

STORAGE NAME: h1659s1z.rpp

DATE: July 6, 1999

****FINAL ACTION****

****SEE FINAL ACTION STATUS SECTION****

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
REAL PROPERTY AND PROBATE
FINAL ANALYSIS**

BILL #: CS/HB 1659 (**Chapter 99-352, Laws of Florida**)

RELATING TO: Trusts and Trust Powers

SPONSOR(S): Committee on Real Property and Probate, Representative Bilirakis and others

COMPANION BILL(S): CS/SB 2068(s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) REAL PROPERTY AND PROBATE YEAS 8 NAYS 0
- (2) JUDICIARY YEAS 8 NAYS 0
- (3)
- (4)
- (5)

I. FINAL ACTION STATUS:

On June 11, 1999, CS/HB 1659 was approved by the Governor and became law as Chapter 99-352, Laws of Florida.

II. SUMMARY:

This Act authorizes the courts to award costs and attorney's fees in trust proceedings under certain circumstances and provides statutory limitations on the liability of a successor trustee for the acts or omissions of a prior trustee.

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

The effective date of this Act is July 1, 1999.

III. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

General Information

Chapter 737, F.S., relates to the creation and administration of trusts; however, the law governing trusts is primarily developed in case law rather than statute.

A "trust" may be defined as a fiduciary obligation or relationship protected by the courts in which one person, the "trustee," holds a property interest for the benefit or use of another, the "beneficiary." John G. Grimsley, *Fla. Law of Trusts* § 1-1 (4th ed. 1993).

A trust may be created for any purpose not in contravention of law or public policy. Reid v. Barry, 93 Fla. 849, 112 So. 846 (1927). There are many reasons to create a trust, including protection of property and beneficiaries, flexibility, greater privacy of personal affairs, tax planning, and professional management of trust assets. Grimsley, *supra*, § 1-1, at 2.

Duties and Liabilities of Trustees

To qualify as a trustee, a person or entity must be capable of taking and holding title to the property being placed in trust and, as a practical matter, should also possess adequate experience to efficiently carry out the terms of the trust. Id. at 39. It is well established that the extent of the trustee's liability is precisely related to the management of trust assets and that the trustee who holds himself or herself out as a professional fiduciary, or one who has skill and ability, is held to a higher standard of performance. Id. at 110.

A brief examination of court decisions in Florida illustrates that the responsibilities of a trustee are substantial and solemn. Id. at 21. The general duty of a trustee is to diligently administer the trust for the beneficiaries utilizing any special skills the trustee possesses. §§ 737.301-.302, F.S. (1997). A trustee must administer a trust in accordance with the trust agreement, in good faith, and with due care, diligence and skill. Thomas v. Carlton, 106 Fla. 648, 143 So. 780 (1932). However, the specific duties and liabilities of trustees are ordinarily fixed by the terms of the trust agreement. Jones v. First Nat. Bank, 226 So.2d 834 (4th DCA Fla. 1969).

If a trustee breaches a fiduciary duty or improperly exercises a power, a beneficiary may take legal action against the trustee. Grimsley, *supra*, § 7-1, at 109. Examples of a breach of fiduciary duty include the negligent investment of trust funds, improper expenditures from the trust, misfeasance, malfeasance, breach of loyalty, maladministration, failure to act prudently and reasonably, improper exercise of powers granted by the trust agreement, and breach of trust committed in bad faith or intentionally. Id. John G. Grimsley, a leading trust law attorney in Florida, states that "[t]he scope of liability resting on the trustee must fairly be described as awesome....When the liability potential of the trustee is contrasted to the modest compensation, the services of a qualified trustee must be considered a remarkable economic bargain." Id. at 110.

Duty of Accounting and Liability of Trustees

Certain beneficiaries are entitled to an annual statement of the trust's accounts as well as upon termination of the trust or a change in the trustee; however, a beneficiary or a beneficiary's representative may waive a trustee's duty to account. § 737.303(4)(a) & (d), F.S. (1997).

A beneficiary is barred from taking legal action against a trustee for breach of trust if the action is not commenced within 6 months after the beneficiary receives a final, annual, or periodic accounting or statement. § 737.307, F.S. (1997). In any event, and notwithstanding lack of full disclosure, all claims by a beneficiary against a trustee are barred after the appropriate statute of limitations runs if the beneficiary received a final accounting from the trustee and the trustee informed the beneficiary of the location and availability of records. A beneficiary has "received" an accounting if it is received by the beneficiary or the beneficiary's representative, as appropriate. Id.

Liability of Successor Trustees

A successor trustee has special concerns regarding the liability of a prior trustee who committed improper acts or possibly omitted the performance of certain required act. Grimsley, *supra*, § 7-1, at 112. Based on the general duty of a trustee to take reasonable steps to enforce claims of the trust, a successor trustee is liable for breach of trust if the successor neglects to take proper steps to compel a predecessor to redress a breach of duty. *Id.* One writer on this subject expressed a fear that a successor trustee may become a "surety or guarantor for the misdeeds of someone else,"¹ especially if the successor trustee is held liable for failure to redress a predecessor's breach regardless of whether the successor trustee knows, or has reason to know, of the breach.²

A professional, corporate fiduciary is often chosen as a trustee because a corporate fiduciary has: permanence, financial responsibility, experience in administration and investments, and less risk of potential personality differences that may arise between an individual trustee and beneficiary. Grimsley, *supra*, § 4-1, at 40. However, some corporate fiduciaries in Florida will not accept a successor trusteeship because of potential liabilities for acts of the prior trustee which may be difficult or impossible for the successor trustee to ascertain. *Id.* at 44.

Trust agreements frequently contain "exoneration clauses" to protect a trustee from liability or to limit liability. Some agreements may contain "exculpatory clauses" which are an attempt to release a trustee from liability for gross negligence, bad faith, or intentional breach of duties. Both types of clauses are narrowly construed by the courts and run the risk of being considered contrary to public policy. *Id.* at 119. Under current law, a trust agreement may contain an exoneration clause under which a successor trustee is not required to audit the accounts of a prior trustee and the successor trustee is relieved of liability for acts of a prior trustee. *Id.* at 45. However, the only sure protection for a successor trustee is court approval of the prior trustee's accounting. *Id.*

Attorney's Fees in Trust Proceedings

The statute does not generally authorize an award of attorney's fees or costs in trust proceedings. Section 737.627, F.S., does authorize an award of attorneys fees in actions challenging the exercise of trustee powers. In addition, an attorney for a trustee is entitled to reasonable compensation for ordinary and extraordinary services as described in statute. § 737.2041, F.S. (1997). The general rule is that a trustee is entitled to reimbursement in a reasonable amount for attorney's fees "properly incurred in the administration of the estate, and for the cost of suits properly brought on behalf of the estate." 56 Fla. Jur. 2d § 78.

The Florida Probate Code states that costs in probate proceedings may be awarded as in chancery actions, that any attorney who renders services to an estate may apply for an order awarding attorney fees, and that the court may, in its discretion, direct from what part of the estate costs and attorney's fees will be paid. § 733.106, F.S. (1997). This provision is the subject of numerous reported cases in which Florida courts have determined the appropriateness of awarding attorney's fees to beneficiaries in probate proceedings. The Florida Supreme Court declared that "an attorney who has rendered valuable services to an estate ... may be paid for such services." *In re Gleason's Estate*, 74 So.2d 360 (Fla. 1954). However, the court further stated that "[i]f the services tend to break down, subtract from or dissipate the estate he cannot be compensated from it." *Id.* In 1989, the Third District Court of Appeal stated that attorney's fees should not be awarded if the action prolonged litigation, delayed administration, and did not produce a net enhancement in value or increase in assets to justify an award of attorney's fees. *In re Estate of Simon*, 549 So.2d 210 (Fla. 3d DCA 1989); *review denied*, 560 So.2d 788. More recently, the First District Court of Appeal addressed the issue of attorney's fees in probate proceedings and stated as follows:

¹ Wohl, "The Successor Trustee as Scapegoat," 113 *Trusts & Estates* 159 (1974).

² Report, "Duties and Responsibilities of a Successor Trustee," 10 *Real Property, Probate and Trust Journal* 310 (1975); 2 *Scott on Trusts* § 177 (4th ed. 1987); 2d *Restatement, Trusts*, § 177.

This provision has been construed to permit attorney's fees when the attorney's services were necessary for or beneficial to the probate estate. See In re Gleason's Estate, 74 So. 2d 360 (Fla. 1954); Dew v. Nerreter, 664 So. 2d 1179, 1180 (Fla. 5th DCA 1995); Franklin v. Stettin, 579 So. 2d 245, 247 (Fla. 3d DCA 1991); In re Estate of Simon, 549 So. 2d 210, 212 (Fla. 3d DCA 1989), *review denied*, 560 So. 2d 788 (Fla. 1990). The "benefit" to the estate may include services that enhance the value of the estate, as well as services that successfully give effect to the testamentary intention set forth in the will. Dew v. Nerreter, 664 So. 2d at 1180; In re Estate of Lewis, 442 So. 2d 290, 292 (Fla. 4th DCA 1983).

In re Estate of Brock, 659 So.2d 714 (Fla. 1st DCA 1996).

It should be noted that the Fourth District Court of Appeal recently stated that § 733.106, F.S. (1997), is inapplicable to trust proceedings and authorizes attorney's fees only where services have been rendered to an estate. Nalls v. Millender, 721 So. 2d 426 (Fla. 4th DCA 1998). In Nalls, the court acknowledged that there is discretion to award fees under § 737.627, F.S., but upheld the lower court's refusal to do so on the facts of the case.

B. EFFECT OF PROPOSED CHANGES:

Attorney's Fees in Trust Proceedings

This Act allows costs and attorney's fees incurred in trust proceedings to be paid out of a trust if the court determines that the attorney rendered services to the trust.

Specifically, if an attorney "has rendered services to a trust," the attorney may apply to the court for an order awarding attorney's fees, and after notice and service upon the trustee and all beneficiaries entitled to an accounting from the trustee, the court must enter an order on the attorney's application. If the court grants the attorney's application for fees, the court may direct the attorney's fees to be paid from a particular part of the trust.

This Act is closely modeled after the probate code, which allows recovery of costs and attorney's fees from an estate under certain circumstances. § 733.106, F.S. (1997). Accordingly, case law construing that provision of the probate code may be persuasive to a court during its review of an application for attorney's fees incurred in a trust proceeding.

This Act requires an attorney to provide notice to the trustee of that attorney's retention by an interested person and his or her entitlement to fees under the bill. The Act also allows a court to reduce the amount of fees if it finds that the attorney's actual notice date is later than a reasonable notice date.

It should be noted that attorney's fees may be awarded only for services rendered by an attorney on or after July 1, 1999.

Liability of Successor Trustees

This Act also provides statutory limitations on the liability of successor trustees under certain circumstances.

Specifically, a successor trustee will not have a duty to institute any action against any prior trustee, or file any claim against any prior trustee's estate, for any of the prior trustee's acts or omissions under the following circumstances:

- ▶ if the prior trustee was a grantor of a trust that was revocable during the time that the grantor served as trustee;
- ▶ as to any beneficiary who waives an accounting, but only for the period included in the waiver;
- ▶ as to any beneficiary who releases the successor trustee from the duty to institute an action or file a claim;
- ▶ as to any person who is not a beneficiary as defined in § 737.303(4)(b), F.S. (1997);
- ▶ as to any beneficiary described in § 737.303(4)(b), F.S. (1997), if a "super majority" of the beneficiaries releases the successor trustee;
- ▶ as to any beneficiary described in § 737.303(4)(b), F.S. (1997), who does not properly commence a claim against a prior trustee within 6 months after the successor trustee's acceptance of the trust, if the beneficiary was notified of the acceptance and the notice advised the beneficiary that legal

action must be commenced within 6 months or the beneficiary's right to proceed against the successor trustee would be barred;

- ▶ for any action or claim that a beneficiary, as described in § 737.303(4)(b), F.S. (1997), is barred from bringing against the prior trustee.

A "super majority" is at least two-thirds in interest of the beneficiaries, if the interests of the beneficiaries are reasonably ascertainable; otherwise, a "super majority" means at least two-thirds of the number of beneficiaries.

A release or waiver may be exercised by a legal representative or natural guardian of a beneficiary. The committee substitute does not affect the liability of a prior trustee or the right of a successor trustee, or any beneficiary, to pursue an action or claim against the prior trustee.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

- a. Does the bill create, increase or reduce, either directly or indirectly:

- (1) any authority to make rules or adjudicate disputes?

- No.

- (2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

- No.

- (3) any entitlement to a government service or benefit?

- No.

- b. If an agency or program is eliminated or reduced:

An agency or program is not eliminated or reduced.

- (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

- N/A

- (2) what is the cost of such responsibility at the new level/agency?

- N/A

- (3) how is the new agency accountable to the people governed?

- N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

- No.

- b. Does the bill require or authorize an increase in any fees?

- No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

The bill does not purport to provide services to families or children.

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

N/A

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

The bill does not change a program providing services to families or children.

- (1) parents and guardians?

N/A

- (2) service providers?

N/A

- (3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

§ 737.2035 and § 737.306, F.S.

E. SECTION-BY-SECTION ANALYSIS:

Please see the "Current Situation" and "Effect of Proposed Changes" sections of this analysis.

IV. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

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

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

A proponent of this Act asserts the attorney's fees provision (Section 1) was added to protect the interests of a minority beneficiary by allowing a minority beneficiary to recover attorney's fees from the trust estate under certain circumstances if the minority beneficiary is forced to proceed against the prior trustee. Florida Bankers Association, Trust Law Reformation (February 18, 1999).

3. Effects on Competition, Private Enterprise and Employment Markets:

A proponent of this Act asserts that the provisions related to successor trustee liability "were designed to give successor trustees more certainly (sic) that they will be free from litigation while at the same time protecting the fundamental interests of beneficiaries." Florida Bankers Association, Trust Law Reformation (February 18, 1999).

D. **FISCAL COMMENTS:**

None.

V. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. **APPLICABILITY OF THE MANDATES PROVISION:**

This Act does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. **REDUCTION OF REVENUE RAISING AUTHORITY:**

This Act does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. **REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:**

This Act does not reduce the percentage of a state tax shared with counties or municipalities.

VI. COMMENTS:

The Real Property, Probate and Trust Law Section of The Florida Bar does not oppose, and "now passively supports," this committee substitute. Laird A. Lile, Chair, Legislative Committee, Real Property, Probate and Trust Law Section, The Florida Bar, Facsimile Transmission (March 23, 1999).

Judiciary Staff Comments:

In providing for an award of attorney's fees in all trust proceedings, the bill may create a risk of unnecessary litigation. By providing advance notice of a claim for fees with a non-adverse trustee, a claimant may avoid

such litigation. An amendment to the bill could provide for such notice without adversely affecting the bill's substantive goals.

VII. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On March 30, 1999, the Committee on Real Property and Probate unanimously passed PCS/HB 1659 and reported it out favorably as a committee substitute. The committee substitute and the original bill as filed differ as follows:

1. The bill as filed eliminated the current rule against perpetuities in Florida, whereas current law remains intact under the committee substitute.
2. The bill as filed relieved a successor trustee of liability for certain acts of a prior trustee if a beneficiary "received or waived" an accounting from the prior trustee. The committee substitute relieves the successor trustee of liability only if the beneficiary "waived" an accounting.
3. The committee substitute clarifies that a beneficiary must bring an action within 6 months after a successor trustee accepts a trust if the successor trustee provides sufficient notice to the beneficiary.
4. The bill as filed relieved a successor trustee of liability for certain acts of a prior trustee as to any beneficiary who waived an accounting for the periods "before or included in such waiver." The committee substitute clarifies that a successor trustee is relieved of liability for the period included in a beneficiary's waiver, but not any period prior to the waiver.

The Committee on Judiciary adopted one amendment to the committee substitute. That amendment requires an attorney to provide notice to the trustee of that attorney's retention by an interested person and his or her entitlement to fees under the bill. The amendment also allows a court to reduce the amount of fees if it finds that the attorney's actual notice date is later than a reasonable notice date.

VIII. SIGNATURES:

COMMITTEE ON REAL PROPERTY AND PROBATE:

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