the following provisions:
3791 1. The trustee shall be an individual or a business entity
3792 authorized and qualified to conduct trust business in this
3793 state. Any corporation authorized to do business in this state
3794 may act as trustee in connection with a timeshare plan pursuant
3795 to this chapter. The trustee must be independent from any
3796 developer or managing entity of the timeshare plan or any
3797 interestholder of any accommodation or facility of such plan.
3798 The same trustee may hold the accommodations and facilities, or
3799 use rights therein, for one or more of the component sites of
3800 the timeshare plan.
3801 2. The trust shall be irrevocable so long as any purchaser
3802 has a right to occupy any portion of the timeshare property
3803 pursuant to the timeshare plan.
3804 3. The trustee shall not convey, hypothecate, mortgage,
3805 assign, lease, or otherwise transfer or encumber in any fashion
3806 any interests in or portion of the timeshare property with
3807 respect to which any purchaser has a right of use or occupancy

3808 unless the timeshare plan is terminated pursuant to the
3809 timeshare instrument, or the timeshare property held in trust is
3810 deleted from a multisite timeshare plan pursuant to s.
3811 721.552(3), or such conveyance, hypothecation, mortgage,
3812 assignment, lease, transfer, or encumbrance is approved by vote
3813 of two-thirds of all voting interests of the timeshare plan and
3814 such decision is declared by a court of competent jurisdiction
3815 to be in the best interests of the purchasers of the timeshare
3816 plan.
3817 4. All purchasers of the timeshare plan or the owners'
3818 association of the timeshare plan shall be express beneficiaries
3819 of the trust. The trustee shall act as a fiduciary to the
3820 beneficiaries of the trust. The personal liability of the
3821 trustee shall be governed by ss. 736.08125, 736.08163, 736.1013,
3822 and 736.1015 ~~s. 737.306~~. The agreement establishing the trust
3823 shall set forth the duties of the trustee. The trustee shall be
3824 required to furnish promptly to the division upon request a copy
3825 of the complete list of the names and addresses of the owners in
3826 the timeshare plan and a copy of any other books and records of
3827 the timeshare plan required to be maintained pursuant to s.
3828 721.13 that are in the possession of the trustee. All expenses
3829 reasonably incurred by the trustee in the performance of its
3830 duties, together with any reasonable compensation of the
3831 trustee, shall be common expenses of the timeshare plan.
3832 5. The trustee shall not resign upon less than 90 days'
3833 prior written notice to the managing entity and the division. No
3834 resignation shall become effective until a substitute trustee,
3835 approved by the division, is appointed by the managing entity
3836 and accepts the appointment.
3837 6. The documents establishing the trust arrangement shall
3838 constitute a part of the timeshare instrument.

3839 7. For trusts holding property in component sites located
3840 outside this state, the trust holding such property shall be
3841 deemed in compliance with the requirements of this paragraph, if
3842 such trust is authorized and qualified to conduct trust business
3843 under the laws of such jurisdiction and the agreement or law
3844 governing such trust arrangement provides substantially similar
3845 protections for the purchaser as are required in this paragraph
3846 for trusts holding property in a component site located in this
3847 state.
3848 8. The trustee shall have appointed a registered agent in
3849 this state for service of process. In the event such a
3850 registered agent is not appointed, service of process may be
3851 served pursuant to s. 721.265.
3852 Section 28. Section 731.103, Florida Statutes, is amended
3853 to read:
3854 731.103 Evidence as to death or status.--In proceedings
3855 under this code and under chapter 736, the ~~rules of evidence in~~
3856 ~~civil actions are applicable unless specifically changed by the~~
3857 ~~code. The~~ following additional rules relating to determination
3858 of death and status are applicable:
3859 (1) An authenticated copy of a death certificate issued by
3860 an official or agency of the place where the death purportedly
3861 occurred is prima facie proof of the fact, place, date, and time
3862 of death and the identity of the decedent.
3863 (2) A copy of any record or report of a governmental
3864 agency, domestic or foreign, that a person is alive, missing,
3865 detained, or, from the facts related, presumed dead is prima
3866 facie evidence of the status and of the dates, circumstances,
3867 and places disclosed by the record or report.
3868 (3) A person who is absent from the place of his or her
3869 last known domicile for a continuous period of 5 years and whose

3870 absence is not satisfactorily explained after diligent search
3871 and inquiry is presumed to be dead. The person's death is
3872 presumed to have occurred at the end of the period unless there
3873 is evidence establishing that death occurred earlier. Evidence
3874 showing that the absent person was exposed to a specific peril
3875 of death may be a sufficient basis for the court determining at
3876 any time after such exposure that he or she died less than 5
3877 years after the date on which his or her absence commenced. A
3878 petition for this determination shall be filed in the county in
3879 Florida where the decedent maintained his or her domicile or in
3880 any county of this state if the decedent was not a resident of
3881 Florida at the time his or her absence commenced.
3882 (4) This section does not preclude the establishment of
3883 death by direct or circumstantial evidence prior to expiration
3884 of the 5-year time period set forth in subsection (3).
3885 Section 29. Section 731.1035, Florida Statutes, is created
3886 to read:
3887 731.1035 Applicable rules of evidence.--In proceedings
3888 under this code, the rules of evidence in civil actions are
3889 applicable unless specifically changed by the code.
3890 Section 30. Section 731.201, Florida Statutes, is amended
3891 to read:
3892 731.201 General definitions.--Subject to additional
3893 definitions in subsequent chapters that are applicable to
3894 specific chapters or parts, and unless the context otherwise
3895 requires, in this code, in s. 409.9101, and in chapters 736 ~~737~~,
3896 738, 739, and 744, the term:
3897 (1) "Authenticated," when referring to copies of documents
3898 or judicial proceedings required to be filed with the court
3899 under this code, means a certified copy or a copy authenticated
3900 according to the Federal Rules of Civil Procedure.

3901 (2) "Beneficiary" means heir at law in an intestate estate
3902 and devisee in a testate estate. The term "beneficiary" does not
3903 apply to an heir at law or a devisee after that person's
3904 interest in the estate has been satisfied. In the case of a
3905 devise to an existing trust or trustee, or to a trust or trustee
3906 described by will, the trustee is a beneficiary of the estate.
3907 Except as otherwise provided in this subsection, the beneficiary
3908 of the trust is not a beneficiary of the estate of which that
3909 trust or the trustee of that trust is a beneficiary. However, if
3910 each trustee is also a personal representative of the estate,
3911 each qualified beneficiary ~~the beneficiary or beneficiaries~~ of
3912 the trust as defined in s. 736.0103(14) ~~737.303(4)(b)~~ shall be
3913 regarded as a beneficiary of the estate.
3914 (3) "Child" includes a person entitled to take as a child
3915 under this code by intestate succession from the parent whose
3916 relationship is involved, and excludes any person who is only a
3917 stepchild, a foster child, a grandchild, or a more remote
3918 descendant.
3919 (4) "Claim" means a liability of the decedent, whether
3920 arising in contract, tort, or otherwise, and funeral expense.
3921 The term does not include an expense of administration or
3922 estate, inheritance, succession, or other death taxes.
3923 (5) "Clerk" means the clerk or deputy clerk of the court.
3924 (6) "Court" means the circuit court.
3925 (7) "Curator" means a person appointed by the court to
3926 take charge of the estate of a decedent until letters are
3927 issued.
3928 (8) "Devise," when used as a noun, means a testamentary
3929 disposition of real or personal property and, when used as a
3930 verb, means to dispose of real or personal property by will or
3931 trust. The term includes "gift," "give," "bequeath," "bequest,"

3932 and "legacy." A devise is subject to charges for debts,
3933 expenses, and taxes as provided in this code, the will, or the
3934 trust.
3935 (9) "Devisee" means a person designated in a will or trust
3936 to receive a devise. Except as otherwise provided in this
3937 subsection, in the case of a devise to an existing trust or
3938 trustee, or to a trust or trustee of a trust described by will,
3939 the trust or trustee, rather than the beneficiaries of the
3940 trust, is the devisee. However, if each trustee is also a
3941 personal representative of the estate, each qualified
3942 beneficiary ~~the beneficiary or beneficiaries~~ of the trust as
3943 defined in s. 736.0103(14) ~~737.303(4)(b)~~ shall be regarded as a
3944 devisee.
3945 (10) "Distributee" means a person who has received estate
3946 property from a personal representative or other fiduciary other
3947 than as a creditor or purchaser. A testamentary trustee is a
3948 distributee only to the extent of distributed assets or
3949 increments to them remaining in the trustee's hands. A
3950 beneficiary of a testamentary trust to whom the trustee has
3951 distributed property received from a personal representative is
3952 a distributee. For purposes of this provision, "testamentary
3953 trustee" includes a trustee to whom assets are transferred by
3954 will, to the extent of the devised assets.
3955 (11) "Domicile" means a person's usual place of dwelling
3956 and shall be synonymous with residence.
3957 (12) "Estate" means the property of a decedent that is the
3958 subject of administration.
3959 (13) "Exempt property" means the property of a decedent's
3960 estate which is described in s. 732.402.
3961 (14) "File" means to file with the court or clerk.

3962 (15) "Foreign personal representative" means a personal
3963 representative of another state or a foreign country.
3964 (16) "Formal notice" means formal notice under the Florida
3965 Probate Rules.
3966 (17) "Grantor" means one who creates or adds to a trust
3967 and includes "settlor" or "trustor" and a testator who creates
3968 or adds to a trust.
3969 (18) "Heirs" or "heirs at law" means those persons,
3970 including the surviving spouse, who are entitled under the
3971 statutes of intestate succession to the property of a decedent.
3972 (19) "Incompetent" means a minor or a person adjudicated
3973 incompetent.
3974 (20) "Informal notice" or "notice" means informal notice
3975 under the Florida Probate Rules.
3976 (21) "Interested person" means any person who may
3977 reasonably be expected to be affected by the outcome of the
3978 particular proceeding involved. In any proceeding affecting the
3979 estate or the rights of a beneficiary in the estate, the
3980 personal representative of the estate shall be deemed to be an
3981 interested person. In any proceeding affecting the expenses of
3982 the administration and obligations of a decedent's estate, or
3983 any claims described in s. 733.702(1), the trustee of a trust
3984 described in s. 733.707(3) is an interested person in the
3985 administration of the grantor's estate. The term does not
3986 include a beneficiary who has received complete distribution.
3987 The meaning, as it relates to particular persons, may vary from
3988 time to time and must be determined according to the particular
3989 purpose of, and matter involved in, any proceedings.
3990 (22) "Letters" means authority granted by the court to the
3991 personal representative to act on behalf of the estate of the
3992 decedent and refers to what has been known as letters

3993 testamentary and letters of administration. All letters shall be
3994 designated "letters of administration."
3995 (23) "Other state" means any state of the United States
3996 other than Florida and includes the District of Columbia, the
3997 Commonwealth of Puerto Rico, and any territory or possession
3998 subject to the legislative authority of the United States.
3999 (24) "Parent" excludes any person who is only a
4000 stepparent, foster parent, or grandparent.
4001 (25) "Personal representative" means the fiduciary
4002 appointed by the court to administer the estate and refers to
4003 what has been known as an administrator, administrator cum
4004 testamento annexo, administrator de bonis non, ancillary
4005 administrator, ancillary executor, or executor.
4006 (26) "Petition" means a written request to the court for
4007 an order.
4008 (27) "Power of appointment" means an authority, other than
4009 as an incident of the beneficial ownership of property, to
4010 designate recipients of beneficial interests in property.
4011 (28) ~~(27)~~ "Probate of will" means all steps necessary to
4012 establish the validity of a will and to admit a will to probate.
4013 (29) ~~(28)~~ "Property" means both real and personal property
4014 or any interest in it and anything that may be the subject of
4015 ownership.
4016 (30) ~~(29)~~ "Protected homestead" means the property
4017 described in s. 4(a)(1), Art. X of the State Constitution on
4018 which at the death of the owner the exemption inures to the
4019 owner's surviving spouse or heirs under s. 4(b), Art. X of the
4020 State Constitution. For purposes of the code, real property
4021 owned as tenants by the entirety is not protected homestead.
4022 (31) ~~(30)~~ "Residence" means a person's place of dwelling.

4023 (32) ~~(31)~~ "Residuary devise" means a devise of the assets
4024 of the estate which remain after the provision for any devise
4025 which is to be satisfied by reference to a specific property or
4026 type of property, fund, sum, or statutory amount. If the will
4027 contains no devise which is to be satisfied by reference to a
4028 specific property or type of property, fund, sum, or statutory
4029 amount, "residuary devise" or "residue" means a devise of all
4030 assets remaining after satisfying the obligations of the estate.
4031 (33) ~~(32)~~ "Security" means a security as defined in s.
4032 517.021.
4033 (34) ~~(33)~~ "Security interest" means a security interest as
4034 defined in s. 671.201.
4035 (35) ~~(34)~~ "Trust" means an express trust, private or
4036 charitable, with additions to it, wherever and however created.
4037 It also includes a trust created or determined by a judgment or
4038 decree under which the trust is to be administered in the manner
4039 of an express trust. "Trust" excludes other constructive trusts,
4040 and it excludes resulting trusts; conservatorships; custodial
4041 arrangements pursuant to the Florida Uniform Transfers to Minors
4042 Act; business trusts providing for certificates to be issued to
4043 beneficiaries; common trust funds; land trusts under s. 689.05;
4044 trusts created by the form of the account or by the deposit
4045 agreement at a financial institution; voting trusts; security
4046 arrangements; liquidation trusts; trusts for the primary purpose
4047 of paying debts, dividends, interest, salaries, wages, profits,
4048 pensions, or employee benefits of any kind; and any arrangement
4049 under which a person is nominee or escrowee for another.
4050 (36) ~~(35)~~ "Trustee" includes an original, additional,
4051 surviving, or successor trustee, whether or not appointed or
4052 confirmed by court.

4053 (37) ~~(36)~~ "Will" means an instrument, including a codicil,
4054 executed by a person in the manner prescribed by this code,
4055 which disposes of the person's property on or after his or her
4056 death and includes an instrument which merely appoints a
4057 personal representative or revokes or revises another will.
4058 Section 31. Paragraph (a) of subsection (1) and subsection
4059 (5) of section 731.303, Florida Statutes, are amended to read:
4060 731.303 Representation.--In the administration of or in
4061 judicial proceedings involving estates of decedents or trusts,
4062 the following apply:
4063 (1) Persons are bound by orders binding others in the
4064 following cases:
4065 (a)1. Orders binding the sole holder or all coholders of a
4066 power of revocation or a general, special, or limited power of
4067 appointment, including one in the form of a power of amendment
4068 or revocation to the extent that the power has not become
4069 unexercisable in fact, bind all persons to the extent that their
4070 interests, as persons who may take by virtue of the exercise or
4071 nonexercise of the power, are subject to the power.
4072 2. Subparagraph 1. does not apply to:
4073 a. Any matter determined by the court to involve fraud or
4074 bad faith by the trustee;
4075 b. A power of a trustee to distribute trust property; or
4076 c. A power of appointment held by a person while the
4077 person is the sole trustee.
4078 (5) The holder of a power of appointment over property not
4079 held in trust may represent and bind persons whose interests, as
4080 permissible appointees, takers in default, or otherwise, are
4081 subject to the power. Representation under this subsection does
4082 not apply to:

4083 (a) Any matter determined by the court to involve fraud or
4084 bad faith by the trustee;
4085 (b) A power of a trustee to distribute trust property; or
4086 (c) A power of appointment held by a person while the
4087 person is the sole trustee ~~When a sole holder or coholder of a~~
4088 ~~general, special, or limited power of appointment, including an~~
4089 ~~exercisable power of amendment or revocation over property in an~~
4090 ~~estate or trust, is bound by:~~
4091 ~~(a) Agreements, waivers, consents, or approvals; or~~
4092 ~~(b) Accounts, trust accountings, or other written reports~~
4093 ~~that adequately disclose matters set forth therein,~~
4094
4095 ~~then all persons who may take by virtue of, and whose interests~~
4096 ~~are subject to, the exercise or nonexercise of the power are~~
4097 ~~also bound, but only to the extent of their interests which~~
4098 ~~could otherwise be affected by the exercise or nonexercise of~~
4099 ~~the power~~.
4100 Section 32. Subsection (5) of section 732.2075, Florida
4101 Statutes, is amended to read:
4102 732.2075 Sources from which elective share payable;
4103 abatement.--
4104 (5) Unless otherwise provided in the trust instrument or,
4105 in the decedent's will if there is no provision in the trust
4106 instrument, any amount to be satisfied from trust property shall
4107 be paid from the assets of the trust in the order provided for
4108 claims under s. 736.05053 ~~737.3054~~(2) and (3). A direction in
4109 the decedent's will is effective only for revocable trusts.
4110 Section 33. Subsection (2) of section 732.513, Florida
4111 Statutes, is amended to read:
4112 732.513 Devises to trustee.--

4113 (2) The devise shall not be invalid for any or all of the
4114 following reasons:
4115 (a) Because the trust is amendable or revocable, or both,
4116 by any person.
4117 (b) Because the trust has been amended or revoked in part
4118 after execution of the will or a codicil to it.
4119 ~~(c) Because the trust instrument or any amendment to it~~
4120 ~~was not executed in the manner required for wills.~~
4121 (c) ~~(d)~~ Because the only res of the trust is the possible
4122 expectancy of receiving, as a named beneficiary, a devise under
4123 a will or death benefits as described in s. 733.808, and even
4124 though the testator or other person has reserved any or all
4125 rights of ownership in the death benefit policy, contract, or
4126 plan, including the right to change the beneficiary.
4127 (d) ~~(e)~~ Because of any of the provisions of s. 689.075.
4128 Section 34. Section 732.603, Florida Statutes, is amended
4129 to read:
4130 (Substantial rewording of section. See
4131 s. 732.603, F.S., for present text.)
4132 732.603 Antilapse; deceased devisee; class gifts.--
4133 (1) Unless a contrary intent appears in the will, if a
4134 devisee who is a grandparent, or a descendant of a grandparent,
4135 of the testator:
4136 (a) Is dead at the time of the execution of the will;
4137 (b) Fails to survive the testator; or
4138 (c) Is required by the will or by operation of law to be
4139 treated as having predeceased the testator,
4140
4141 a substitute gift is created in the devisee's surviving
4142 descendants who take per stirpes the property to which the

4143 devisee would have been entitled had the devisee survived the
4144 testator.
4145 (2) When a power of appointment is exercised by will,
4146 unless a contrary intent appears in the document creating the
4147 power of appointment or in the testator's will, if an appointee
4148 who is a grandparent, or a descendant of a grandparent, of the
4149 donor of the power:
4150 (a) Is dead at the time of the execution of the will or
4151 the creation of the power;
4152 (b) Fails to survive the testator; or
4153 (c) Is required by the will, the document creating the
4154 power, or by operation of law to be treated as having
4155 predeceased the testator,
4156
4157 a substitute gift is created in the appointee's surviving
4158 descendants who take per stirpes the property to which the
4159 appointee would have been entitled had the appointee survived
4160 the testator. Unless the language creating a power of
4161 appointment expressly excludes the substitution of the
4162 descendants of an object of a power for the object, a surviving
4163 descendant of a deceased object of a power of appointment may be
4164 substituted for the object whether or not the descendant is an
4165 object of the power.
4166 (3) In the application of this section:
4167 (a) Words of survivorship in a devise or appointment to an
4168 individual, such as "if he survives me," or to "my surviving
4169 children," are a sufficient indication of an intent contrary to
4170 the application of subsections (1) and (2). Words of
4171 survivorship used by the donor of the power in a power to
4172 appoint to an individual, such as "if he survives the donee," or
4173 in a power to appoint to the donee's "then surviving children,"

4174 are a sufficient indication of an intent contrary to the
4175 application of subsection (2).
4176 (b) The term:
4177 1. "Appointment" includes an alternative appointment and
4178 an appointment in the form of a class gift.
4179 2. "Appointee" includes:
4180 a. A class member if the appointment is in the form of a
4181 class gift.
4182 b. An individual or class member who was deceased at the
4183 time the testator executed his or her will as well as an
4184 individual or class member who was then living but who failed to
4185 survive the testator.
4186 3. "Devise" also includes an alternative devise and a
4187 devise in the form of a class gift.
4188 4. "Devisee" also includes:
4189 a. A class member if the devise is in the form of a class
4190 gift.
4191 b. An individual or class member who was deceased at the
4192 time the testator executed his or her will as well as an
4193 individual or class member who was then living but who failed to
4194 survive the testator.
4195 (4) This section applies only to outright devises and
4196 appointments. Devises and appointments in trust, including to a
4197 testamentary trust, are subject to s. 736.1106.
4198 Section 35. Section 732.604, Florida Statutes, is amended
4199 to read:
4200 732.604 Failure of testamentary provision.--
4201 (1) Except as provided in s. 732.603, if a devise other
4202 than a residuary devise fails for any reason, it becomes a part
4203 of the residue.

4204 (2) Except as provided in s. 732.603, if the residue is
4205 devised to two or more persons, the share of a residuary devisee
4206 that fails for any reason ~~and the devise to one of the residuary~~
4207 ~~devisees fails for any reason, that devise~~ passes to the other
4208 residuary devisee, or to the other residuary devisees in
4209 proportion to the ~~their~~ interests of each in the remaining part
4210 of the residue.
4211 Section 36. Section 732.611, Florida Statutes, is amended
4212 to read:
4213 732.611 Devises to multigeneration classes to be per
4214 stirpes.--Unless the will provides otherwise, all devises to
4215 descendants, issue, and other multigeneration classes shall be
4216 per stirpes.
4217 Section 37. Subsection (1) of section 733.212, Florida
4218 Statutes, is amended to read:
4219 733.212 Notice of administration; filing of objections.--
4220 (1) The personal representative shall promptly serve a
4221 copy of the notice of administration on the following persons
4222 who are known to the personal representative:
4223 (a) The decedent's surviving spouse;
4224 (b) Beneficiaries;
4225 (c) The trustee of any trust described in s. 733.707(3)
4226 and each qualified beneficiary of the trust as defined in s.
4227 736.0103(14) ~~737.303(4)(b)~~, if each trustee is also a personal
4228 representative of the estate; and
4229 (d) Persons who may be entitled to exempt property
4230
4231 in the manner provided for service of formal notice, unless
4232 served under s. 733.2123. The personal representative may
4233 similarly serve a copy of the notice on any devisees under a

4234 known prior will or heirs or others who claim or may claim an
4235 interest in the estate.
4236 Section 38. Subsection (1) of section 733.602, Florida
4237 Statutes, is amended to read:
4238 733.602 General duties.--
4239 (1) A personal representative is a fiduciary who shall
4240 observe the standards of care applicable to trustees as
4241 described by part VII of chapter 736 ~~s. 737.302~~. A personal
4242 representative is under a duty to settle and distribute the
4243 estate of the decedent in accordance with the terms of the
4244 decedent's will and this code as expeditiously and efficiently
4245 as is consistent with the best interests of the estate. A
4246 personal representative shall use the authority conferred by
4247 this code, the authority in the will, if any, and the authority
4248 of any order of the court, for the best interests of interested
4249 persons, including creditors.
4250 Section 39. Subsection (4) of section 733.805, Florida
4251 Statutes, is amended to read:
4252 733.805 Order in which assets abate.--
4253 (4) In determining the contribution required under s.
4254 733.607(2), subsections (1)-(3) of this section and s. 736.05053
4255 ~~737.3054~~(2) shall be applied as if the beneficiaries of the
4256 estate and the beneficiaries of a trust described in s.
4257 733.707(3), other than the estate or trust itself, were taking
4258 under a common instrument.
4259 Section 40. Paragraph (j) of subsection (1) of section
4260 733.817, Florida Statutes, is amended to read:
4261 733.817 Apportionment of estate taxes.--
4262 (1) For purposes of this section:
4263 (j) "Residuary devise" has the meaning set forth in s.
4264 731.201~~(31)~~.

4265 Section 41. Paragraphs (a) and (f) of subsection (8) and
4266 paragraphs (a) and (d) of subsection (9) of section 738.104,
4267 Florida Statutes, are amended to read:
4268 738.104 Trustee's power to adjust.--
4269 (8) With respect to a trust in existence on January 1,
4270 2003:
4271 (a) A trustee shall not have the power to adjust under
4272 this section until the statement required in subsection (9) is
4273 provided and either no objection is made or any objection which
4274 is made has been terminated.
4275 1. An objection is made if, within 60 days after the date
4276 of the statement required in subsection (9), a super majority of
4277 the eligible ~~trust~~ beneficiaries deliver to the trustee a
4278 written objection to the application of this section to such
4279 trust. An objection shall be deemed to be delivered to the
4280 trustee on the date the objection is mailed to the mailing
4281 address listed in the notice provided in subsection (9).
4282 2. An objection is terminated upon the earlier of the
4283 receipt of consent from a super majority of eligible ~~trust~~
4284 beneficiaries of the class that made the objection, or the
4285 resolution of the objection pursuant to paragraph (c).
4286 (f) The objection of a super majority of eligible
4287 beneficiaries under this subsection shall be valid for a period
4288 of 1 year after the date of the notice set forth in subsection
4289 (9). Upon expiration of the objection, the trustee may
4290 thereafter give a new notice under subsection (9).
4291 (9)(a) A trustee of a trust in existence on January 1,
4292 2003, that is not prohibited under subsection (3) from
4293 exercising the power to adjust shall, any time prior to
4294 initially exercising the power, provide to all eligible
4295 ~~reasonably ascertainable current~~ beneficiaries ~~described in s.~~

4296 ~~737.303(4)(b)1. and all reasonably ascertainable remainder~~
4297 ~~beneficiaries described in s. 737.303(4)(b)2.~~ a statement
4298 containing the following:
4299 1. The name, telephone number, street address, and mailing
4300 address of the trustee and of any individuals who may be
4301 contacted for further information;
4302 2. A statement that unless a super majority of the
4303 eligible beneficiaries objects to the application of this
4304 section to the trust within 60 days after the date the statement
4305 pursuant to this subsection was served, s. 738.104 shall apply
4306 to the trust; and
4307 3. A statement that, if s. 738.104 applies to the trust,
4308 the trustee will have the power to adjust between income and
4309 principal and that such a power may have an effect on the
4310 distributions to such beneficiary from the trust.
4311 (d) For purposes of subsection (8) and this subsection,
4312 the term:
4313 1. "Eligible beneficiaries" means:
4314 a. If at the time the determination is made there is one
4315 or more beneficiaries described in s. 736.0103(14)(c), the
4316 beneficiaries described in s. 736.0103(14)(a) and (c); or
4317 b. If there is no beneficiary described in s.
4318 736.0103(14)(c), the beneficiaries described in s.
4319 736.0103(14)(a) and (b).
4320 2. ~~A~~ "Super majority of the eligible ~~trust~~ beneficiaries"
4321 means:
4322 a. If at the time the determination is made there is one
4323 or more beneficiaries described in s. 736.0103(14)(c), at least
4324 two-thirds in interest of the ~~reasonably ascertainable current~~
4325 beneficiaries described in s. 736.0103(14)(a) ~~737.303(4)(b)1.~~ or
4326 two-thirds in interest of the ~~reasonably ascertainable remainder~~

4327 beneficiaries described in s. 736.0103(14)(c) ~~737.303(4)(b)2.~~,
4328 if the interests of the beneficiaries are reasonably
4329 ascertainable; otherwise, it means two-thirds in number of
4330 either such class; or
4331 b. If there is no beneficiary described in s.
4332 736.0103(14)(c), at least two-thirds in interest of the
4333 beneficiaries described in s. 736.0103(14)(a) or two-thirds in
4334 interest of the beneficiaries described in s. 736.0103(14)(b),
4335 if the interests of the beneficiaries are reasonably
4336 ascertainable, otherwise, two-thirds in number of either such
4337 class.
4338 Section 42. Subsection (4) of section 738.1041, Florida
4339 Statutes, is amended to read:
4340 738.1041 Total return unitrust.--
4341 (4) All determinations made pursuant to sub-subparagraph
4342 (2)(b)2.b. shall be conclusive if reasonable and made in good
4343 faith. Such determination shall be conclusively presumed to have
4344 been made reasonably and in good faith unless proven otherwise
4345 in a proceeding commenced by or on behalf of a person interested
4346 in the trust within the time provided in s. 736.1008 ~~737.307~~.
4347 The burden will be on the objecting interested party to prove
4348 that the determinations were not made reasonably and in good
4349 faith.
4350 Section 43. Subsection (5) of section 738.202, Florida
4351 Statutes, is amended to read:
4352 738.202 Distribution to residuary and remainder
4353 beneficiaries.--
4354 (5) The value of trust assets shall be determined on an
4355 asset-by-asset basis and shall be conclusive if reasonable and
4356 determined in good faith. Determinations based on appraisals
4357 performed within 2 years before or after the valuation date

4358 shall be presumed reasonable. The value of trust assets shall be
4359 conclusively presumed to be reasonable and determined in good
4360 faith unless proven otherwise in a proceeding commenced by or on
4361 behalf of a person interested in the trust within the time
4362 provided in s. 736.1008 ~~737.307~~.
4363 Section 44. Paragraph (a) of subsection (12) of section
4364 739.102, Florida Statutes, is amended to read:
4365 739.102 Definitions.--As used in this chapter, the term:
4366 (12) "Trust" means:
4367 (a) An express trust (including an honorary trust or a
4368 trust under s. 736.0408 ~~737.116~~), charitable or noncharitable,
4369 with additions thereto, whenever and however created; and
4370
4371 As used in this chapter, the term "trust" does not include a
4372 constructive trust or a resulting trust.
4373 Section 45. Paragraphs (b) and (f) of subsection (6) of
4374 section 744.331, Florida Statutes, are amended to read:
4375 744.331 Procedures to determine incapacity.--
4376 (6) ORDER DETERMINING INCAPACITY.--If, after making
4377 findings of fact on the basis of clear and convincing evidence,
4378 the court finds that a person is incapacitated with respect to
4379 the exercise of a particular right, or all rights, the court
4380 shall enter a written order determining such incapacity. A
4381 person is determined to be incapacitated only with respect to
4382 those rights specified in the order.
4383 (b) When an order determines that a person is incapable of
4384 exercising delegable rights, the court must consider and find
4385 whether there is an alternative to guardianship which will
4386 sufficiently address the problems of the incapacitated person. A
4387 guardian must be appointed to exercise the incapacitated
4388 person's delegable rights unless the court finds there is an

4389 alternative. A guardian may not be appointed if the court finds
4390 there is an alternative to guardianship which will sufficiently
4391 address the problems of the incapacitated person. ~~In any order~~
4392 ~~declaring a person incapacitated the court must find that~~
4393 ~~alternatives to guardianship were considered and that no~~
4394 ~~alternative to guardianship will sufficiently address the~~
4395 ~~problems of the ward.~~
4396 (f) Upon the filing of a verified statement by an
4397 interested person stating:
4398 1. That he or she has a good faith belief that the alleged
4399 incapacitated person's trust, trust amendment, or durable power
4400 of attorney is invalid; and
4401 2. A reasonable factual basis for that belief,
4402
4403 the trust, trust amendment, or durable power of attorney shall
4404 not be deemed to be an alternative to the appointment of a
4405 guardian. The appointment of a guardian does not limit the
4406 court's power to determine that certain authority granted by a
4407 durable power of attorney is to remain exercisable by the
4408 attorney in fact. ~~When an order is entered which determines that~~
4409 ~~a person is incapable of exercising delegable rights, a guardian~~
4410 ~~must be appointed to exercise those rights.~~
4411 Section 46. Paragraph (a) of subsection (6) of section
4412 744.361, Florida Statutes, is amended to read:
4413 744.361 Powers and duties of guardian.--
4414 (6) A guardian who is given authority over any property of
4415 the ward shall:
4416 (a) Protect and preserve the property and invest it
4417 prudently as provided in chapter 518 ~~defined in s. 737.302~~,
4418 apply it as provided in s. 744.397, and account for it
4419 faithfully.

4420 Section 47. Subsections (11) and (18) of section 744.441,
4421 Florida Statutes, are amended to read:
4422 744.441 Powers of guardian upon court approval.--After
4423 obtaining approval of the court pursuant to a petition for
4424 authorization to act, a plenary guardian of the property, or a
4425 limited guardian of the property within the powers granted by
4426 the order appointing the guardian or an approved annual or
4427 amended guardianship report, may:
4428 (11) Prosecute or defend claims or proceedings in any
4429 jurisdiction for the protection of the estate and of the
4430 guardian in the performance of his or her duties. Before
4431 authorizing a guardian to bring an action described in s.
4432 736.0207, the court shall first find that the action appears to
4433 be in the ward's best interests during the ward's probable
4434 lifetime. If the court denies a request that a guardian be
4435 authorized to bring an action described in s. 736.0207, the
4436 court shall review the continued need for a guardian and the
4437 extent of the need for delegation of the ward's rights.
4438 (18) When the ward's will evinces an objective to obtain a
4439 United States estate tax charitable deduction by use of a split
4440 interest trust (as that term is defined in s. 736.1201 ~~737.501~~),
4441 but the maximum charitable deduction otherwise allowable will
4442 not be achieved in whole or in part, execute a codicil on the
4443 ward's behalf amending said will to obtain the maximum
4444 charitable deduction allowable without diminishing the aggregate
4445 value of the benefits of any beneficiary under such will.
4446 Section 48. Section 744.462, Florida Statutes, is created
4447 to read:
4448 744.462 Determination regarding alternatives to
4449 guardianship.--Any judicial determination concerning the
4450 validity of the ward's durable power of attorney, trust, or

4451 trust amendment shall be promptly reported in the guardianship
4452 proceeding by the guardian of the property. If the instrument
4453 has been judicially determined to be valid or if, after the
4454 appointment of a guardian, a petition is filed alleging that
4455 there is an alternative to guardianship which will sufficiently
4456 address the problems of the ward, the court shall review the
4457 continued need for a guardian and the extent of the need for
4458 delegation of the ward's rights.
4459 Section 49. Sections 737.101, 737.105, 737.106, 737.111,
4460 737.115, 737.116, 737.201, 737.202, 737.203, 737.2035, 737.204,
4461 737.2041, 737.205, 737.206, 737.2065, 737.207, 737.208, 737.209,
4462 737.301, 737.302, 737.303, 737.3035, 737.304, 737.305, 737.3053,
4463 737.3054, 737.3055, 737.306, 737.3061, 737.307, 737.308,
4464 737.309, 737.401, 737.402, 737.4025, 737.403, 737.4031,
4465 737.4032, 737.4033, 737.404, 737.405, 737.406, 737.501, 737.502,
4466 737.503, 737.504, 737.505, 737.506, 737.507, 737.508, 737.509,
4467 737.510, 737.511, 737.512, 737.6035, 737.621, 737.622, 737.623,
4468 737.624, 737.625, 737.626, and 737.627, Florida Statutes, are
4469 repealed.
4470 Section 50. This act shall take effect July 1, 2007.
4471
4472 ========== T I T L E A M E N D M E N T ==========
4473 Remove the entire title and insert:
4474 An act relating to the Florida Trust Code; creating parts
4475 I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, and XIII
4476 of chapter 736, F.S.; providing a short title; providing
4477 general provisions and definitions; providing for judicial
4478 proceedings; providing for representations; providing for
4479 creation, validity, modification, and termination of
4480 trusts; providing for creditors' claims; providing for
4481 spendthrift, discretionary, and revocable trusts;

4482 providing for the office of trustee; providing for powers
4483 and duties of the trustee; providing for trust
4484 investments; providing for liability of trustee and rights
4485 of persons dealing with trustee; providing for rules of
4486 construction; providing for charitable trusts; providing
4487 miscellaneous provisions; creating s. 518.117, F.S.;
4488 providing that certain investments of fiduciary funds are
4489 permissible; amending s. 660.25, F.S.; adding a definition
4490 of investment instrument; amending s. 660.417, F.S.;
4491 expanding the permissible investments by a trust company;
4492 creating s. 689.175, F.S.; abolishing the worthier title
4493 doctrine; providing construction of certain instrument
4494 language; amending s. 731.103, F.S.; correcting a cross-
4495 reference; providing construction relating to
4496 establishment of death by certain evidence under certain
4497 circumstances; creating s. 731.1035, F.S.; providing for
4498 application of rules of evidence in civil actions to
4499 certain proceedings; amending s. 731.201, F.S.; revising
4500 definitions; conforming terms and correcting cross-
4501 references; amending s. 731.303, F.S.; specifying
4502 nonapplication of certain orders relating to powers of
4503 revocation and powers of appointment; revising provisions
4504 relating to representation by a holder of a power of
4505 appointment; amending s. 732.513, F.S.; deleting a ground
4506 protecting a devise's validity; amending s. 732.603, F.S.;
4507 revising provisions relating to antilapse, deceased
4508 devisees, and class gifts; amending s. 744.331, F.S.;
4509 revising provisions relating to orders determining
4510 incapacity; amending s. 744.441, F.S.; revising authority
4511 of certain guardians to prosecute or defend claims or
4512 proceedings for certain purposes; specifying duties of a

4513 court; creating s. 744.462, F.S.; providing requirements
4514 for judicial determinations relating to alternatives to
4515 guardianship; providing duties of a court; amending ss.
4516 497.458, 607.0802, 617.0802, 660.46, 660.418, 689.071,
4517 689.075, 709.08, 721.08, 721.53, 732.2075, 732.604,
4518 732.611, 733.212, 733.602, 733.805, 733.817, 738.104,
4519 738.1041, 738.202, 739.102, and 744.361, F.S., to conform
4520 terms and correct cross-references; repealing ss. 737.101,
4521 737.105, 737.106, 737.111, 737.115, and 737.116,
4522 constituting part I of ch. 737, F.S., relating to trust
4523 registration; repealing ss. 737.201, 737.202, 737.203,
4524 737.2035, 737.204, 737.2041, 737.205, 737.206, 737.2065,
4525 737.207, 737.208, and 737.209, constituting part II of ch.
4526 737, F.S., relating to jurisdiction of courts; repealing
4527 ss. 737.301, 737.302, 737.303, 737.3035, 737.304, 737.305,
4528 737.3053, 737.3054, 737.3055, 737.306, 737.3061, 737.307,
4529 737.308, and 737.309, constituting part III of ch. 737,
4530 F.S., relating to duties and liabilities of trustees;
4531 repealing ss. 737.401, 737.402, 737.4025, 737.403,
4532 737.4031, 737.4032, 737.4033, 737.404, 737.405, and
4533 737.406, constituting part IV of ch. 737, F.S., relating
4534 to powers of trustees; repealing ss. 737.501, 737.502,
4535 737.503, 737.504, 737.505, 737.506, 737.507, 737.508,
4536 737.509, 737.510, 737.511, and 737.512, constituting part
4537 V of ch. 737, F.S., relating to charitable trusts;
4538 repealing ss. 737.6035, 737.621, 737.622, 737.623,
4539 737.624, 737.625, 737.626, and 737.627, consisting of part
4540 VI of ch. 737, F.S., relating to rules of construction of
4541 trust administration; providing an effective date.
4542

HB 455

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 455 Change of a Name
SPONSOR(S): Sands
TIED BILLS: None **IDEN./SIM. BILLS:** SB 908

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Blalock	Bond
2) Criminal Justice Appropriations Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

Current law requires a person seeking a name change, other than a person restoring a former name, to attach a set of fingerprints to the petition.

This bill provides that a person seeking a name change, other than a person restoring a former name, must attach 2 sets of fingerprints to the petition together with a fingerprint processing fee. The clerk of the court must send one set of petitioner's fingerprints to the Florida Department of Law Enforcement for a state and national criminal history records check, which must be provided to the court hearing the request for a name change.

This bill appears to have a minimal positive recurring fiscal impact on state revenues. This bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill increases the procedural requirements for, and the cost of, a petition for name change.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Any person or family that wants to change their name must follow the procedural requirements established by s. 68.07, F.S. The person seeking a name change is called the petitioner, and the petitioner files his or her petition for a change of name in the county in which he or she resides.

Section 68.07(2), F.S., provides that the petition must include a copy of the petitioner's fingerprints taken by a law enforcement agency, except where a former name is being restored. Section 68.07(2), F.S., also provides that the petition must be verified and show:

- That petitioner is a bona fide resident of and domiciled in the county where the change of name is sought.
- If known, the date and place of birth of petitioner, petitioner's father's name, mother's maiden name, and where petitioner has resided since birth.
- If petitioner is married, the name of petitioner's spouse and if petitioner has children, the names and ages of each and where they reside.
- If petitioner's name has previously been changed and when and where and by what court.
- Petitioner's occupation and where petitioner is employed and has been employed for 5 years next preceding filing of the petition. If petitioner owns and operates a business, the name and place of it shall be stated and petitioner's connection therewith and how long petitioner has been identified with said business. If petitioner is in a profession, the profession shall be stated, where the petitioner has practiced the profession and if a graduate of a school or schools, the name or names thereof, time of graduation, and degrees received.
- Whether the petitioner has been generally known or called by any other names and if so, by what names and where.
- Whether petitioner has ever been adjudicated a bankrupt and if so, where and when.
- Whether petitioner has ever been arrested for or charged with, pled guilty or nolo contendere to, or been found to have committed a criminal offense, regardless of adjudication, and if so, when and where.
- Whether any money judgment has ever been entered against petitioner and if so, the name of the judgment creditor, the amount and date thereof, the court by which entered, and whether the judgment has been satisfied.
- That the petition is filed for no ulterior or illegal purpose and granting it will not in any manner invade the property rights of others, whether partnership, patent, good will, privacy, trademark, or otherwise
- That the petitioner's civil rights have never been suspended, or if the petitioner's civil rights have been suspended, that full restoration of civil rights has occurred.[1]

[1] Section 68.07(2), F.S.

A facially sufficient petition for change of name should be granted by the court in the absence of evidence of a wrongful or fraudulent purpose.[2] Upon entry of the final judgment, the clerk must send a report of the judgment to the Florida Department of Law Enforcement (FDLE). The FDLE must send a copy of the report to the Department of Highway Safety and Motor Vehicles. Any information retained by these Departments is to be revised to reflect the changes made by the name change. If a person has been convicted of a felony in another state or of a federal offense, the FDLE must send the report to the respective state's office of law enforcement records or to the office of the FBI. The FDLE may also forward the report to any other law enforcement agency it believes may retain information related to the petitioner.[3]

Effect of Bill

This bill amends s. 68.07(2), F.S., to require that a petition for name change, other than a petition seeking to restore a former name, must include 2 sets of the petitioner's fingerprints instead of just one, and must include a fingerprint-processing fee. The fee is in the amount as established by s. 943.053, F.S.[4] for the state criminal history records check and in the amount established by the FBI[5] for the national criminal history records check. This bill requires the clerk of the court to forward one of the sets of fingerprints to the FDLE for a state and national criminal history records check. The results of the criminal history check are then to be returned to the clerk to be used by the court in determining whether to grant the petition for name change. If the judgment is granted the clerk must send the second set of fingerprints to the FDLE as required by s. 68.07(5), F.S.

C. SECTION DIRECTORY:

Section 1 amends s. 68.07, F.S., to require that certain name change petitions include 2 sets of fingerprints and a fingerprint-processing fee, and that the clerk of the court forward one set of fingerprints to the for a state and national criminal history records check.

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

(FY 06 07) Amount / FTE	(FY 07-08) Amount / FTE	(FY 08-09) Amount / FTE
$78,660	$78,660	$78,660

FDLE estimates that there are approximately 3,420 criminal record check requests for prospective name change petitions annually that would be subject to the $23 fingerprint-processing fee (3,420 x $23 = $78,660).[6]

These revenues will be deposited into the FDLE Operating Trust Fund.

2. Expenditures:

None.

---

[2] *In re Name Change Petition of Mullin,* 892 So.2d 1214 (Fla. 2nd DCA 2005)
[3] Section 68.07(5), F.S.
[4] The fee per record for criminal history information is $23 per name submitted. s. 943.053(3)(b), F.S.
[5] FDLE requires a fee of $47 to process and state and Federal (FBI) criminal history records check according to the FDLE website; www.fdle.state.fl.us/CriminalHistory. (accessed on January 06, 2006)
[6] Fiscal analysis prepared by the FDLE, December 1, 2005

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill increases the cost to the individual seeking a change of name by requiring the petitioner to pay a $47 fingerprint-processing fee for the state and national criminal history records check.

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:

Section 68.07(3), F.S., which is not amended by this bill, provides that a hearing on a petition for name change may be immediately after the petition is filed. This may conflict with the requirement for the clerk to send away fingerprints and later provide the petitioner's criminal history to the court. This subsection should perhaps be amended.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

n/a

1 A bill to be entitled
2 An act relating to the change of a name; amending s.
3 68.07, F.S.; requiring that a petition for a change of
4 name include two sets of fingerprints and a processing
5 fee; providing duties of the clerk of the court with
6 respect to forwarding sets of fingerprints to the
7 Department of Law Enforcement for purposes of the state
8 and national criminal history records check and for duties
9 following the granting of a petition; providing an
10 effective date.
11
12 Be It Enacted by the Legislature of the State of Florida:
13
14 Section 1. Section 68.07, Florida Statutes, is amended to
15 read:
16 68.07 Change of name.--
17 (1) Chancery courts have jurisdiction to change the name
18 of any person residing in this state on petition of the person
19 filed in the county in which he or she resides.
20 (2) The petition must ~~shall~~ include two sets ~~a copy~~ of the
21 petitioner's fingerprints taken by a law enforcement agency,
22 along with the fingerprint processing fee, except where a former
23 name is being restored. The clerk of the court shall forward one
24 set of fingerprints to the Department of Law Enforcement for a
25 state and national criminal history records check, the results
26 of which shall be returned to the clerk for use by the court in
27 determining whether to grant the petition. The fee for this
28 processing is the fee established by s. 943.053 for the state

29 criminal history records check plus the fee established by the
30 Federal Bureau of Investigation for the national criminal
31 history records check. The second set of fingerprints shall be
32 retained by the clerk to be forwarded to the Department of Law
33 Enforcement, along with the report of the judgment, if the
34 petition is granted. The petition shall ~~and~~ be verified and
35 show:
36 (a) That the petitioner is a bona fide resident of and
37 domiciled in the county where the change of name is sought.
38 (b) If known, the date and place of birth of the
39 petitioner, the petitioner's father's name, the petitioner's
40 mother's maiden name, and where the petitioner has resided since
41 birth.
42 (c) If the petitioner is married, the name of the
43 petitioner's spouse and if the petitioner has children, the
44 names and ages of each and where they reside.
45 (d) If the petitioner's name has previously been changed
46 and when and where and by what court.
47 (e) The petitioner's occupation and where the petitioner
48 is employed and has been employed for 5 years next preceding the
49 filing of the petition. If the petitioner owns and operates a
50 business, the name and place of it shall be stated and the
51 petitioner's connection therewith and how long the petitioner
52 has been identified with that ~~said~~ business. If the petitioner
53 is in a profession, the profession shall be stated, where the
54 petitioner has practiced the profession and, if a graduate of a
55 school or schools, the name or names thereof, time of
56 graduation, and degrees received.

57 (f) Whether the petitioner has been generally known or
58 called by any other names and if so, by what names and where.
59 (g) Whether the petitioner has ever been adjudicated a
60 bankrupt and if so, where and when.
61 (h) Whether the petitioner has ever been arrested for or
62 charged with, pled guilty or nolo contendere to, or been found
63 to have committed a criminal offense, regardless of
64 adjudication, and if so, when and where.
65 (i) Whether any money judgment has ever been entered
66 against the petitioner and if so, the name of the judgment
67 creditor, the amount and date thereof, the court by which
68 entered, and whether the judgment has been satisfied.
69 (j) That the petition is filed for no ulterior or illegal
70 purpose and granting it will not in any manner invade the
71 property rights of others, whether partnership, patent, good
72 will, privacy, trademark, or otherwise.
73 (k) That the petitioner's civil rights have never been
74 suspended, or if the petitioner's civil rights have been
75 suspended, that full restoration of civil rights has occurred.
76 (3) The hearing on the petition may be immediately after
77 it is filed.
78 (4) On filing the final judgment, the clerk shall, if the
79 birth occurred in this state, send a report of the judgment to
80 the Office of Vital Statistics of the Department of Health on a
81 form to be furnished by the department. The form must ~~shall~~
82 contain sufficient information to identify the original birth
83 certificate of the person, the new name, and the file number of
84 the judgment. This report shall be filed by the department with

85 respect to a person born in this state and shall become a part
86 of the vital statistics of this state. With respect to a person
87 born in another state, the clerk shall provide the petitioner
88 with a certified copy of the final judgment.
89 (5) The clerk must, upon the filing of the final judgment,
90 send a report of the judgment to the Department of Law
91 Enforcement on a form to be furnished by that department. The
92 Department of Law Enforcement must send a copy of the report to
93 the Department of Highway Safety and Motor Vehicles, which may
94 be delivered by electronic transmission. The report must contain
95 sufficient information to identify the petitioner, including a
96 set ~~copy~~ of the petitioner's fingerprints taken by a law
97 enforcement agency, the new name of the petitioner, and the file
98 number of the judgment. Any information retained by the
99 Department of Law Enforcement and the Department of Highway
100 Safety and Motor Vehicles may be revised or supplemented by said
101 departments to reflect changes made by the final judgment. With
102 respect to a person convicted of a felony in another state or of
103 a federal offense, the Department of Law Enforcement must send
104 the report to the respective state's office of law enforcement
105 records or to the office of the Federal Bureau of Investigation.
106 The Department of Law Enforcement may forward the report to any
107 other law enforcement agency it believes may retain information
108 related to the petitioner. Any costs associated with
109 fingerprinting must be paid by the petitioner.
110 (6) A husband and wife and minor children may join in one
111 petition for change of name and the petition must ~~shall~~ show the
112 facts required of a petitioner as to the husband and wife and

113 the names of the minor children may be changed at the discretion
114 of the court.
115 (7) When only one parent petitions for a change of name of
116 a minor child, process shall be served on the other parent and
117 proof of such service shall be filed in the cause; ~~provided,~~
118 however, <u>if</u> ~~that where~~ the other parent is a nonresident,
119 constructive notice of the petition may be given pursuant to
120 chapter 49, and proof of publication shall be filed in the cause
121 without the necessity of recordation.
122 (8) <u>This section does not apply</u> ~~Nothing herein applies~~ to
123 any change of name in proceedings for dissolution of marriage or
124 for adoption of children.
125 Section 2. This act shall take effect July 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. **HB 455**

1

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

---

1 Council/Committee hearing bill: Civil Justice Committee
2 Representative(s) Sands offered the following:
3
4 **Amendment**
5 Remove line(s) 76-77 and insert:
6 (3) The hearing on a ~~the~~ petition for restoring a former
7 name may be immediately after it is filed. Where a criminal
8 history records check is required, the hearing on the petition
9 may be immediately after the results are returned to the clerk.
10
11 ========== T I T L E A M E N D M E N T ==========
12 Remove line 9 and insert:
13 following the granting of a petition; revising when a hearing on
14 a change of name petition may occur; providing an

HB 521

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 521 Probate
SPONSOR(S): Hukill
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		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 for in the Florida Probate Code. The Florida Probate Code provides that a surviving spouse has a right to a certain percentage of the decedent's estate, known as the "elective share". The surviving spouse, or the deceased's children if there is no surviving spouse, is also entitled to certain property, known as "exempt property", which they are entitled to receive before payment of debts by the estate. The Florida Probate Code provides for filing deadlines for when a person entitled to the elective share or exempt property must make an election, may withdraw an election, or file a petition for determination of exempt property. Current law provides that the timing requirements for making an election, withdrawing an election, or for filing for a petition for determination of exempt property, must be "within" a certain period. It is possible that a court may find that a spouse or child of a decedent has filed a notice too early. As a result, surviving spouses or children that file early may believe that they have made a timely filing only to find out too late that they did not and, as a result, have lost the right to make an election or receive exempt property.

This bill alters the time for filing to make an election, to withdraw an election, or to file a petition for determination of exempt property, and eliminates the potential for a surviving spouse or surviving children if there is no surviving spouse, to lose the right to an elective share or exempt property by filing too early. This bill also amends the Notice of Administration to require it to notify surviving spouse and beneficiaries of the time deadlines for filing for an elective share and exempt property.

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 increases the 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 in an intestate estate than was provided for in the will.

Commencement of Probate, Notice of Administration

A probate case is commenced by the filing of a Petition for Administration.[1] The court will 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 of a Notice to Creditors and by serving 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.

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

[1] Section 733.202, F.S.

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]

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,[8] instead of the share of the estate provided for in the will of provided for in the laws of intestacy. The elective share is for the express purpose of caring for the surviving spouse.[9] The elective share is 30% of the elective estate.[10] 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.[11]

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 of Objections to Validity of Will, Personal Representative, Venue, or Jurisdiction

Section 733.212(3), F.S., provides that a 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 requesting relief within 3 months after the date of service of a copy of the notice of administration on the objecting person, or those objecting are forever barred.

---

[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] Section 732.201, F.S.
[9] *In re Anderson's Estate*, 394 So.2d 1146 (Fla. 4th DCA 1981)
[10] Section 732.2065, F.S.
[11] Section 732.2105, F.S.

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, 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.

Effect of Bill

Elective Share

This bill amends s. 732.2135, F.S., to provide that a surviving spouse must file for an elective share "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 "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.

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 shall be deemed to have waived their 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 Will, Personal Representative, Venue, or Jurisdiction

This bill amends s. 733.212, F.S., to remove the "within" from the timing requirement for objecting to the validity of the will, the qualifications of the personal representative, the venue, or the jurisdiction of the court. This bill provides that the filing deadline of a petition or other pleading requesting relief under this section be "on or before the date that is" 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.

Timing of Service

This bill also amends s. 733.212, 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.

C. SECTION DIRECTORY:

Section 1 amends s. 732.2135, F.S., revising the time-period for when an election must be filed and for an election withdrawal.

Section 2 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 3 amends 733.212, F.S., revising what must be included in a notice of administration.

Section 4 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

n/a

1 A bill to be entitled
2 An act relating to probate; amending s. 732.2135, F.S.;
3 revising provisions relating to time of filing or
4 withdrawing certain estate share elections; amending s.
5 732.402, F.S.; revising procedures relating to filing
6 petitions for determinations of exempt property; amending
7 s. 733.212, F.S.; revising procedures and requirements
8 relating to notices of administration and petitions for
9 relief; providing an effective date.
10
11 Be It Enacted by the Legislature of the State of Florida:
12
13 Section 1. Subsections (1) and (3) of section 732.2135,
14 Florida Statutes, are amended to read:
15 732.2135 Time of election; extensions; withdrawal.--
16 (1) Except as provided in subsection (2), the election
17 must be filed on or before ~~within~~ the earlier of the date that
18 is 6 months after ~~of~~ the date of service of a copy of the notice
19 of administration on the surviving spouse, or an attorney in
20 fact or guardian of the property of the surviving spouse, or the
21 date that is 2 years after the date of the decedent's death.
22 (3) The surviving spouse or an attorney in fact, guardian
23 of the property, or personal representative of the surviving
24 spouse may withdraw an election on or before the earlier of the
25 date that is ~~at any time within~~ 8 months after the date of the
26 decedent's death or the date of a court ~~and before the court's~~
27 order of contribution. If an election is withdrawn, the court
28 may assess attorney's fees and costs against the surviving

29 spouse or the surviving spouse's estate.
30 Section 2. Subsection (6) of section 732.402, Florida
31 Statutes, is amended to read:
32 732.402 Exempt property.--
33 (6) Persons entitled to exempt property shall be deemed to
34 have waived their rights under this section unless a petition
35 for determination of exempt property is filed by or on behalf of
36 the persons entitled to the exempt property on or before the
37 later of the date that is ~~within~~ 4 months after the date of
38 service of the notice of administration or the date that is
39 ~~within~~ 40 days after ~~from~~ the date of termination of any
40 proceeding involving the construction, admission to probate, or
41 validity of the will or involving any other matter affecting any
42 part of the estate subject to this section.
43 Section 3. Section 733.212, Florida Statutes, is amended
44 to read:
45 733.212 Notice of administration; filing of objections.--
46 (1) The personal representative shall promptly serve a
47 copy of the notice of administration on the following persons
48 who are known to the personal representative:
49 (a) The decedent's surviving spouse;
50 (b) Beneficiaries;
51 (c) The trustee of any trust described in s. 733.707(3)
52 and each beneficiary of the trust as defined in s.
53 737.303(4)(b), if each trustee is also a personal representative
54 of the estate; and
55 (d) Persons who may be entitled to exempt property
56

57 in the manner provided for service of formal notice, unless
58 served under s. 733.2123. The personal representative may
59 similarly serve a copy of the notice on any devisees under a
60 known prior will or heirs or others who claim or may claim an
61 interest in the estate.
62 (2) The notice shall state:
63 (a) The name of the decedent, the file number of the
64 estate, the designation and address of the court in which the
65 proceedings are pending, whether the estate is testate or
66 intestate, and, if testate, the date of the will and any
67 codicils.~~,~~
68 (b) The name and address of the personal representative~~,~~
69 and the name and address of the personal representative's
70 attorney.
71 (c) ~~The notice shall state~~ That any interested person
72 ~~persons are required to file with the court any objection by an~~
73 ~~interested person~~ on whom a copy of the notice of administration
74 is ~~the notice was~~ served must file on or before the date that is
75 3 months after the date of service of a copy of the notice of
76 administration on that person any objection that challenges the
77 validity of the will, the qualifications of the personal
78 representative, the venue, or the jurisdiction of the court
79 ~~within 3 months after the date of service of a copy of the~~
80 ~~notice of administration on the objecting person~~.
81 (d) That persons who may be entitled to exempt property
82 under s. 732.402 will be deemed to have waived their rights to
83 claim that property as exempt property unless a petition for
84 determination of exempt property is filed by or on their behalf

85 on or before the later of the date that is 4 months after the
86 date of service of a copy of the notice of administration on
87 such persons or the date that is 40 days after the date of
88 termination of any proceeding involving the construction,
89 admission to probate, or validity of the will or involving any
90 other matter affecting any part of the exempt property.
91 (e) That an election to take an elective share must be
92 filed on or before the earlier of the date that is 6 months
93 after the date of service of a copy of the notice of
94 administration on the surviving spouse, or an attorney in fact
95 or a guardian of the property of the surviving spouse, or the
96 date that is 2 years after the date of the decedent's death.
97 (3) Any interested person on whom a copy of the notice of
98 administration is ~~was~~ served must object to the validity of the
99 will, the qualifications of the personal representative, the
100 venue, or the jurisdiction of the court by filing a petition or
101 other pleading requesting relief in accordance with the Florida
102 Probate Rules on or before the date that is ~~within~~ 3 months
103 after the date of service of a copy of the notice of
104 administration on the objecting person, or those objections are
105 forever barred.
106 (4) The appointment of a personal representative or a
107 successor personal representative shall not extend or renew the
108 period for filing objections under this section, unless a new
109 will or codicil is admitted.
110 (5) ~~(4)~~ The personal representative is not individually
111 liable to any person for giving notice under this section,
112 regardless of whether it is later determined that notice was not

113 required by this section. The service of notice in accordance
114 with this section shall not be construed as conferring any
115 right.
116 (6) ~~(5)~~ If the personal representative in good faith fails
117 to give notice required by this section, the personal
118 representative is not liable to any person for the failure.
119 Liability, if any, for the failure is on the estate.
120 (7) ~~(6)~~ If a will or codicil is subsequently admitted to
121 probate, the personal representative shall promptly serve a copy
122 of a new notice of administration as required for an initial
123 will admission.
124 (8) For the purpose of determining deadlines established
125 by reference to the date of service of a copy of the notice of
126 administration in cases in which such service has been waived,
127 service shall be deemed to occur on the date the waiver is
128 filed.
129 Section 4. This act shall take effect July 1, 2006.

Bill No. **HB 521**

1

COUNCIL/COMMITTEE ACTION

ADOPTED	__	(Y/N)
ADOPTED AS AMENDED	__	(Y/N)
ADOPTED W/O OBJECTION	__	(Y/N)
FAILED TO ADOPT	__	(Y/N)
WITHDRAWN	__	(Y/N)
OTHER	____	

---

1 Council/Committee hearing bill: Civil Justice Committee
2 Representative(s) offered the following:
3
4 **Amendment (with title amendments)**
5 Remove line 129 and insert:
6 Section 4. Section 655.935, Florida Statutes, is amended
7 to read:
8 655.935 Search procedure on death of lessee.--If
9 satisfactory proof of the death of the lessee is presented, a
10 lessor shall permit the person named in a court order for the
11 purpose, or if no order has been served upon the lessor, the
12 spouse, a parent, an adult descendant, or a person named as a
13 personal representative in a copy of a purported will produced
14 by such person, to open and examine the contents of a safe-
15 deposit box leased <u>or co-leased</u> by a decedent, or any documents
16 delivered by a decedent for safekeeping, in the presence of an
17 officer of the lessor; and the lessor, if so requested by such
18 person, shall deliver:
19 (1) Any writing purporting to be a will of the decedent,
20 to the court having probate jurisdiction in the county in which
21 the financial institution is located;

22 (2) Any writing purporting to be a deed to a burial plot
23 or to give burial instructions, to the person making the request
24 for a search; and
25 (3) Any document purporting to be an insurance policy on
26 the life of the decedent, to the beneficiary named therein.
27
28 No other contents may be removed pursuant to this section.
29 Access granted pursuant to this section shall not be considered
30 the initial opening of the safe-deposit box pursuant to s.
31 733.6065 by a personal representative appointed by a court in
32 this state.
33 Section 5. Subsections (1) and (2) of section 655.936,
34 Florida Statutes, are amended to read:
35 655.936 Delivery of safe-deposit box contents or property
36 held in safekeeping to personal representative.--
37 (1) Subject to the provisions of subsection (3), the
38 lessor shall immediately deliver to a ~~resident~~ personal
39 representative appointed by a court in this state, upon
40 presentation of a certified copy of his or her letters of
41 authority, all property deposited with it by the decedent for
42 safekeeping, and shall grant the ~~resident~~ personal
43 representative access to any safe-deposit box in the decedent's
44 name and permit him or her to remove from such box any part or
45 all of the contents thereof.
46 (2) If a ~~foreign~~ personal representative of a deceased
47 lessee has been appointed by a court of any other state, a
48 lessor may, at its discretion, after 3 months from the issuance
49 to such ~~foreign~~ personal representative of his or her letters of
50 authority, deliver to such ~~foreign~~ personal representative all
51 properties deposited with it for safekeeping and the contents of

52 any safe-deposit box in the name of the decedent if at such time
53 the lessor has not received written notice of the appointment of
54 a personal representative in this state, and such delivery is a
55 valid discharge of the lessor for all property or contents so
56 delivered. A ~~Such foreign~~ personal representative appointed by a
57 court of any other state shall furnish the lessor with an
58 affidavit setting forth facts showing the domicile of the
59 deceased lessee to be other than this state and stating that
60 there are no unpaid creditors of the deceased lessee in this
61 state, together with a certified copy of his or her letters of
62 authority. A lessor making delivery pursuant to this subsection
63 shall maintain in its files a receipt executed by such ~~foreign~~
64 personal representative which itemizes in detail all property so
65 delivered.
66 Section 6. Section 655.937, Florida Statutes, is amended
67 to read:
68 655.937 Access to safe-deposit boxes leased in two or more
69 names.--
70 (1) Unless ~~When~~ specifically provided in the lease or
71 rental agreement to the contrary, when ~~covering~~ a safe-deposit
72 box is heretofore or hereafter rented or leased in the names of
73 two or more lessees, ~~that~~ access to the safe-deposit box will be
74 granted to ~~either lessee, or to either or the survivor, access~~
75 ~~to the safe-deposit box shall be granted to~~:
76 (a) Either or any of such lessees, regardless of whether or
77 not the other lessee or lessees or any of them are living or
78 competent; ~~or~~
79 (b) Subject to s. 655.933, those persons named in s.
80 655.933;

81 (c) Subject to s. 655.935, those persons named in s.
82 655.935; and
83 (d) Subject to s. 733.6065, to the personal representative
84 of the estate of either or any of such lessees who is deceased,
85 or the guardian of the property of either or any of such lessees
86 who is incapacitated~~; and, in either such case, the provisions~~
87 ~~of s. 655.933 apply, and~~.
88 (2) In all cases described in subsection (1) the signature
89 on the safe-deposit entry or access record (or the receipt or
90 acquittance, in the case of property or documents otherwise held
91 for safekeeping) is a valid and sufficient release and discharge
92 to the lessor for granting access to such safe-deposit box or
93 for the delivery of such property or documents otherwise held
94 for safekeeping.
95 (3) ~~(2)~~ A lessor may not be held liable for damages or
96 penalty by reason of any access granted or delivery made
97 pursuant to this section.
98 (4) The right of access by a co-lessee is separate from
99 the rights and responsibilities of other persons who may be
100 granted access to a safe-deposit box after the death or
101 incapacity of another co-lessee and such right of access is not
102 subject to the provisions of s. 655.935, s. 733.6065 or other
103 requirements imposed upon personal representatives, guardians or
104 other fiduciaries.
105 (5) After the death of a co-lessee, the co-lessee or any
106 other person who is granted access to the safe deposit box
107 pursuant to this section may make a written inventory of the box
108 which will be conducted by the person making the request in the
109 presence of one other person as specified in this subsection.

110 Each person present shall verify the contents of the box by
111 signing a copy of the inventory under penalties of perjury.
112 (a) If the person making the written inventory is a
113 surviving co-lessee, the other person may be any other person
114 granted access pursuant to this section, an employee of the
115 institution where the box is located, or an attorney licensed in
116 this state.
117 (b) If the person making the written inventory is not a
118 surviving co-lessee, the other person may be a surviving co-
119 lessee, an employee of the institution where the box is located,
120 or an attorney licensed in this state.
121 Section 7. Section 733.6065, Florida Statutes, is amended
122 to read:
123 733.6065 Opening safe-deposit box--
124 (1) Subject to the provisions of s. 655.936(2), the
125 initial opening of a ~~the decedent's~~ safe-deposit box leased or
126 co-leased by the decedent shall be conducted in the presence of
127 any two of the following persons: an employee of the
128 institution where the box is located, the personal
129 representative, or the personal representative's attorney of
130 record. Each person who is present must verify the contents of
131 the box by signing a copy of the inventory under penalties of
132 perjury. The personal representative shall file the safe-deposit
133 box inventory, together with a copy of the box entry record from
134 a date which is 6 months prior to the date of death to the date
135 of inventory, with the court within 10 days after the box is
136 opened. Unless otherwise ordered by the court, this inventory
137 and the attached box entry record is subject to inspection only
138 by persons entitled to inspect an inventory under s. 733.604(1).
139 The personal representative may remove the contents of the box.

140 (2) The right to open and examine the contents of a safe-
141 deposit box leased by a decedent, or any documents delivered by
142 a decedent for safekeeping, and to receive items as provided for
143 in s. 655.935 are separate from ~~in addition to~~ the rights
144 provided for in subsection (1).
145 Section 8. This act shall take effect July 1, 2006.
146
147 ========== T I T L E A M E N D M E N T ==========
148 Remove line 9 and insert:
149 relief; amending s. 655.935, F.S.; revising procedures relating
150 to opening a decedent's safe-deposit box; amending 655.936,
151 F.S.; revising the procedures relating to delivery of a
152 decedent's safe-deposit box by lessor; amending s. 655.937,
153 F.S.; revising the procedures relating to granting access to
154 safe-deposit boxes leased in two or more names; amending
155 733.6065, F.S.; providing for procedures relating to the opening
156 of a safe-deposit box leased or co-leased by decedent; providing
157 an effective date.