

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Judiciary Committee

BILL: CS/SB 1170

INTRODUCER: Judiciary Committee and Senator Aronberg

SUBJECT: Florida Trust Code

DATE: March 10, 2006

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Chinn	Maclure	JU	Fav/CS
2.			BI	
3.				
4.				
5.				
6.				

## I. Summary:

The bill creates a comprehensive, new Florida Trust Code (FTC or the Code) based in part upon the Uniform Trust Code (UTC) with revisions to account for distinctions found in current Florida statutory and case law. Several of these distinctions are retained in the new code; however, changes put forth in the new code would affect trust administration as follows:

- **Representation** – expands the provision dealing with representation by a holder of a power of appointment<sup>1</sup> and adds a new provision permitting a settlor to designate a representative (e.g., a trust protector).<sup>2</sup>
- **Trust Creation** – affirms the requirement that trusts containing land be evidenced by a signed writing; limits the unique Florida requirement that the testamentary aspects of trusts be executed with the formalities required for a will to revocable trusts;<sup>3</sup> and specifies that the capacity needed to create a revocable trust is the same as that required for the execution of a will.<sup>4</sup>
- **Trust Modification** – revises provisions relating to trust creation and termination proposed in the UTC while retaining Florida’s existing trust modification provisions.<sup>5</sup>
- **Charitable Trusts** – codifies the authority the Attorney General has at common law to enforce charitable trusts<sup>6</sup> and extends standing to enforce charitable trusts to the settlors

<sup>1</sup> See s. 736.0302.

<sup>2</sup> See s. 736.0306.

<sup>3</sup> See s. 736.0403(2).

<sup>4</sup> See s. 736.0601.

<sup>5</sup> See ss. 736.04113 - .0412.

<sup>6</sup> See s. 736.0110(3).

who create them<sup>7</sup> and to charitable organizations designated in an instrument to receive distributions from them.<sup>8</sup>

- **Creditors' Rights** – provides that for trusts created after the effective date of the Code, a spendthrift clause must restrain both voluntary and involuntary alienation<sup>9</sup> and slightly modifies the “last resort” principle established in *Bacardi v. White*.<sup>10</sup>
- **Revocable Trusts** – provides that trusts are revocable by default,<sup>11</sup> that a method of revocation expressed in an instrument is exclusive,<sup>12</sup> and that while a trust is revocable, the trustee owes duties only to the settlor.<sup>13</sup> The trustee’s duties to the settlor also apply to beneficiaries who have a right of withdrawal over trust property, i.e., holders of a right of withdrawal are treated as a settlor while the power is exercisable.<sup>14</sup>
- **Miscellaneous and Conforming** – replaces the existing antilapse statute for inter vivos trusts with a new provision more broadly applicable to the descendibility of future interests in both testamentary and inter vivos trusts;<sup>15</sup> creates new provision in ch. 518, F.S., to allow for fiduciary investment of funds in investment instruments owned by the trustee or its affiliate;<sup>16</sup> abolishes the Worthier Title Doctrine;<sup>17</sup> makes s. 731.103 (evidence of death or status) and s. 731.201, F.S. (definitions) now apply to chapter 736.; adds definition of “power of appointment” to s. 731.201, F.S.; makes s. 731.303, F.S. (representation) no longer applicable to proceedings involving trusts; and makes s. 732.603, F.S. (antilapse) now apply only to outright devises and appointments.

This bill amends the following sections of the Florida Statutes: 497.458, 607.0802, 617.0802, 660.25, 660.418, 660.46, 689.071, 689.075, 709.08, 721.08, 721.53, 731.103, 731.201, 731.303, 732.2075, 732.513, 732.603, 732.604, 732.611, 733.212, 733.602, 733.805, 733.817, 738.104, 738.1041, 738.202, 739.102, 744.331, 744.361, and 744.441. This bill creates sections 518.117, 689.175, 731.1035, 744.462, and chapter 736 (see bill text for individual section numbers), Florida Statutes, and repeals chapter 737, Florida Statutes.

## II. Present Situation:

Florida’s body of statutory law specific to trusts is found in chapter 737 of the Florida Statutes and 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 be limited or altered by the settlor (creator of the trust) in the trust instrument. Trust provisions in statute are also supplemented by case law in areas such as requirements for trust creation, treatment of revocable trusts, and rights of creditors.

<sup>7</sup> See s. 736.0405(3).

<sup>8</sup> See s. 736.0110(1).

<sup>9</sup> See s. 736.0502(1).

<sup>10</sup> 463 So. 2d 218 (Fla. 1885). See s. 736.0503(2).

<sup>11</sup> See s. 736.0602(1).

<sup>12</sup> See s. 736.0602(3)(b).

<sup>13</sup> See s. 736.0603(1).

<sup>14</sup> See s. 736.0603(2).

<sup>15</sup> See s. 736.1106.

<sup>16</sup> See s. 518.117 (created to conform to new s. 736.0802(5)).

<sup>17</sup> See s. 689.175.

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.<sup>18</sup>

The Florida Statutes define a “grantor” as “one who creates or adds to a trust and includes ‘settlor’ or ‘trustor’ and a testator who creates or adds to a trust.”<sup>19</sup> “Trustee” refers to “an original, additional, surviving, or successor trustee, whether or not appointed or confirmed by court.”<sup>20</sup> A trustee may be a beneficiary of the trust but may not be the sole beneficiary of the trust.<sup>21</sup>

Trusts may be classified as express trusts or as trusts by operation of law (discussed below). Trusts may also be classified based upon whether they become effective after the death of the settlor or during his or her life, making the trust testamentary or inter vivos, respectively. Additionally, a trust is considered private or charitable based upon the beneficiary or beneficiaries of a trust.<sup>22</sup>

Express trusts have been divided into passive trusts, sometimes known as “nominal” or “dry” trusts, and active trusts, otherwise called “live” or “operative” trusts. An express trust is a trust intentionally created by the direct and positive act of the settlor by some writing, deed, will, or oral declaration. Express trusts are distinguishable from trusts by operation of law (resulting and constructive trusts) in that the latter are respectively founded on an intention of the parties to a transaction implied in law, or on fraud or wrongdoing irrespective of the intention of the parties concerned.<sup>23</sup>

The National Conference of Commissioners on Uniform State Laws adopted the Uniform Trust Code (UTC) in 2000 which has been enacted in 15 states and is being considered for adoption in several more. In Florida, the Ad Hoc Trust Code Revision Committee (the committee) of the Florida Bar has been reviewing and revising the UTC to account for distinctions found in Florida statutory and case law. The product of the committee’s work is a new Florida Trust Code comprised of approximately 40 percent of the provisions found in prior Florida law and about 60 percent of provisions based on the UTC. Of the provisions in this latter group, almost a third were revised in some substantive respect.

---

<sup>18</sup> 55A Fla. Jur. 2d Trusts s.1.

<sup>19</sup> Section 731.201(17), F.S.

<sup>20</sup> Section 731.201(35), F.S.

<sup>21</sup> Restatement Third, Trusts s. 2.

<sup>22</sup> 55A Fla. Jur. 2d Trusts s.2.

<sup>23</sup> *Id.* at s.8

### III. Effect of Proposed Changes:

The bill repeals chapter 737, F.S., “Trust Administration,” and creates chapter 736 entitled the “Florida Trust Code” (FTC or the Code). The new chapter uses the Uniform Trust Code (UTC) as a model while simultaneously incorporating many of the provisions currently found in existing chapter 737, F.S. and Florida case law.<sup>24</sup> The new chapter is divided into thirteen parts; eleven parts are based upon the UTC and the remaining two parts address rules of construction and charitable trusts.

The “Effect of Proposed Changes” section of this staff analysis is based in substantial part upon the “Florida Trust Code Scrivener’s Summary” dated February 16, 2006, and prepared by the Ad Hoc Trust Code Revision Committee<sup>25</sup> (the committee or the drafters) that drafted the new code. The committee was comprised of members of various sections of the Florida Bar, including Real Property Probate & Trust Law, Elder Law, and Tax Law. It also included liaisons to the Probate and Trust Litigation Committee, the Probate Law Committee and representatives of the Florida Bankers Association and the Florida Institute of Certified Public Accountants.

#### Chapter 736 – Florida Trust Code (New)

##### Part I: General Provisions and Definitions (ss. 736.0101 – 736.0112)

This part of the proposed chapter provides the scope and applicability of the Code;<sup>26</sup> the definitions of terms relating to trusts;<sup>27</sup> and the relative weight to be given to the Code, common law, and terms of a trust.<sup>28</sup> Also covered are the rules defining when a person or an organization is considered to have knowledge of a fact;<sup>29</sup> the methods of giving and waiving notice;<sup>30</sup> the rules for determining and changing a trust’s principal place of administration;<sup>31</sup> and the validity and permissible scope of nonjudicial settlement agreements.<sup>32</sup>

##### *Scope and Applicability*

The scope of the Code is identical to that of chapter 737, F.S., which the bill would repeal. 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,<sup>33</sup> business trusts, land trusts, or to any other

<sup>24</sup> 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.

<sup>25</sup> The committee is co-chaired by Brian J. Felcoski and Laird A. Lile. Other members of the committee include: 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.

<sup>26</sup> See s. 736.0102.

<sup>27</sup> See s. 736.0103.

<sup>28</sup> See ss. 736.0105 and 736.0106.

<sup>29</sup> See s. 736.0104.

<sup>30</sup> See s. 736.0109.

<sup>31</sup> See s. 736.0108.

<sup>32</sup> See s. 736.0111.

<sup>33</sup> *I.e.*, resulting and constructive trusts.

arrangement that does not meet the definition of a trust under current s. 731.201(34), F.S.<sup>34 35</sup> Consistent with that, and except as otherwise provided in Part XIII (discussed below) or in a particular section, the provisions of the Code apply retroactively to all *Florida* trusts.<sup>36</sup> 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<sup>37</sup> or, in the absence of such a designation, if Florida is the jurisdiction where the settlor resides at the time the trust is first created.<sup>38</sup>

### ***Definitions***

The current chapter providing for trust administration, chapter 737, F.S., does not provide definitions to be used for terms referenced throughout the chapter. Terms can be found in individual sections within the chapter<sup>39</sup> and in other chapters such as chapter 731, F.S., on estates and trusts. The bill would create s. 736.0103 within the new chapter to provide definitions for terms that are used in more than one section of the Code. The definitions would continue to be 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.<sup>40</sup>

The bill provides that “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.<sup>41</sup> It is immaterial for purposes of this definition whether the beneficial interest is present or future, vested or contingent, or whether the person having the interest is ascertainable or even living.<sup>42</sup>

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

<sup>34</sup> This subsection is renumbered in the bill and would become s. 731.201(35), F.S.

<sup>35</sup> See s. 736.0102.

<sup>36</sup> On the retroactive application of the Code, see “*Effective date*,” infra p. 57.

<sup>37</sup> See s. 736.0107(1).

<sup>38</sup> Section 736.0107(2). With respect to any particular matter, the designation is not effective if it is contrary to a strong public policy of this state. Section 736.0107 (flush left).

<sup>39</sup> *Eg.*, s. 737.501, F.S. (defining terms relating to charitable trusts).

<sup>40</sup> Committee Substitute for Senate Bill 1170, p. 135, lines 15-16.

<sup>41</sup> See s. 736.0103(4).

<sup>42</sup> 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.

The proposed language defines a “qualified beneficiary” as referring only to living persons who are current beneficiaries, intermediate beneficiaries, and first line remainder beneficiaries, whether vested or contingent.<sup>43</sup> In contrast to “beneficiary,”<sup>44</sup> the term “qualified beneficiary” encompasses a limited subset of all trust beneficiaries.

Example 2 – Qualified beneficiary – Using the 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.<sup>45</sup> C1 and C2 are included because they would become permissible distributees were S’s interest to terminate at D’s death (i.e., were S to die at that time).<sup>46</sup> 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).<sup>47</sup> 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.

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.<sup>48 49</sup> In addition, the Code authorizes the Attorney General to assert the rights of a qualified beneficiary with respect to charitable trusts.<sup>50</sup> The trustee of a charitable trust, however, would have 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.

Code definitions of some of the more commonly used terms provide the following:

- The term “settlor” includes anyone who either creates or transfers property to a trust, including a testator.<sup>51</sup>
- The term “trustee” includes additional, successor, and cotrustees.<sup>52</sup>

<sup>43</sup> 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).

<sup>44</sup> The Code employs qualified beneficiary in the various provisions dealing with notice and consent.

<sup>45</sup> s. 736.0105(14)(a).

<sup>46</sup> s. 736.0105(14)(b).

<sup>47</sup> s. 736.0105(14)(c).

<sup>48</sup> 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.

<sup>49</sup> The Code also extends the rights of a qualified beneficiary to any person appointed to enforce an animal or noncharitable purpose trust because neither trust has ascertainable beneficiaries, but both are validated by other provisions of the Code. See s. 736.0110(2) (qualified beneficiaries); s. 736.0408 (trust for animal), and s. 736.0409 (noncharitable trust without ascertainable beneficiary).

<sup>50</sup> Section 736.0110(3). Common law authority of the Attorney General to police charitable trusts on behalf of the public already exists.

<sup>51</sup> Section 736.0103(16).

<sup>52</sup> Section 736.0103(21).

- A trust is “revocable” if it is revocable by the settlor without the consent of either the trustee or an adverse person.<sup>53</sup>
- A power of appointment<sup>54</sup> is a “general power” if it is exercisable in favor of its holder, the holder’s estate, or the creditors of either the holder or the holder’s estate.<sup>55</sup>
- 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.<sup>56</sup>
- 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.<sup>57</sup>
- The term “trust instrument” refers to a written instrument executed by a settlor which contains the original or amended terms of a trust.<sup>58</sup> In contrast, 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.<sup>59</sup>
- 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.<sup>60</sup>

### ***Sources of Trust Law; Default and Mandatory Rules***

The Code is more comprehensive than chapter 737, F.S., but is not intended to anticipate all possible issues that can arise with respect to trusts. Instead, for matters not addressed in the Code, s. 736.0106 provides that the Code is supplemented by the common law of trusts and by principles of equity. Additionally, the Code can, and usually is, supplemented by the terms of a trust.

In fact, it is more accurate that the terms of a trust are supplemented by the Code. This is 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.<sup>61</sup> Thus, as a general matter, a settlor is free to limit, expand, or override almost any Code provision. There are exceptions, and all of the exceptions are listed in s. 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<sup>62</sup> and the requirement that the purpose of a trust be lawful, possible to achieve, and not contrary to public policy.<sup>63</sup>

---

<sup>53</sup> Section 736.0103(15).

<sup>54</sup> 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).

<sup>55</sup> Section 736.0103(7).

<sup>56</sup> Section 736.0103(12).

<sup>57</sup> Section 736.0103(3).

<sup>58</sup> Section 736.0103(20).

<sup>59</sup> Section 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.

<sup>60</sup> Section 736.0103(10).

<sup>61</sup> Section 736.0105(1).

<sup>62</sup> Section 736.0105(2)(a).

<sup>63</sup> Section 736.0105(2)(c).

- Those containing public policy restrictions on the designation of a principal place of administration<sup>64</sup> and the effect of penalty,<sup>65</sup> spendthrift,<sup>66</sup> and exculpatory clauses.<sup>67</sup>
- Those covering procedural matters including jurisdiction,<sup>68</sup> venue,<sup>69</sup> and limitations on commencing judicial actions.<sup>70</sup>
- Those dealing with court powers, including the power to adjust a trustee's compensation;<sup>71</sup> to act in the interests of justice;<sup>72</sup> to require, dispense with, modify, or terminate a trustee's bond;<sup>73</sup> and, except as otherwise provided elsewhere in the Code, the power to modify or terminate a private or charitable trust.<sup>74</sup>
- 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;<sup>75</sup> the duty to notify, account to, and respond to requests for information by qualified beneficiaries;<sup>76</sup> and with respect to a revocable trust, the duty to file a notice of trust at the death of the settlor<sup>77</sup> and to pay the expenses and obligations of the settlor's estate.<sup>78</sup>

The mandatory provisions dealing with the duty to account and to provide information to qualified beneficiaries involves a 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. The Florida Code balances these interests differently from the Uniform Code in three notable respects:

- 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.<sup>79</sup>
- 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.<sup>80</sup>

---

<sup>64</sup> Section 736.0105(2)(f).

<sup>65</sup> Section 736.0105(2)(w).

<sup>66</sup> Section 736.0105(2)(l).

<sup>67</sup> Section 736.0105(2)(u).

<sup>68</sup> Section 736.0105(2)(g).

<sup>69</sup> *Id.*

<sup>70</sup> Section 736.0105(2)(d).

<sup>71</sup> Section 736.0105(2)(q).

<sup>72</sup> Section 736.0105(2)(e).

<sup>73</sup> Section 736.0105(2)(p).

<sup>74</sup> Section 736.0105(2)(j).

<sup>75</sup> Section 736.0105(2)(b).

<sup>76</sup> Section 736.0105(2)(r) – (t).

<sup>77</sup> Section 736.0105(2)(n).

<sup>78</sup> Section 736.0105(2)(m).

<sup>79</sup> Compare UTC s. 105(b)(8) with s. 736.0813(1)(d).

<sup>80</sup> Compare UTC ss. 813(a) and 105(b)(9) with s. 736.0813.



- Revisions and additions to the representation provisions in Part III of the FTC provide a means by which settlors can effectively withhold information from one or more qualified beneficiaries.<sup>81</sup>

### ***Principal Place of Administration***

The Code imposes a duty on a trustee to administer the trust at a place that is appropriate to its purposes and administration.<sup>82</sup> 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.<sup>83</sup>

In the absence of a valid designation in the trust instrument, s. 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 it is the trustee's residence.<sup>84</sup> 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.<sup>85</sup>

### ***Factual Knowledge***

Section 736.0104 clarifies when a person is considered to have knowledge of a fact. One has knowledge of a fact 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.<sup>86</sup> With respect to an organization operating through employees, the organization has notice or knowledge of a fact involving a trust only from the earlier of the time the information was received by an employee having responsibility to act on matters involving the trust or the time the information would have been brought to the employee's attention if the organization had exercised reasonable diligence.<sup>87</sup>

### ***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.<sup>88</sup> Other notices and the sending of required documents must be accomplished in a reasonably suitable manner that is likely to result in receipt.<sup>89</sup> Notice and the sending of documents are not required for persons whose identity or location is not reasonably ascertainable by the trustee<sup>90</sup> or who have waived the sending of the notice or documents.<sup>91</sup>

<sup>81</sup> See ss. 736.0301, 736.0302, and 736.0306.

<sup>82</sup> Section 736.0108(4).

<sup>83</sup> See s. 736.0108(5). The contents of the required notice are set out in s. 736.0108(6).

<sup>84</sup> 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) through (3), F.S.

<sup>85</sup> 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).

<sup>86</sup> Section 736.0104(1).

<sup>87</sup> Section 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. 1<sup>st</sup> DCA 1983).

<sup>88</sup> Section 736.0109(4).

<sup>89</sup> See s. 736.0109(1), particularly the last sentence which contains a list of acceptable methods, including a properly directed facsimile or other electronic message.

<sup>90</sup> Section 736.0109(2).

<sup>91</sup> Section 736.0109(3).

***Nonjudicial Settlement Agreements***

Under the Code, interested persons<sup>92</sup> may enter into a binding nonjudicial settlement agreement 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;<sup>93</sup> and
- The agreement does not produce a result that is not authorized under other provisions of the Code.<sup>94</sup>

Nonjudicial settlement agreements in the corporate context are useful in avoiding the expense and delays of formal accountings at the termination of a trust. These settlements can be useful in a variety of other contexts, as well.<sup>95</sup>

**Part II: Judicial Proceedings (ss. 736.0201 – 736.0207)**

Part II collects in one place a number of the rules applicable to judicial proceedings involving the validity, administration, and distribution of trusts.<sup>96</sup> Among these are provisions that affirm that, in the absence of a court order, trusts are not subject to continuing judicial supervision;<sup>97</sup> that proceedings involving the validity, administration, or distribution of trusts are commenced by complaint and are governed by the Florida Rules of Civil Procedure;<sup>98</sup> and that the circuit court has original jurisdiction with respect to all matters arising under the Code.<sup>99</sup>

This part of the Code also incorporates verbatim four provisions found in chapter 737, F.S., including:

- Section 736.0204 dealing with venue for actions and proceedings concerning trusts. The section is identical to s. 737.202, F.S.<sup>100</sup>
- 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 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, s. 736.0207 includes a new exception for court-approved actions by the guardian of the property of an incapacitated settlor.

<sup>92</sup> In this context, interested persons is defined to be those persons whose interest would be affected by the settlement agreement. Section 736.0111(1).

<sup>93</sup> Court approval may be requested by any interested person. Section 736.0111(5).

<sup>94</sup> See s. 736.0111(2) and (3).

<sup>95</sup> For a list of matters that may be resolved by a nonjudicial settlement agreement, see s. 736.0111(4).

<sup>96</sup> For a 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)(e).

<sup>97</sup> See s. 736.0201(3).

<sup>98</sup> See s. 736.0201(1).

<sup>99</sup> See s. 736.0203. This is a mandatory provision. See s. 736.0105(2)(g).

<sup>100</sup> 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.

Lastly, s. 736.0202 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.<sup>101</sup> With respect to a trust having its principal place of administration in Florida, this section 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.

There is no provision in chapter 737, F.S., that corresponds to the proposed s. 736.0202 rather jurisdiction under existing law is obtained under the general long-arm statutes found in chapter 48, F.S. The reach of the state's jurisdiction in the new section may prove to be longer than that provided in chapter 48, F.S.

### **Part III: Representation (ss. 736.0301 – 736.0306)**

Part III of the Code includes the general representation provisions of the UTC, along with modifications specific to Florida, designed to facilitate planning and the efficient administration of trusts.

In the context in which it is used here, “representation” refers to the authority of one person to act on behalf of another. Under the Code, notice, information, accountings, and reports sent to a representative have the same effect as those sent to the person being represented. Additionally, actions taken by a representative bind the person being represented to the same extent as actions taken by the person being represented.<sup>102</sup>

Florida law, s. 731.303, F.S., already provides for limited representation in the administration of, or in judicial proceedings involving, decedents' estates and trusts,<sup>103</sup> but the Code representation provisions are more extensive. The provisions 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 provisions of the Code, and to a limited extent, the provisions apply to settlors as well as to beneficiaries.<sup>104</sup>

#### ***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

<sup>101</sup> Section 736.0202(3).

<sup>102</sup> See s. 736.0301(1) and (2).

<sup>103</sup> 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.

<sup>104</sup> 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.

itself – present special considerations and are discussed in greater detail below. The remaining representation types include:

- **Fiduciary** – This category includes those provisions that permit a guardian of the property to represent a ward; an attorney-in-fact to represent a principal; and a trustee or personal representative to represent the beneficiaries of a trust or estate, as the case may be. The Code also provides that a parent may represent an unborn or minor child if no guardian of the property has been appointed.<sup>105</sup>
- **Virtual** – If not otherwise represented, a minor, incapacitated, unborn, unascertainable or unlocatable person may be represented by another person having a “substantially identical” interest.<sup>106</sup> 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. 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.<sup>107</sup>

### ***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. The exceptions are created for representation by holders of powers of appointment and by settlor-designated persons. 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 on Representation***

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 state’s Probate Code,<sup>108</sup> but unlike the corresponding provision in the UTC,<sup>109</sup> s. 736.0302 makes no distinction between general and nongeneral powers. Nor does section 736.0302 make a distinction between presently exercisable (i.e., inter vivos) and testamentary powers. Representation applies to the holders of either.

The UTC contains a restriction on one holding the representation power if the power holder would have a conflict of interest with the objects or takers in default.<sup>110</sup> Explicitly and structurally, current Florida law, s. 731.303, F.S., of the Probate Code does not provide a similar restriction.<sup>111</sup> The new limitation put forth in the new FTC would preclude representation by

---

<sup>105</sup> Section 736.0303.

<sup>106</sup> Section 736.0304.

<sup>107</sup> Section 736.0305.

<sup>108</sup> See s. 731.303(1).

<sup>109</sup> Compare UTC s. 302.

<sup>110</sup> *E.g.*, a conflict could arise where a life tenant of a trust is given a power to appoint trust property by will.

<sup>111</sup> According to the drafters, if the Code has no conflict of interest limitation, a representative of the objects and takers in default could approve acts that improperly benefit his or her life interest; however, if a conflict limitation is included in the Code, the limitation would preclude most representation by holders of powers as there would usually be some conflict

power holders in matters involving fraud or bad faith by the trustee but would not adopt the UTC's more broad regulation of conflicts of interest. Under the FTC, it would be up to the good faith trustee to resist any attempt by the holder of a nongeneral or testamentary power to enhance his or her life interest.

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, the authorization of a holder of a power of appointment to also represent others does not apply to the distribution powers of a trustee.<sup>112</sup> Nor may a beneficiary with a power of appointment represent others while the beneficiary is serving as sole trustee.<sup>113</sup>

### ***Designated Representatives***

Within limits discussed below, s. 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 UTC, 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.

The new section places two 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.<sup>114</sup> This is a mandatory restriction that cannot be waived in the trust instrument.<sup>115</sup> The second restriction, which is also mandatory, 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.<sup>116</sup>

### ***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, and the interests qualified beneficiaries have in accessing trust information. Because the trustee's duty to notify, account to, and respond to requests for

---

between the power holder and the objects and takers in default. In an attempt to balance these concerns, the drafters of the Code adopted s. 736.302(2) to restrict the use of the power of appointment in situations involving fraud or bad faith by the trustee.

<sup>112</sup> Section 736.0302(2)(b).

<sup>113</sup> Section 736.0302(2)(c).

<sup>114</sup> Section 736.0306(2).

<sup>115</sup> See s. 736.0105(2)(h).

<sup>116</sup> See s. 736.0306(3)(a) and (b).

information by qualified beneficiaries is mandatory, a settlor may not directly affect this duty in the trust instrument. Nevertheless, with the 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 for them to have. If a trustee gives notices, accountings, etc., directly to a person who is represented by another under the Code, however, the trustee is not individually liable for doing so.<sup>117</sup>

#### **Part IV: Trust Creation, Validity, Modification, and Termination (ss. 736.0401 – 736.0417)**

The first several sections of Part IV of the Code gather together the traditional common law of trusts. The remaining sections of Part IV cover trust modification, termination, and reformation. Some of these later provisions are codifications of existing Florida statutes while others are based upon the UTC.

##### ***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.<sup>118</sup> To create a trust, a settlor having the capacity to do so must intend to create a trust<sup>119</sup> for a purpose that is lawful, consistent with public policy, and possible to achieve.<sup>120</sup> The trust must not be passive, meaning that the trustee must have enforceable duties to perform.<sup>121</sup> 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.<sup>122</sup>

In addition to the above, a private trust must have ascertainable beneficiaries,<sup>123</sup> but 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.<sup>124</sup> If a class of beneficiaries is ascertainable (such as descendants), the shares of each may be left to the discretion of the trustee.

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

---

<sup>117</sup> Section 736.0301(4).

<sup>118</sup> Section 736.0401.

<sup>119</sup> Section 736.0402(1).

<sup>120</sup> Section 736.0404.

<sup>121</sup> Section 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. Section 736.0402(1)(e). *Accord, Wiley v. Hoggson*, 90 Fla. 343, 106 So. 408 (1925).

<sup>122</sup> Section 736.0406.

<sup>123</sup> Section 736.0402(1)(c). This is because it is the beneficiaries who have standing to enforce the trust, and beneficiaries, courts, and trustees need to know who the beneficiaries are.

<sup>124</sup> Section 736.0402(2). Section 689.225, F.S., provides requirements under the Rule Against Perpetuities.

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.<sup>125</sup>

### ***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).<sup>126</sup> The ascertainable beneficiary requirement does not apply to such trusts<sup>127</sup> because the enforcement of charitable trusts is provided by other mechanisms. Although not stated explicitly, the Code continues the common law rule that charitable trusts are enforced by the state Attorney General.<sup>128</sup> 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.<sup>129</sup> Finally, in a departure from common law, the Code gives settlors standing to enforce the charitable trusts they create.<sup>130</sup>

### ***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.<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup> Like animal trusts, trusts for a noncharitable purpose are enforced by a person designated by the settlor in the terms of the trust, or, in the absence of such a designee, by a person appointed by the court.<sup>135</sup> Hence, this type of trust need not have ascertainable beneficiaries either.<sup>136</sup>

<sup>125</sup> Section 736.0402(3). *Accord*, Restatement (Third) of Trusts s. 46 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts s. 122 (1959); Restatement (Second) of Property: Donative Transfers s. 12.1 cmt. e (1986). In this regard, the Code overrules *Kunce v. Robinson*, 469 So. 2d 874 (Fla. 3d DCA 1985).

<sup>126</sup> Section 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. Section 736.0405(2).

<sup>127</sup> Section 736.0402(1)(c)1.

<sup>128</sup> See s. 736.0110(3), under which the Attorney General may assert the right of a qualified beneficiary with respect to charitable trusts.

<sup>129</sup> See s. 736.0110(1).

<sup>130</sup> Section 736.0405(3).

<sup>131</sup> See generally, s. 736.0408. This provision is similar to existing s. 737.116, F.S.

<sup>132</sup> 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.

<sup>133</sup> An action to request the appointment of someone to enforce an animal trust, or to remove a person serving in that capacity, may be brought by anyone having an interest in the welfare of the animal. Section 736.0408(2).

<sup>134</sup> Section 736.0409(1). This Code provision will not apply to the two most common types of trusts for a specific noncharitable purpose (e.g., trusts for the care of animals and trusts for the care and maintenance of cemetery plots), meaning that they are not subject to the 21 year limitation and they may be perpetual.

<sup>135</sup> Section 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

### ***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.<sup>137</sup> 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 discussed above in "Trust Creation and Validity."<sup>138</sup>

### ***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<sup>139</sup> provided that their terms can be established by clear and convincing evidence.<sup>140</sup> Trusts containing Florida *real* property, however, must be evidenced by a signed writing.<sup>141</sup>

### ***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. Additionally, since 1995, s. 737.111, F.S., has provided that the testamentary aspects of most trusts<sup>142</sup> are void unless the trusts are executed with the formalities required for a will.<sup>143</sup> Similar requirements are imposed by s. 736.0403(2)(b) of the Code, but only with respect to revocable trusts containing testamentary aspects<sup>144</sup> created by Florida domiciliaries<sup>145</sup> on or after the effective date of the Code.<sup>146</sup> The practical effect is that, under the Code, if revocable trusts are to serve the function

---

distributed as provided in the terms of the trust or in the absence of such terms, to the settlor, if living, otherwise to the settlor's estate. Section 736.0409(3).

<sup>136</sup> Section 736.0402(1)(c)3.

<sup>137</sup> Section 736.0403(1).

<sup>138</sup> The formalities do not apply to certain trusts established as part of deferred compensation plans. See s. 736.0403(3).

<sup>139</sup> Section 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. 4<sup>th</sup> DCA 1986).

<sup>140</sup> Florida cases state the standard of evidentiary proof somewhat differently from s. 736.0407, though they may be functionally equivalent. See *Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative*, 52 So. 2d 670, 674 (Fla. 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. 1973) ("clear, strong, conclusive and unequivocal").

<sup>141</sup> See s. 736.0403(2)(a), providing that trusts containing land must comply with s. 689.05, F.S.

<sup>142</sup> Section 737.111, F.S., applies to trusts created by Florida residents and some trusts created in Florida by nonresidents.

Certain trusts involved with deferred compensation arrangements are explicitly excluded from the requirements of s. 737.111, F.S. See s. 737.111(5), F.S. An identical exclusion is included in section 736.0403(3).

<sup>143</sup> See s. 737.111(1), F.S. This section does not apply to trusts created before October 1, 1995. Section 737.111(6), F.S.

<sup>144</sup> A trust is revocable if it is revocable by the settlor without the consent of either the trustee or a person holding an adverse interest. Section 736.0103(15).

<sup>145</sup> 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.

<sup>146</sup> Section 737.111, F.S., continues to apply to trust created before that date. Section 736.0403(4).



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.

Additional aspects to the application of s. 736.0403(2)(b) relating to formalities of a trust include the following:

- The section applies both at the creation of a revocable trust and to any subsequent amendments.<sup>147</sup>
- A failure to comply with the requirements of this provision 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, the Code provides that testamentary aspects mean “those provisions of the trust that dispose of the trust property on or after the settlor’s death other than to the settlor’s estate.”<sup>148</sup>
- The formalities required for execution of a trust are the same as those required for execution of a will in Florida. Complying with the formalities for a will in some other state does not satisfy the Code’s requirements.
- The provision has no applicability to trusts created by non-Florida domiciliaries whether or not the trust was executed in Florida.<sup>149</sup>
- Conversely, the provision does not contain an “out” for trusts executed in other states by Florida domiciliaries, meaning that 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.

New s. 736.0403(2)(b) replaces existing s. 737.111, F.S., and because of the differences between the two, the new section applies only to trusts created on or after the effective date of the Code.<sup>150</sup>

### ***Trust Modification and Termination***

In addition to provisions dealing with the requisites for a trust, Part IV of the Code includes 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 based upon the UTC.

Current chapter 737, F.S., includes two key 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.

The three sections under consideration here – s. 736.04113, 736.04115, and s. 736.0412 – are all in addition to and not in derogation of common law rights to modify, amend, and terminate

<sup>147</sup> Unlike s. 737.111(3), F.S., s. 736.0403(2) makes no mention of trust amendments. It applies to trust amendments, however, because trust amendments are included within the definition of trust instrument. See s. 736.0103(20).

<sup>148</sup> See s. 736.0403(2)(b).

<sup>149</sup> 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.

<sup>150</sup> Section 736.0403(4). Section 737.111, F.S., continues to apply to trusts created before that date.

trusts.<sup>151</sup> Although they apply in different contexts and with different prerequisites, none is applicable while a trust is revocable and all permit the same kind of modifications. That is, when applicable, each section provides a mechanism through which a trust can be:

- Amended with respect to either administrative or distribution terms;
- Terminated in whole or in part;
- Modified to direct or permit a trustee to do unauthorized or prohibited acts; or
- Modified to preclude a trustee from doing authorized or required acts.<sup>152</sup>

Areas of difference among these three sections 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.<sup>153</sup>

#### *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.<sup>154</sup> This section should be similar in effect to current s. 737.4031(1), F.S. The only real difference is that the new section clarifies who may apply for modification under the section. The application may be made by a trustee or any qualified beneficiary.<sup>155</sup>

An important characteristic of s. 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.<sup>156</sup> Importantly, modification under this section is not precluded by the presence of a spendthrift provision.<sup>157</sup>

The court's authority to modify a trust under s. 736.04113 is included on the list of mandatory provisions.<sup>158</sup> 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.

<sup>151</sup> See ss. 736.04113(4), 736.04115(5), and 736.0412(6), respectively.

<sup>152</sup> See ss. 736.04113(2), 736.04115(1), and 736.0412(1).

<sup>153</sup> A settlor can preclude modifications and terminations that are inconsistent with his or her intent in the governing instrument.

<sup>154</sup> See s. 736.04113(1)(b).

<sup>155</sup> Section 736.04113(1).

<sup>156</sup> Section 736.04113(3)(a).

<sup>157</sup> Section 736.04113(3)(b). Spendthrift provisions act as a restraint on the voluntary or involuntary transfer of a beneficiary's trust interest.

<sup>158</sup> See s. 736.0105(2)(j).

*Judicial Modification in the Best Interest of the Beneficiaries*

Under the Code, s. 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. As with s. 736.04113 discussed above, modification under this section is not precluded by the presence of a spendthrift provision.<sup>159</sup> 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.<sup>160</sup>

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.<sup>161</sup> Under both sections, it is the best interest of the beneficiaries that is the controlling criteria for modification. Consequently, it is possible that the new section could be used to modify a trust in a manner that is inconsistent with the settlor’s intent.

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, s. 736.04115 is mandatory.<sup>162</sup> However, a provision in a trust instrument that expressly prohibits judicial modification under this section 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 this section. The trust instrument must also expressly prohibit judicial modifications under the section.<sup>163</sup>

*Nonjudicial Modification of Irrevocable Trusts*

Section 736.0412 provides for the nonjudicial modification of a trust. Under this section, a qualifying trust may be modified in any of the ways described previously upon the unanimous agreement of the trustee and all qualified beneficiaries, although neither a spendthrift clause nor a provision in a trust instrument prohibiting amendment or revocation of a trust prevents modifications under the section. The objection of a nonconsenting beneficiary, however, might. Because consent to a nonjudicial modification is required only of the trustee and *qualified* beneficiaries, there is a possibility that a s. 736.0412 modification could be detrimental to the interests of other beneficiaries. To protect against that, Code s. 736.0410(2) allows any beneficiary (i.e., qualified beneficiaries and beneficiaries) to commence a judicial proceeding to have a court review a proposed nonjudicial modification.

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

---

<sup>159</sup> Section 736.04115(2)(c).

<sup>160</sup> Section 736.04115(2)(b).

<sup>161</sup> Like s. 737.4031(1), F.S., s. 736.04155 does not apply to any trust created prior to January 1, 2001. Section 736.04115(3)(a). For this purpose, a revocable trust is deemed to be created on the date the trust becomes irrevocable. Section 736.04115(4).

<sup>162</sup> See s. 736.0105(2)(j).

<sup>163</sup> See s. 736.04115(3)(b)2. *Accord*, s. 737.4031(2)(c)2., F.S.

- There can be no nonjudicial modification for trusts created before 2001.<sup>164</sup>
- There can be no nonjudicial modification 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.<sup>165</sup>
- There can be no nonjudicial modification of any trust while the trust settlor is still alive.<sup>166</sup>

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 s. 736.04113. Nonjudicial modification is not only permissible, its availability is mandatory for trusts having a perpetuities period in excess of the common law and 90-year statutory periods.<sup>167</sup> For other trusts, the availability of nonjudicial modification is within the control of the governing instrument. By default, trusts which are drafted to comply with the common law or 90-year statutory periods are automatically exempt from modification under s. 736.0412. The governing instrument may, however, provide to the contrary.<sup>168</sup>

The three sections discussed above have their roots in the existing modification provisions of chapter 737, F.S. In addition, the Code includes two other modification/termination provisions that are derived from the UTC. Modification and termination are addressed for situations involving uneconomic trusts and settlor tax objectives.

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 this section may be precluded by an express provision in the trust instrument.<sup>169</sup> Assuming no such provision:

- A trustee of a trust with property worth less than \$50,000 may terminate the trust on its own initiative if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration. Before proceeding, notice must be given to the qualified beneficiaries. If one or more of them object, they may commence a judicial proceeding to disapprove the trustee's termination.<sup>170</sup>
- 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.<sup>171</sup>

---

<sup>164</sup> Section 736.0412(4)(a).

<sup>165</sup> Section 736.0412(4)(c). This restriction is intended to preserve deductibility of charitable trusts for federal tax purposes.

<sup>166</sup> See s. 736.0412(1). 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 Internal Revenue Code sections 2036 and 2038.

<sup>167</sup> See s. 736.0105(2)(k).

<sup>168</sup> See s. 736.0412(4)(b).

<sup>169</sup> Note that the existence of a spendthrift clause is not itself sufficient to preclude applicability of the section.

Section 736.0414(4).

<sup>170</sup> See s. 736.0414.

<sup>171</sup> Section 736.0414(2).

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.<sup>172</sup>

In another section derived from the Uniform Code, s. 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. This section provides state law authority for this type of modification. It does not, and cannot, however, ensure that the modification will be recognized for tax purposes. In general, tax recognition requires either that the modification occurs before the event giving rise to the tax<sup>173</sup> or that the modification be authorized by the Internal Revenue Code or Treasury Regulations promulgated thereunder.

### ***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 and the second permits reformations to cure mistakes. This latter, in particular, is an expansion of existing law.

Section 736.0413 codifies the common law *cy pres* doctrine. Under the new 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 this section is discretionary with a court and differs in that regard from the corresponding UTC provision. Under UTC 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.<sup>174</sup> This limitation is not present in the Florida Code.

Reformation of a trust to cure mistakes is addressed in s. 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. Existing Florida case law supports reformation to cure scrivener's errors.<sup>175</sup> This section is broader, however, as it allows reformation for mistakes both in the expression and in the inducement.

### ***Trust Division and Combination***

The final section of Part IV of the Code, s. 736.0417, gives trustees the power to sever or combine trusts. The section is derived from UTC section 417. It replaces more restrictive provisions in chapter 737, F.S., which also permit trust combinations and severances.<sup>176</sup> To illustrate, severances under existing statutes must result in trusts with identical terms and with an

---

<sup>172</sup> A trustee may enter into agreements and take other necessary or appropriate actions to protect the interests of the beneficiaries and to effectuate the intent and purposes of the trust. Section 736.0414(3).

<sup>173</sup> See Rev. Rul. 73-142, 1973-1 C.B. 405.

<sup>174</sup> This is discussed further in the comments to UTC s. 413.

<sup>175</sup> See *In re Estate of Robinson*, 720 So. 2d 540 (Fla. 4<sup>th</sup> DCA 1998).

<sup>176</sup> See s. 737.403, F.S.

aggregate of interests that are reasonably equivalent to those that existed prior to the severance. Similar restrictions apply to combinations.<sup>177</sup> By contrast, under the new section, 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. There are some caveats that apply to the new section, however.

- First, the authority of the trustee is circumscribed by a requirement that the severance or combination not impair any beneficiary's rights.
- Second, notice must be given to qualified beneficiaries<sup>178</sup> and any beneficiary may commence a proceeding to disapprove a proposed severance or combination.<sup>179</sup>
- Lastly, the types of actions permitted under this section may exceed what are permissible from a tax standpoint.

### **Part V: Creditors' Claims; Spendthrift and Discretionary Trusts (ss. 736.0501 – 736.0507)**

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 creditors' 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***

As used here, the term "third party trusts" denote trusts that a settlor creates for others and "self-settled trusts" are those where the settlor has either a power of revocation or an interest as beneficiary.

#### ***Trusts Without a Spendthrift Provision***

With respect to third party trusts, s. 736.0501 provides the basic statement of creditor remedy. Under this 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."<sup>180</sup> 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, s. 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.<sup>181 182</sup> In addition,

<sup>177</sup> See s. 737.403(1)(b), F.S.

<sup>178</sup> Section 736.0417(1).

<sup>179</sup> Section 736.0410(2).

<sup>180</sup> Section 736.0501. Although chapter 737, F.S., contains nothing similar, this section 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.").

<sup>181</sup> Existing Florida case law does not permit the garnishment of interests in wholly discretionary trust interests. See *Bacardi v. White*, supra note 180. 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.

s. 736.0504(2) ensures 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.<sup>183</sup>

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.<sup>184</sup>

#### *Trusts with a Spendthrift Provision*

Code s. 736.0502 gives statutory recognition to spendthrift provisions.<sup>185</sup> Assuming a trust has a valid spendthrift provision, a beneficiary may not transfer his beneficial interest in the trust. Additionally, with some exceptions discussed below, 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.<sup>186</sup>

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.<sup>187</sup> That is not allowable under the Code. Under s. 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.<sup>188</sup>

When it comes to the effectiveness of spendthrift provisions, for public policy reasons, some creditors may proceed against a beneficiary's interest in a trust even though the trust includes a spendthrift clause. Thus, s. 736.0503(2) provides "last resort" exceptions for claims by:

- A beneficiary's child, spouse, or former spouse for support or maintenance, and
- A judgment creditor (such as an attorney) who has provided services for the protection of a beneficiary's interest in the trust.

In addition, s. 736.0503(2) provides an exception for claims by a state or the United States, but only to the extent provided in a statute separate from the Code.

<sup>182</sup> Section 736.0505(1)(c) provides that a settlor's creditors may not reach assets in an irrevocable trust solely based upon the trustee's discretionary power to pay taxes with trust funds.

<sup>183</sup> 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. In *Croom v. Ocala Plumbing & Electric Co.*, 57 So. 243 (Fla. 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, i.e., not subject to an ascertainable standard.

<sup>184</sup> Section 736.0504(3).

<sup>185</sup> 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 would be sufficient. See s. 736.0502(2).

<sup>186</sup> Section 736.0502(3).

<sup>187</sup> Although neither court discussed the point, the spendthrift clauses upheld in *Bacardi v. White*, 463 So. 2d 218 (Fla. 1985) and *Mason v. Mason*, 798 So. 2d 895 (Fla. 3d DCA 2001) both permitted limited transfers to family members.

<sup>188</sup> Section 736.0502(1).

The Code's "last resort" requirement differs in two ways from that established by the Florida Supreme Court in its 1985 decision, *Bacardi v. White*.<sup>189</sup> The court in *Bacardi* held that a spouse (and in dicta, a child) could proceed against a beneficiary's interest in a spendthrift trust only as a last resort after a showing that traditional remedies are inadequate. The case can be read as requiring a separate "last resort" showing in order to get a continuing writ of garnishment. The Code extends the last resort principle to claims by a judgment creditor who has provided services for the protection of a beneficiary's interest. The Code requires only a single initial showing that traditional remedies are inadequate. The change is a compromise between a public policy in favor of spendthrift provisions in Florida and the administrative burdens created by a requirement of repeated compliance with the last resort principle. If the financial situation of the beneficiary changes, a court may always modify its earlier order. But the Code places the burden of seeking a modification on the beneficiary who is in possession of the critical facts rather than the spouse, child, or judgment claimant.

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;<sup>190</sup> they can not compel distributions from or otherwise reach beneficial interests in discretionary trusts.<sup>191</sup>

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 impede the beneficiary's creditors' efforts to reach the distributions. Code s. 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.<sup>192</sup> 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 mandatory distribution does not encompass discretionary distributions of any sort.<sup>193</sup>

As mentioned previously, "self-settled trust" is used here to denote a trust that is revocable by the settlor or if the settlor is a mandatory or permissible distributee of trust property. Traditionally, self-settled trusts have been treated harshly when it comes to creditors' rights. This flows from a 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

---

<sup>189</sup> 463 So. 2d 218 (Fla. 1985).

<sup>190</sup> 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.

<sup>191</sup> See s. 736.0504(1) which applies whether or not a trust contains a spendthrift provision.

<sup>192</sup> Section 736.0506(2).

<sup>193</sup> It is immaterial for this purpose that the discretion is subject to a standard or that it is coupled with language of direction. Section 736.0506(1).



self-settled trusts. Under Code s. 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;<sup>194</sup> and
- In the case of an irrevocable trust, a settlor's creditor or assignee may reach the maximum amount that can be distributed to or for the benefit of the settlor.<sup>195</sup>

While the remedies given in the Code to creditors of settlors of self-settled trusts are not new, there is one aspect of s. 736.0505 that may be. Under s. 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. 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,<sup>196</sup> the rule in s. 736.0505(2)(a) appears consistent with the supreme court's decision in *Croom v. Ocala Plumbing & Electric Co.*,<sup>197</sup> which subjected trust property to the reach of creditors when the trust beneficiaries had an unrestricted right to access trust property. Under s. 736.0505(2)(b), F.S., however, upon a lapse, release, or waiver of a withdrawal power, the power holder retains the status of trust settlor with respect to the value of the property subject to the lapse, etc.<sup>198</sup> 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, this would be a change in existing law.

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

Chapter 737, F.S., includes provisions which establish a 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, a mandatory provision, s. 736.05053 obligates a trustee of a trust described in s. 733.707(3), F.S.,<sup>199</sup> 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

<sup>194</sup> Section 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.

<sup>195</sup> Section 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).

<sup>196</sup> See s. 736.0103(12).

<sup>197</sup> 57 So. 243 (Fla. 1911). *Croom* is discussed further at note 180.

<sup>198</sup> 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(2)(b)1. and 2. For powers drafted not to exceed these limits, the property subject to the power will be subject to the power holder's creditors before the lapse, release, etc., but not thereafter.

<sup>199</sup> Section 736.05053 and s. 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.

mandatory provision, s. 736.05055 carries forward the requirements found in current 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.

### **Part VI: Revocable Trusts (ss. 736.0601 – 736.0604)**

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.<sup>200</sup> In an initial mandatory provision, s. 736.0601 clarifies that the capacity required to create a revocable trust is the same as that needed to execute a will.<sup>201</sup> 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.

#### ***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.<sup>202</sup> As a consequence:

- No other person is entitled to notices, information, accountings, or reports;<sup>203</sup> and
- A trustee may follow a direction of the settlor that is contrary to the trust instrument.<sup>204</sup>

The situations where a trustee's duties are restricted by s. 736.0603 are not limited to traditional revocable trusts. Under s. 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.<sup>205</sup>

#### ***Trusts are Revocable by Default***

In a key 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.<sup>206</sup> This change is prospective only. It conforms Florida law to that of California, Texas, and several other states. The new rule assumes that most well drafted trust

<sup>200</sup> Section 736.0103(15).

<sup>201</sup> As a section dealing with the requirements for creating a trust, s. 736.0601 is made mandatory by s. 736.0105(2)(a).

<sup>202</sup> Section 736.0603(1).

<sup>203</sup> 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).

<sup>204</sup> See s. 736.0808(1).

<sup>205</sup> Accord UTC s. 603(b).

<sup>206</sup> Section 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.

instruments explicitly say whether they are revocable and when a trust instrument does not clarify this, the omission was likely accidental.<sup>207</sup>

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.<sup>208</sup>
- If the instrument does not specify a method, any clear and convincing manifestation of the settlor's intent to revoke is sufficient,<sup>209</sup> 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.<sup>210</sup>

Both principles, however, are subject to the possible overriding application of s. 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. Recall that under s. 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.<sup>211</sup> Hence, notwithstanding the principles set out above, *amendments* to the testamentary provisions of a revocable trust must comply with s. 736.0403(2)(b).

The question of whether trust *revocations* must also comply with s. 736.0403(2)(b) is less clear. It is likely that they do not, as the effect of a revocation is to return the property to the settlor free of trust.<sup>212</sup> It is an unnecessary stretch to say that such a result is a trust "amendment" to which s. 736.0403(2)(b) would apply. Nevertheless, there is sufficient uncertainty on the issue that compliance with s. 736.0403(2)(b) for all amendments and revocations would appear prudent.

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.;<sup>213</sup> or
- A guardian of the property, but only as authorized in s. 744.441, F.S.<sup>214</sup>

<sup>207</sup> 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.

<sup>208</sup> Section 736.0602(3)(a). The "substantial compliance" test in this section may be more lenient than existing Florida law, which appears to require strict compliance. See *Euart v. Yoakley*, 456 So. 2d 1327 (Fla. 4th DCA 1984).

<sup>209</sup> Section 736.0602(3)(b)2. *Accord Macfarlane v. First National Bank of Miami*, 203 So. 2d 257 (Fla. 3d DCA 1967).

<sup>210</sup> Section 736.0602(3)(b)1.

<sup>211</sup> Section 736.0103(20).

<sup>212</sup> 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 approaches might be available under the identical provision of the Uniform Code, see the comments to UTC s. 602.

<sup>213</sup> Section 736.0602(5).

<sup>214</sup> Section 736.0602(5) and (6).

As defined in the Code, “settlor” includes anyone who transfers property to a new or existing trust.<sup>215</sup> Under this definition, a trust can have more than one settlor. In such cases, s. 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.<sup>216</sup>

### ***Protection of Trustees***

If a trust is revoked, the Code directs the trustee to deliver the trust property as the settlor directs.<sup>217</sup> Of course, nothing ensures that directions from the settlor will be forthcoming and, particularly where no method is specified in the trust instrument, it is possible that a trust could be amended or revoked without the trustee’s knowledge. In such cases, the Code holds the unknowing trustee harmless for distributions made and other actions taken on the assumption that the trust has not been amended or revoked.<sup>218</sup>

### ***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.<sup>219</sup> 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.<sup>220</sup> The Part VI contribution to this area is in s. 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 s. 736.0604.

This provision takes into account 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.

### **Part VII: Office of Trustee (ss. 736.0701 – 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

<sup>215</sup> Section 736.0103(16).

<sup>216</sup> See s. 736.0602(2)(c). 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.

<sup>217</sup> Section 736.0602(4).

<sup>218</sup> Section 736.0602(7).

<sup>219</sup> See s. 736.0406.

<sup>220</sup> See s. 736.0207.

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.<sup>221</sup> 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.<sup>222</sup>

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
- Inspect or investigate trust property for any purpose including determining potential liability under environmental or other law.<sup>223</sup>

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.<sup>224</sup> In the former case, the court may dispense with a bond required in an instrument. In all cases, the court 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.<sup>225</sup>

### ***Resignations and Removals***

A trustee may resign with court approval.<sup>226</sup> In addition, the Code provides a mechanism for trustees to resign without court approval.<sup>227</sup> A trustee may resign by giving at least 30 days notice to the settlor (if living), the cotrustees (if any), and all qualified beneficiaries.<sup>228</sup> In either case, a trustee's resignation does not discharge any liability of the resigning trustee or any

---

<sup>221</sup> Section 736.0701(2).

<sup>222</sup> Section 736.0701(1)(a) and (b).

<sup>223</sup> Section 736.0701(3)(a) and (b).

<sup>224</sup> Section 736.0702(1).

<sup>225</sup> Section 736.0702(2). The power a court has to modify or terminate a bond under this subsection includes the power to modify any required surety.

<sup>226</sup> Section 736.0705(1)(b). The court may impose conditions and enter orders reasonably necessary to protect trust property. Section 736.0705(2).

<sup>227</sup> Section 737.309, F.S., currently provides for trustee resignation without court approval.

<sup>228</sup> Section 736.0705(1)(a).

sureties on the trustee's bond.<sup>229</sup> The trustee's right to resign is a mandatory provision and may not be denied or curtailed in the trust instrument.<sup>230</sup>

Court removal of a trustee may be sought by the settlor, a cotrustee, or any beneficiary. In addition, a court may remove a trustee on its own initiative.<sup>231</sup> 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.<sup>232</sup> In lieu of (or in addition to) removing a trustee, the court may grant appropriate relief for any breaches of trust that have occurred.<sup>233</sup>

The Code's provision giving a settlor the right to seek removal of a trustee is probably an expansion of existing law.<sup>234</sup> So too is the "unfitness" criteria at least if and to the extent it permits removal in anticipation of an actual breach.<sup>235</sup>

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 is available.<sup>236</sup>

#### ***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 entitled to it.<sup>237</sup> Pending that, unless a cotrustee remains in office or the court orders otherwise, a

<sup>229</sup> Section 736.0705(3).

<sup>230</sup> See s. 736.0105(2)(o).

<sup>231</sup> Section 736.0706(1).

<sup>232</sup> Section 736.0706(2)(a) – (c).

<sup>233</sup> See s. 736.0706(3). On the remedies generally available for a breach of trust, see s. 736.1001(2).

<sup>234</sup> See *Sanders v. Citizens Nat. Bank of Leesburg*, 585 So. 2d 1064, 1066 (Fla. 5<sup>th</sup> 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.

<sup>235</sup> 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. 5<sup>th</sup> DCA 1987); *Robinson v. Tootalian*, 691 So. 2d 52 (Fla. 4<sup>th</sup> DCA 1997); *State of Delaware ex rel. Gebelein v. Belin*, 456 So. 2d 1237 (Fla. 1<sup>st</sup> DCA 1984), *rev. den.* 464 So. 2d 556 (Fla. 1985); *Rosen v. Rosen*, 167 So. 2d 70 (Fla. 3d DCA 1964).

<sup>236</sup> Section 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 s. 0706(2)(d).

<sup>237</sup> Section 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 the drafters of the Code is to ensure 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).

trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect trust property.<sup>238</sup>

### ***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.<sup>239</sup> In addition, the court has residual authority to appoint a successor trustee if an otherwise unfilled vacancy in the trusteeship occurs.<sup>240</sup>

A vacancy in a trusteeship can occur for a number of reasons including the inability to identify a designated trustee, or the fact that a designated trustee declines the office, is adjudicated to be incapacitated, resigns, is disqualified, is removed or dies.<sup>241</sup> 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.<sup>242</sup> Where a vacancy in a trusteeship is required to be filled, it must be filled first by a person designated pursuant to the terms of the trust, then by a person appointed by unanimous agreement of the qualified 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.<sup>243</sup>

The ability of qualified beneficiaries (or named charities) to designate a successor trustee is an expansion of existing Florida law.<sup>244</sup>

### ***Cotrustees***

With some exceptions noted below, the Code imposes upon cotrustees a duty to participate in the administration of the trust.<sup>245</sup> 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.<sup>246</sup>

A cotrustee's participation is excused if the cotrustee is unavailable because of absence, illness, disqualification or other temporary incapacity.<sup>247</sup> In the event that participation of a cotrustee is excused, 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.<sup>248</sup> 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.<sup>249</sup>

---

<sup>238</sup> Section 736.0707(1).

<sup>239</sup> Section 736.0704(5).

<sup>240</sup> See s. 736.0704(3)(c) and (4)(c).

<sup>241</sup> These reasons are detailed in section 736.0704(1).

<sup>242</sup> Section 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. Section 736.0703(2). *Accord* s. 737.404(2), F.S.

<sup>243</sup> Section 736.0704(3) and (4).

<sup>244</sup> See *Van Roy v. Hunter*, 117 So. 887 (Fla.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).

<sup>245</sup> Section 736.0703(3).

<sup>246</sup> Section 736.0703(1).

<sup>247</sup> Section 736.0703(3).

<sup>248</sup> Section 736.0703(4).

<sup>249</sup> Section 736.0703(3).

Delegation is permitted under the Code only if the settlor did not reasonably expect delegated functions to be performed jointly by the trustees.<sup>250</sup> 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.<sup>251</sup>

In general, a trustee who does not join in an action by another trustee is not liable for the action.<sup>252</sup> 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.<sup>253</sup> Because the Code permits a majority of trustees to act for the trust, it is possible that one or more trustees could be outvoted as to some particular course of action. A dissenting trustee who joins in an action at the 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.<sup>254</sup>

### ***Compensation and Reimbursement of Trustees***

A trustee is entitled to reasonable compensation,<sup>255</sup> including reasonable additional compensation for other services the trustee renders in connection with the administration of the trust.<sup>256</sup> 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.<sup>257</sup>

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.<sup>258</sup>

### **Part VIII: Duties and Powers of Trustee (ss. 736.0801 – 736.0817)**

As its title suggests, Part VIII of the Code covers the duties and powers of a trustee.

<sup>250</sup> Section 736.0703(5). Irrevocable delegations are not permitted under this subsection. A trustee may revoke a delegation previously made. Compare UTC s. 703(e).

<sup>251</sup> See s. 518.112, F.S.

<sup>252</sup> Section 736.0703(6).

<sup>253</sup> Section 736.0703(7)(a) and (b).

<sup>254</sup> Section 736.0703(8). Unlike the similar provision in existing law, s. 736.0703(8) does not require the notice of the dissent to be in writing. Compare s. 737.404(1), F.S.

<sup>255</sup> Section 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 (Fla. 1958) citing with favor *Bogert, Trusts and Trustees*, s. 976.

<sup>256</sup> Section 736.0708(3). There is no existing statute covering the compensation of multiple trustees and the Code does not address this issue either. Compare s. 733.617(5), F.S., dealing with the compensation of multiple personal representatives.

<sup>257</sup> Section 736.0708(2). The authority of the court to adjust a trustee's compensation in this manner under existing law is unsettled.

<sup>258</sup> Section 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. 4<sup>th</sup> DCA 2000).



### *Duties of a Trustee*

In a series of separate sections, new chapter 736 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.

Statutory duties of a trustee include the following:

- *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.<sup>259</sup> This is a mandatory duty which may not be relaxed or curtailed in the trust instrument.<sup>260</sup>
- *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 (see further discussion below).
- *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.<sup>261</sup>
- *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.<sup>262</sup>
- *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.<sup>263</sup>
- *Duty to use special skills* – A trustee with special skills or expertise has a duty to use those special skills.<sup>264</sup>
- *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.<sup>265</sup>
- *Duty to keep accurate records* – A trustee must keep clear, distinct, and accurate records.<sup>266</sup>

<sup>259</sup> Section 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. 2d DCA 1975); *Hoppe v. Hoppe*, 370 So. 2d 374 (Fla. 4<sup>th</sup> DCA 1978).

<sup>260</sup> Section 736.0105(2)(b).

<sup>261</sup> Section 736.0803.

<sup>262</sup> Section 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(1)(a), F.S.

<sup>263</sup> Section 736.0805.

<sup>264</sup> Section 736.0806. 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. This duty also appears in the Florida Prudent Investor Act. See s. 518.11(1)(a), F.S.

<sup>265</sup> See ss. 736.0809 and 736.0812.

<sup>266</sup> Section 736.0810(1).

- *Duty not to commingle and to earmark* – A trustee must keep trust property separate from the trustee’s own property and, to the extent feasible, cause the interest of the trust to appear in any records maintained by third parties.<sup>267</sup> 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.<sup>268</sup>
- *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.<sup>269</sup>
- *Duty to enforce and defend claims* – A trustee must take reasonable steps to enforce claims of and to defend claims against the trust.<sup>270</sup>
- *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.<sup>271</sup> However, this duty is subject to important exceptions (see further discussion below).
- *Duty to inform and account* – A trustee must keep qualified beneficiaries reasonably informed of the trust and its administration (see further discussion below).<sup>272</sup>
- *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.<sup>273</sup>
- *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.<sup>274</sup>

### *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.<sup>275</sup> Among other things, this means that in the absence of a contrary provision in the trust instrument, a court order,<sup>276</sup> or a specific statutory exception:

<sup>267</sup> Section 736.0810(2) and (3).

<sup>268</sup> Section 736.0810(4).

<sup>269</sup> Section 736.08105.

<sup>270</sup> Section 736.0811.

<sup>271</sup> See s. 736.0812.

<sup>272</sup> See s. 732.813.

<sup>273</sup> See s. 736.08165. This section is identical to s. 737.208, F.S.

<sup>274</sup> Section 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 by the drafters of the Code to ensure that this section does not override the holdings of cases such as *First Union Nat’l Bank v. Jones*, 768 So. 2d 1213 (Fla. 4<sup>th</sup> DCA 2000) and *Merrill Lynch Trust Co. v. Alzheimer’s Lifeliners Ass’n, Inc.*, 832 So. 2d 948 (Fla. 2d DCA 2002).

<sup>275</sup> See generally, s. 736.0802(1).

<sup>276</sup> 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. Section 736.0802(9).

- 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;<sup>277</sup>
- A trustee may not usurp an opportunity properly belonging to the trust;<sup>278</sup> 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.<sup>279</sup> 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.<sup>280</sup>

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.<sup>281</sup>

The fact that an offending transaction is voidable rather than void is a change in Florida law.<sup>282</sup> 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.<sup>283</sup>
- A beneficiary's action can be precluded by an effective consent, ratification, or release<sup>284</sup> or by a failure to commence an action within the applicable limitations period.<sup>285</sup>

To be contrasted with the transactions described above are those entered into between the trustee and persons who have close business<sup>286</sup> or personal ties<sup>287</sup> to the trustee. Such transactions are

<sup>277</sup> Section 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. Section 736.0802(2)(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.

<sup>278</sup> See s. 736.0802(4).

<sup>279</sup> Section 736.0802(6).

<sup>280</sup> *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."

<sup>281</sup> Section 736.0802(2).

<sup>282</sup> Compare *Barnhart v. Hovde*, 490 So. 2d 1271 (Fla. 5<sup>th</sup> DCA 1986). (Where trustee failed to get court approval in advance of a transaction involving a conflict of interest, the transaction was void.)

<sup>283</sup> See s. 736.0802(2), introductory clause. On the protection of persons dealing with a trustee, see s. 736.1016.

<sup>284</sup> Section 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.

<sup>285</sup> Section 736.0802(2)(c). On the statute of limitations on proceedings against trustees, see s. 736.1008.

<sup>286</sup> Section 736.0802(3)(c) and (d). 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.

<sup>287</sup> Section 736.0802(3)(a) and (b). This includes the trustee's spouse and the trustee's descendants, siblings, parents, or the spouse of any of them.

only presumed to be affected by a conflict between the personal and fiduciary interests of the trustee.<sup>288</sup> Accordingly, the transactions are not voidable per se; they are voidable only if the presumption is not rebutted (the “presumptively voidable rule”).

According to the comments to UTC section 802 from which s. 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.

The Code provides an exception that the presumption of voidability does not apply to an investment by a trustee in a mutual fund to which the trustee or its affiliate<sup>289</sup> provides services in a capacity other than as trustee provided:

- The investment otherwise complies with the requirements of chapter 518, F.S.;<sup>290</sup> 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.<sup>291</sup>

The Code includes several exceptions to the basic duty of loyalty in the interest of fair, effective, and efficient trust administration. 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;<sup>292</sup>
- 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;<sup>293</sup>
- A deposit of trust money in a regulated financial-service institution operated by the trustee;<sup>294</sup>
- An advance by the trustee of money for the protection of the trust;<sup>295</sup> or
- The employment of persons, including attorneys, accountants, investment advisers, or agents, even if they are the trustee or are associated with the trustee, to advise or assist the trustee in the performance of its administrative duties or the employment of agents to perform any act of administration, whether or not discretionary.<sup>296</sup>

---

<sup>288</sup> Section 736.0802(3).

<sup>289</sup> Section 736.103(2) defines an affiliate as any person or entity that directly or indirectly through one or more intermediaries owns or controls, is owned or controlled by, or is under common control or ownership with, the fiduciary. This subsection also provides a nonexclusive list of those included under the definition.

<sup>290</sup> Section 736.802(5). See in particular s. 518.11, F.S. (Florida’s Prudent Investor Act). The bill also creates a new s. 518.117 to provide that investments under s. 736.802(5) are permissible investments of fiduciary funds.

<sup>291</sup> Section 736.802(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 and provides the specifics of what must be included in the disclosure to qualified beneficiaries.

<sup>292</sup> Section 736.0802(7)(a) and (b).

<sup>293</sup> Section 736.0802(7)(c).

<sup>294</sup> Section 736.0802(7)(d).

<sup>295</sup> Section 736.0802(7)(e).

<sup>296</sup> Section 736.0802(8). The trustee may act without independent investigation on their recommendations.

*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.<sup>297</sup> This duty is qualified, however, by s. 736.08125, which details several instances where a successor trustee has no personal liability for actions<sup>298</sup> of a prior trustee. This section 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.<sup>299</sup>

Under s. 736.08125, there is no personal liability on the part of the trustee, nor is there any *duty* to institute proceedings against a prior trustee or the estate of a prior trustee:

- 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 an eligible beneficiary.<sup>300</sup>

In addition, there is no personal liability on the part of the trustee with respect to a qualified beneficiary:

- For any action or claim that the qualified beneficiary is barred from bringing against the prior trustee;<sup>301</sup>
- 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;<sup>302</sup> or
- If a super majority<sup>303</sup> of the eligible beneficiaries have released the successor trustee.<sup>304</sup>

*Duty to Inform and Account*

Under s. 736.0813, a trustee must keep the qualified beneficiaries of an irrevocable<sup>305</sup> trust reasonably informed of the trust and its administration.<sup>306</sup> The extent of this duty, which is

<sup>297</sup> Section 736.0812.

<sup>298</sup> The term “actions” includes a failure to act. Section 736.0103(1).

<sup>299</sup> Section 736.08125(3).

<sup>300</sup> Section 736.08125(1)(a) – (d).

<sup>301</sup> Section 736.08125(1)(e)3.

<sup>302</sup> Section 736.08125(1)(e)2. In addition informing the qualified beneficiary of the trustee’s acceptance of the trusteeship in accordance with s. 736.0813(1)(a), 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 six months after the date of the trustee’s acceptance.

<sup>303</sup> Under s. 736.08125(6)(b), 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.

<sup>304</sup> Section 736.08125(1)(e)1. Under s. 736.08125(2)(a), eligible beneficiaries is defined to be a subset of the qualified beneficiaries. The intermediate qualified beneficiaries described in s. 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 s. 736.0103(14)(c).

<sup>305</sup> While a trust is revocable, a trustee’s duty to inform and account is owed only to the settlor. Sections 736.0603(1) and 736.0813(4).

limited to the qualified beneficiaries, is described in detail in the five paragraphs of s. 736.0813(1), each of which is included on the list of mandatory provisions.<sup>307</sup> According to these paragraphs, a trustee's duty to inform and account to qualified beneficiaries includes, but is not limited to:

- Notifying 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;
- Notifying 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;
- Upon reasonable request, furnishing them with a complete copy of the trust instrument;
- 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; and
- Upon reasonable request, provide them with relevant information about the trust's assets and liabilities and the particulars of the trust administration.<sup>308</sup>

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.<sup>309</sup>

The contents of the required accounting are detailed in s. 736.08135.<sup>310</sup> This section is identical to 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.<sup>311</sup> A qualified beneficiary may waive (or withdraw a prior waiver of) the right to one or more accountings, including a final accounting.<sup>312</sup>

### ***Powers of Trustee***

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 terms of the trust.

### ***General Powers***

In addition to powers granted in the trust instrument and those provided in other sections of the Code, s. 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 powers that an unmarried competent owner has over individually owned property. These powers may be exercised without authorization of the court.

<sup>306</sup> Section 736.0813(3). The representation provisions of Part III of the Code apply with respect to the rights of a qualified beneficiary under this section.

<sup>307</sup> See s. 736.0105(2)(r) – (t). Section 736.0813 applies only with respect to accountings rendered for periods beginning on or after January 1, 2008.

<sup>308</sup> Section 736.0813(1).

<sup>309</sup> See the flush language following s. 736.0813(1)(e).

<sup>310</sup> This section is effective for all trust accountings rendered for any accounting period beginning on or after January 1, 2003. Section 736.08135(3).

<sup>311</sup> Section 736.08135(2)(f).

<sup>312</sup> Section 736.0813(2). A withdrawal of a prior waiver is effective only for accounting for future periods.

*Specific Powers*

Section 736.0816 contains a detailed list of powers that a trustee automatically has in the absence, of a contrary provision in the trust instrument. This new 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. In addition, under s. 736.0816, a trustee has authority to:

- Exercise federal, state, and local tax elections;<sup>313</sup>
- Select payment options, exercise rights, and take other appropriate actions with respect to retirement plans, annuities, and insurance contracts payable to the trust;<sup>314</sup>
- Make loans, including to a beneficiary, with terms and conditions that are fair and reasonable under the circumstances;<sup>315</sup> 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.<sup>316</sup>

*Environmental Powers*

Code s. 736.08163 incorporates almost verbatim<sup>317</sup> the provisions of current s. 737.4025, F.S., dealing with a trustee's rights and powers (and the concomitant protection from personal liability) when a trust includes or might include environmentally contaminated property.

*Power to Delegate to Agents*

Under s. 736.0807, 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.<sup>318</sup> In accepting a delegation, an agent submits to the jurisdiction of Florida courts<sup>319</sup> and thereafter owes a duty to exercise reasonable care to comply with the terms of the delegation.<sup>320</sup> A trustee who properly delegates duties and powers under the strictures of this section is not liable for the acts of the agent.

Current law permits delegations of investment functions (including special provisions relating to life insurance trusts) under s. 518.112, F.S., and, somewhat more indirectly, functions relating to trust administration under the general authority to employ agents under s. 737.402(2)(y), F.S. The former remain available under the Code. The provisions of s. 737.402(2)(y), F.S., are replaced with the Code's more comprehensive s. 736.0807, under which any duty or power may be delegated provided the delegation would be proper for a trustee of comparable skill. Apart from its increased scope, Code s. 736.0807 makes one other important change.

<sup>313</sup> Section 736.0816(17).

<sup>314</sup> Section 736.0816(18).

<sup>315</sup> Section 736.0816(19). The trustee has a lien on future distributions for repayment of any loans.

<sup>316</sup> Section 736.0816(25).

<sup>317</sup> 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 s. 736.08163 in favor of the more generally applicable definition found in s. 736.0103(6).

<sup>318</sup> See s. 736.0807(1).

<sup>319</sup> Section 736.0807(4).

<sup>320</sup> Section 736.0807(2).

Section 737.402(2)(y), F.S., states that trustees may act without independent investigation of an agent's recommendations,<sup>321</sup> but s. 736.0807(1)(c) contemplates a continuing duty to review and monitor an agent's actions and performance.

#### *Powers to Direct*

Section 736.0808 addresses the ability for someone to have the power to direct the trustee's actions and decisions with respect to a trust. There is no statutory equivalent addressing this topic under existing law, and the new section should provide clarification in how to conduct these situations.

While a trust is revocable, the settlor has the power to direct the trustee whether or not it is explicitly stated in the terms of the trust. Thus, with two important caveats, the trustee of a revocable trust may follow a direction of the settlor even when the direction is contrary to the terms of the trust.<sup>322</sup>

The 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.<sup>323</sup> As such, the direction must be manifested in a manner that substantially complies with any provisions in the trust instrument pertaining to creating trust amendments.<sup>324</sup> Moreover, if the direction relates to a "testamentary aspect" of the trust, the direction must comply with the requirements of s. 736.0403(2)(b), i.e., it must be made in a written instrument executed with testamentary formalities.

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.<sup>325</sup> 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,<sup>326</sup> or the power to direct the actions of the trustee. In the 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.<sup>327</sup>

#### *Tax Savings*

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

---

<sup>321</sup> A similar statement is found in Code s. 736.0816(20). The potential conflict between this provision and the duties imposed in s. 736.0807(1)(c) is uncertain.

<sup>322</sup> Section 736.0808(1).

<sup>323</sup> On the equivalency of a settlor's direction to a trust amendment, see the comments to UTC s. 808.

<sup>324</sup> Section 736.0808(1).

<sup>325</sup> Section 736.0808(4).

<sup>326</sup> A power to direct trust modification or termination may also be given to a trustee. See s. 736.0808(3).

<sup>327</sup> Section 736.0808(2).



*Duty to Distribute Income of Marital Trust*

Absent a contrary provision in the trust instrument, Code s. 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 ensure 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 ss. 736.0814(2) - (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 s. 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:

- Make distributions of income or principal to or for its own benefit other than distributions subject to an ascertainable standard;
- Make distributions of income or principal to satisfy the trustee's support obligations; or
- Make discretionary allocations of receipts or expenses to directly enlarge or shift beneficial interests in the trust.<sup>328</sup>

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.<sup>329</sup>

Notwithstanding the prohibitions listed above, exceptions are provided for:

- Trustees (whether the settlor or other person) of revocable or amendable trusts;
- A power held by the trust settlor; and
- Trusts where application of the restrictions could jeopardize an intended tax benefit, such as a marital deduction trust where the settlor's spouse serves as trustee; or a trust qualifying for the annual exclusion under s. 2503(c) of the Internal Revenue Code.<sup>330</sup>

**Part IX: Trust Investments (s. 736.0901)**

Part IX of the Code consists of a single section that incorporates the provisions of chapter 518, F.S., which provides for the investment of fiduciary funds.

**Part X: Liability of Trustees and Rights of Persons Dealing with Trustee (ss. 736.1001 – 736.1018)**

Part X provides for remedies and damages for breach of trust; liability of trustees to

---

<sup>328</sup> Section 736.0814(2).

<sup>329</sup> Section 736.0814(4).

<sup>330</sup> Section 736.0814(3).

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.<sup>331</sup> 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.<sup>332</sup>

### *Protection of Trustees from Liability*

When a breach of trust has occurred, new Code s. 736.1009 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. This provision is derived from Uniform Code s. 1006. It is intended to protect trustees from liability arising from subsequent inconsistent reformations of a trust instrument to remedy a mistake of fact or law or from the fact that the terms of a trust may not always be manifested comprehensively in the trust instrument.

In some cases, the terms of a trust or the duties and powers of a trustee may depend on the status of certain external events such as the marriage, divorce, educational status, or death of beneficiaries or other persons. At common law, a trustee is strictly liable for misdelivery regardless of the trustee's level of care. Code s. 736.1010, which is based on Uniform Code s. 1007, changes this rule. It protects a trustee who has exercised reasonable care to ascertain the happening of the event from liability for losses resulting from the trustee's lack of knowledge of the event. The comments to the Uniform Code section clarify that the events listed in the section are not exclusive.

### *Effect of Beneficiary's Consent, Release, or Ratification*

Code s. 736.1012 deals with the impact of a beneficiary's consent, release, or ratification of a trustee's actions. As a general principle, a trustee is not liable to a beneficiary who has consented to the conduct that constitutes a breach or who has released the trustee from liability or ratified the offending transaction. This principle does not apply, however, to consents, releases, or ratifications that were induced by the trustee's improper conduct or made by a beneficiary who did not know of its rights and the material facts relating to the breach.

### *Effect of Term Exculpating Trustee from Liability*

Code s. 736.1011 places restrictions on 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.<sup>333</sup>

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

---

<sup>331</sup> Section 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).

<sup>332</sup> See s. 736.1001(1).

<sup>333</sup> Section 736.0105(2)(u).

the beneficiaries.<sup>334</sup> 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.<sup>335</sup> 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.<sup>336</sup>

### ***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. According to the section, a court may:

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

The drafters of the Code felt that a court's focus in fashioning a remedy for a breach of trust normally should be the redress of the damage caused by the breach and not the punishment of the trustee. Accordingly, s. 736.1001(3) suggests that the appropriate remedy for a breach involving a failure to distribute trust property is an order requiring the trustee to make distributions in an amount necessary to restore the trust beneficiaries to their appropriate position.

Where the breach involves an improper distribution, the trust may be made whole by compelling the recipient of the distribution to return the distribution. In this regard, Code s. 736.1018 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, s. 736.1001(3) suggests that the appropriate remedy for a breach that has resulted in an improper distribution is an order directing the trustee to withhold future distributions. Note, however, that the remedies suggested in s. 736.1001(3) are aspirational, meaning courts are not bound by them. In appropriate situations, courts may adopt a remedy from the more comprehensive list found in s. 736.1001(2) or may order any other relief they find appropriate.

### ***Damages***

In those cases where the court finds that it is appropriate for a trustee to respond in damages for a breach of trust, s. 736.1002 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

---

<sup>334</sup> Section 736.1011(1)(a).

<sup>335</sup> Section 736.1011(1)(b).

<sup>336</sup> Section 736.1011(2). Section 736.1011 is derived from UTC s. 1008, but the Florida provision includes the added requirement that a term drafted by or at the direction of the trustee be *directly* communicated to the settlor rather than allowing communication to the settlor's attorney, only.

for the breach, including lost income, capital gain, or appreciation that would have resulted from a property administration.<sup>337</sup>

### *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.<sup>338</sup>

The following rules 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:<sup>339</sup>

- **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.<sup>340</sup>
- **Section 736.1002(3)** specifies how the pro rata contribution is to be determined. In addition to stating that general principles of equity apply,<sup>341</sup> s. 736.1002(3) clarifies that pro rata in this context means in proportion to the relative degrees of fault.<sup>342</sup> This determination anticipates more than a 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.<sup>343</sup>
- **Section 736.1002(4)** provides for enforcement of the right to contribution;
- **Section 736.1002(5)** provides 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
- **Section 736.1002(6)** makes a court's judgment determining the liability of the persons to the beneficiary binding among the persons for purpose of determining their right to contribution.

### *Costs and Fees*

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

- **Section 736.1004** – This section is derived from a combination of s. 737.188 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

<sup>337</sup> See s. 736.1002(1).

<sup>338</sup> Much of s. 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. Section 768.31(2)(g), F.S.

<sup>339</sup> Section 736.1002(7).

<sup>340</sup> Section 736.1002(2).

<sup>341</sup> Section 736.1002(3)(c).

<sup>342</sup> Section 736.1002(3)(a).

<sup>343</sup> Section 736.1002(3)(b).

- nonexercise of a trustee's power and in proceedings to modify, combine, or divide a trust under s. 736.0410 through s. 736.0417. The section directs the court to award taxable costs and fees as in chancery actions<sup>344</sup> and authorizes the court to direct payment from the party's interest, from other property, or from both. This new section makes no change in Florida law.
- **Section 736.10043** – This section is substantively identical to the 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 736.10045** – This section is substantively identical to that portion of s. 737.2035, F.S., that relates to costs other than attorney's fees. The new section 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 736.10047** – 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 s. 736.1013 and s. 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, s. 736.1013 is substantively identical to current s. 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.<sup>345</sup> Unlike existing law, the Code contains no exception for contracts for attorney's fees.<sup>346</sup>

With respect to torts, a trustee is personally liable for torts committed in the course of administration of a trust or for obligations arising from the ownership or control of trust property only if the trustee is personally at fault.<sup>347</sup>

<sup>344</sup> 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).

<sup>345</sup> Section 736.1013(1).

<sup>346</sup> Compare s. 737.306(1)(a), F.S.

<sup>347</sup> Section 736.1013(2). *Accord* s. 737.306(1)(b), F.S.

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.<sup>348</sup> 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.<sup>349</sup>

#### *Trustee's Liability as General Partner*

Code s. 736.1015 is new to Florida law. 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;<sup>350</sup> 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.<sup>351</sup>

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.<sup>352</sup>

#### *Limitations on Actions Against Trustees*

Code s. 736.1008 specifies limitations periods for claims by a beneficiary against a trustee for breach of trust.<sup>353</sup> 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.

The shortest limitations period provided in s. 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 document when the trustee has provided the beneficiary with a related limitation

<sup>348</sup> Section 736.1013(3). *Accord* s. 737.306(1)(c), F.S.

<sup>349</sup> Section 736.1013(4). *Accord* s. 737.306(2), F.S.

<sup>350</sup> Section 736.1015(2).

<sup>351</sup> Section 736.1015(1).

<sup>352</sup> Section 736.1015(3).

<sup>353</sup> For the limitations period applicable to actions contesting the validity of a revocable trust after the settlor's death, see s. 736.0604.

notice.<sup>354</sup> 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.<sup>355</sup> In all respects, however, these provisions are identical to the corresponding provisions in s. 737.307, F.S.

A significantly longer limitations period applies to claims involving matters adequately disclosed on a trust accounting when no related limitation notice is sent to the beneficiary. Here, s. 736.1008(1)(a) provides that the claims are barred as provided in chapter 95, F.S. Normally, this will result in a four-year limitations with the period beginning on the date of receipt of the adequate disclosure.<sup>356</sup> 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 12 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. Here again, Code s. 736.1008 is identical to s. 737.307, F.S..

*Matters NOT Adequately Disclosed on a Trust Accounting*

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

- The trustee has issued its final accounting for the trust; and
- The trustee has given written notice to the beneficiary of the availability of trust records for examination and that claims based on matters not adequately disclosed in that accounting may be barred unless the action is commenced within the applicable limitations period provided in chapter 95, F.S.<sup>357</sup>

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.<sup>358</sup>

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, s. 736.1008(3) provides that the applicable limitations period is determined under chapter 95, F.S. That is, the normal limitations period will be 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.

<sup>354</sup> See s. 736.1008(2).

<sup>355</sup> See s. 736.1008(4)(c). 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 s. 736.1008(4)(b) and (c), respectively.

<sup>356</sup> See s. 95.11(3), F.S. See also s. 736.1008(1)(a).

<sup>357</sup> See s. 736.1008(1)(b).

<sup>358</sup> *Id.*

***Limitations on Direct Actions Against Certain Trusts After Settlor's Death***

Code s. 736.10133 is a mandatory provision which prohibits direct actions predicated on the individual liability of the settlor against a trust described in s. 733.707(3), F.S., (e.g., the settlor's revocable living trust) after the settlor's death. Instead, such claims must be presented against the settlor's estate as provided in Part VII of chapter 733, F.S. The Code section confirms that the personal representative of the settlor's estate may obtain payment from the trustee as provided in the Probate Code and in s. 736.05053. Section 736.10133 is identical to s. 737.3061, F.S.

***Protection of Persons Other than Beneficiaries Dealing with the Trustee***

The Code contains two sections of interest to persons other than beneficiaries who deal with trustees. Code s. 736.1016, which is based on Uniform Code s. 1012, provides protection against liability for persons who deal with a trustee in good faith. The section is similar to, but slightly more expansive than, current s. 737.405, F.S. Code s. 736.1017, which is derived from Uniform Code s. 1013 and for which there is no counterpart in s. 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 that the trustee is actually a former trustee whose trusteeship has terminated. Additionally, 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, meaning that the protections it provides may not be altered in a trust instrument.<sup>359</sup> The section is similar to current s. 737.405, F.S. Two noteworthy areas of difference include:

- The current section 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, the new section is subservient to other laws (such as the Uniform Commercial Code) relating to commercial transactions and the transfer of securities by fiduciaries.

***Persons Acting in Reliance on a Certification of Trust***

Except when it is required by law or a judicial proceeding concerning the trust, instead of furnishing a complete copy of a trust instrument to a person (other than a beneficiary) who requests it, Code s. 736.1017 provides that the trustee may furnish a certification of trust.<sup>360</sup> The section sets out certain required information that must be included in the certification<sup>361</sup> among

---

<sup>359</sup> See s. 736.0105(2)(v).

<sup>360</sup> Section 736.1017(1) and (8).

<sup>361</sup> 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. Section 736.1017(4).



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.<sup>362</sup>

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;<sup>363</sup>
- 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.<sup>364</sup>

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, however, knowledge of a trust's terms may not be inferred solely because the recipient is in possession of a copy of the trust instrument.<sup>365</sup>

### **Part XI: Rules of Construction (ss. 736.1101 – 736.1108)**

Part XI contains a series of default rules of construction. Except for the provisions included on the mandatory list in s. 736.0105(2) (of which there is only one—s. 736.1108—dealing with penalty clauses for contesting trusts), the intent of the settlor as expressed in the terms of the trust controls the legal effect of the trust dispositions. In ascertaining that intent, however, in the absence of a contrary indication in the terms of a trust, the rules of construction set out in Part XI of the Code apply.<sup>366</sup>

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

#### *Carryover Provisions from Existing Law*

Code s. 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.

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

---

<sup>362</sup> Section 736.1017(3).

<sup>363</sup> Section 736.1017(5).

<sup>364</sup> See s. 736.1017(7).

<sup>365</sup> See s. 736.1017(6).

<sup>366</sup> See s. 736.1101(2).

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.

Absent a contrary provision in the trust instrument or in a judgment for dissolution of marriage or divorce, s. 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.

Code s. 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). 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. The section gives the beneficiary:

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

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<sup>367</sup> are unenforceable. The second subsection of s. 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.<sup>368</sup>

#### ***Antilapse and the Descendibility of Beneficial Interests in Trusts***

Section 736.1106 is new. Like current s. 737.6035, F.S., which it will replace, the new section is concerned with antilapse and the descendibility of beneficial interests in trusts. The new section would apply to all trusts except those which are irrevocable on the effective date of the Code.<sup>369</sup>

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 s. 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., appears below instead of later in the staff analysis where other conforming changes are addressed.

<sup>367</sup> *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).

<sup>368</sup> Section 736.1108(2). For this purpose, a revocable trust is treated as if it was created when the right of revocation terminates.

<sup>369</sup> Section 736.1106(5).

*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,<sup>370</sup> 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 Wife.<sup>371</sup> Then, in 2003, s. 737.6035, F.S., was created to apply similar rules in the case of interests created in living trusts.<sup>372</sup>

The changes made to s. 732.603, F.S., in 2001 and the creation of s. 737.6035, F.S., in 2003 solved some problems but created others. A partial list of the problems created includes:

- 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.<sup>373</sup>

Along with the Code's revision to the trust antilapse statute, the related antilapse statute found in the Probate Code is also revised. Together, these two provisions constitute a new coordinated and more comprehensive default regime covering antilapse and descendibility issues in both testamentary and nontestamentary contexts.

*Revisions to s. 732.603, F.S.*<sup>374</sup>

As detailed above, under existing law, lapse and descendibility rules for testamentary trusts

<sup>370</sup> See s. 731.201(9), F.S.

<sup>371</sup> The 2001 changes became effective January 1, 2002. Chapter 2001-266, s. 51, L.O.F.

<sup>372</sup> Section 737.6035, F.S., became effective on June 12, 2003. Chapter 2003-154, s.18, L.O.F.

<sup>373</sup> For more on these and other issues related to s. 732.603, F.S. and 737.6035, F.S., see David Powell, *Lapse, Antilapse, and Descendible Beneficial Interests in Trusts*, in ADMINISTRATION OF TRUSTS IN FLORIDA, chapter 7 (4<sup>th</sup> Ed. The Florida Bar 2005).

<sup>374</sup> In the interest of clarity, the adjective "new" is used when referencing the newly formulated version of s. 732.603, F.S.

appear in s. 732.603, F.S., of the Probate Code while the companion rules for living trusts appear in s. 737.6035, F.S. The division of labor under the new regime is different. Because Code s. 736.1106 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.<sup>375</sup> In addition, new s. 732.603, F.S., is revised as follows.

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

Current s. 732.603, F.S., is not clear on whether and how it applies to outright interests created by the exercise of testamentary powers of appointment. In contrast, new s. 732.603, F.S., explicitly applies to these interests.<sup>376</sup>

Example 4 — Outright Exercise of Testamentary Power. At his death, D is the life beneficiary of a trust created by his uncle F. Under the terms of the trust, D has a testamentary power to appoint property among D's descendants. D's will purports to appoint \$100,000 to his child C. But C predeceased D, survived by GC who survived D. In the absence of a contrary intent, new s. 732.603, F.S., provides that GC becomes entitled to the \$100,000 D tried to appoint to C. Note, however, the following additional observations about this example:

- It is immaterial to the result whether F created D's power in an *inter vivos* or a testamentary instrument.
- Application of the new section 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 the new section 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 the new section, whether D's power is a general one or a special one. With the latter, however, there exists the possibility that the person in whose favor the section operates is outside the class of permissible objects of the power.<sup>377</sup> The section explicitly permits this unless the language creating the power expressly excludes the substitution of descendants for an object of the power.<sup>378</sup>

Like its predecessor, new s. 732.603, F.S., yields to an indication of a contrary intent. This would include a direction in the testator's will that lapsed gifts are to be added to the residue or that they are to pass instead to an alternate beneficiary. In this regard, the new section also codifies existing Florida case law which holds that mere words of survivorship associated with a

<sup>375</sup> New s. 732.603(4), F.S.

<sup>376</sup> See new s. 732.603(2), F.S.

<sup>377</sup> To illustrate, if D's power in the above example had been to appoint among his children instead of his descendants, the operation of new s. 732.603, F.S., will be to preserve the gift for a person (GC) who is not an object of D's power.

<sup>378</sup> See new s. 732.603(2), F.S.

testamentary disposition are a sufficient indication of contrary intent.<sup>379</sup> 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."<sup>380</sup>

*Beneficial Interests in Trust - General Effect of s. 736.1106*

With some exceptions discussed below, Code s. 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.<sup>381</sup> In such situations, s. 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, s. 736.1106 creates a per stirpital alternate gift in such of the deceased beneficiary's descendants as are living at that time.<sup>382</sup>

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

Example 5 — Beneficial Future Interest in Trust. D dies with a will in which he devises property to a testamentary trust to pay "income to W for life; remainder in corpus to C." C dies after D survived by W and by two children GC-1 and GC-2. Some time later, W dies survived by C's two kids. On the facts of this example, and again assuming no contrary intent appears in the trust instrument, s. 736.1106 creates a per stirpital alternate gift of C's interest in favor of GC-1 and GC-2

The effect of s. 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.<sup>383</sup>

Section 736.1106(1)(a) applies to a broad array of situations where the beneficiary of a future interest in a trust dies before the time the interest becomes possessory. The only two exceptions are situations where a contrary intent appears in the instrument and where the beneficial interest involved is one created in a trust that became irrevocable before the effective date of the Code. Thus, in the illustrative context of Example 5, the section would apply:

- Whether the trust in which C held his interest was created by standard transfer or by an exercise of a power of appointment, and in the latter case, whether the power was general or special.

<sup>379</sup> See *Williams v. Williams*, 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).

<sup>380</sup> See new s. 732.603(3)(a), F.S.

<sup>381</sup> The section refers to this as the "distribution date." See s. 736.1106(1)(b).

<sup>382</sup> Section 736.1106(2).

<sup>383</sup> 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).

- 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.<sup>384</sup>
- Whether or not the trust settlor and predeceasing beneficiary are related. That is, unlike s. 732.603, F.S., of the Probate Code, there is no relationship test under s. 736.1106.

The absence of a relationship test in s. 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 s. 736.1106 is different. It is found in large part on matters of economy and administrative convenience. To illustrate, consider the impact of s. 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 be reached by C's creditors (including the elective share right of C's surviving spouse); and
- It will not be necessary to reopen administration of C's estate at W's subsequent death in order to determine who is entitled to C's interest.

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

It was mentioned previously that application of s. 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 the first principle because to do so is to invite the problems the section was designed to avoid.

The second principle (that an alternate gift arises) 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:

---

<sup>384</sup> See s. 736.1106(1)(a) and (c).

- 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's interest.<sup>385</sup>

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.<sup>386</sup>

In some cases, there will be no eligible alternate taker for the contingent interest arising from an application of the first principle of s. 736.1106. 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.

If the interest was created in a nonresiduary devise in the *transferor's* will (i.e., a traditional transfer), the interest will pass as part of the transferor's residuary estate.<sup>387</sup> 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.<sup>388</sup>

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.

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) 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. Finally, since there is no relationship test under s. 736.1106, all of the above remains true even if D and C are unrelated to each other.

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 distinctions:

---

<sup>385</sup> See s. 736.1106(3)(a) on the use of survivorship for the purposes of avoiding the application of the antilapse statute to designate an alternative taker in the event that a beneficiary predeceases the distribution date.

<sup>386</sup> See s. 736.1106(3)(b).

<sup>387</sup> Section 736.1106(4)(b).

<sup>388</sup> Section 736.1106(4)(c).

- First, prior to application of the above rules, preference is given to the power donor's gift-in-default clause, if any.<sup>389</sup>
- Second, in the application of the above rules, "transferor" denotes the donor of a nongeneral power or the donee of a general power.<sup>390</sup>

## **Part XII: Charitable Trusts (ss. 736.1201 – 736.1210)**

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 737.510 and 737.512, F.S., were omitted, the latter because it is obsolete and the former because charitable organizations expressly designated in a trust instrument are given the rights of a qualified beneficiary under Code s. 736.0110(1). 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 s. 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 s. 736.1205.
- **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 s. 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 s. 736.1204.
- **Section 736.1206** – This section is derived from s. 737.506, F.S. References to s. 737.504(2), F.S., were updated to Code s. 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 s. 736.1208(5).
- **Section 736.1210** – This section is identical to s. 737.511, F.S.

---

<sup>389</sup> See s. 736.1106(4)(a).

<sup>390</sup> See s. 736.1106(4).



### **Part XIII: Miscellaneous (ss. 736.1301 – 736.1303)**

Part XIII of the Code contains three 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 ensure the primacy of any Code provisions that may be added in the future.

#### *Severability*

Section 736.1302 is a severability clause that is intended to ensure that the invalidity of one or more provisions of the Code will not affect the validity of other provisions.

#### *Effective date*

The Code is effective on July 1, 2007. Section 736.1303 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.<sup>391</sup>
- Nor does it 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.<sup>392</sup>
- The Code applies to all judicial proceedings concerning trusts commenced on or after its effective date.<sup>393</sup>
- It 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.<sup>394</sup>
- 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.<sup>395</sup>

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

---

<sup>391</sup> Section 736.1303(1)(e).

<sup>392</sup> Section 736.1303(2).

<sup>393</sup> Section 736.1303(1)(b).

<sup>394</sup> Section 736.1303(1)(c).

<sup>395</sup> Section 736.1303(1)(a).

<b>Section</b>	<b>Title or topic</b>	<b>Effective date:</b>
736.0403	Trusts created in other jurisdictions; formalities required for testamentary aspects of 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 new Code itself, there are 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 discussed below:

- **Section 689.075(4), F.S.** – *Revised*. The second sentence of this subsection was deleted as obsolete.
- **Section 689.175** – *New*. This section abolishes the “Doctrine of Worthier Title” as both a rule of law and a rule of construction. The purposes originally served by that doctrine are no longer relevant and its application can create adverse tax consequences and can impair the validity of special needs trusts.
- **Section 731.103, F.S.** – *Revised*. The section is made applicable to new chapter 736; the provision specifying the applicability of the rules of evidence in civil actions is moved to new s. 731.1035 (below); subsection (4) permitting proof of death by direct or circumstantial evidence before expiration of five-year time period is added to conform this section to s. 737.626(4), F.S.
- **Section 731.1035** – *New*. This new section is separated out from s. 731.103, F.S. (see above). It specifies that the rules of evidence in civil action apply to proceedings under Probate Code.
- **Section 731.201(2) and (9), F.S.** – *Revised*. In both of these subsections, a reference to beneficiaries described in s. 737.303(4)(b), F.S., is changed to qualified beneficiary as defined in the new Code.
- **Section 731.201(27), F.S.** – *New*. This section adds a new definition of “power of appointment.”
- **Section 731.303, F.S.** – *Revised*. This section is amended to limit it to proceedings involving estates and not those involving trusts. In addition, the portions of the section dealing with representation by holders of powers of appointment are subjected to the same restrictions that appear in Code s. 736.0302. That is, representation does not apply to matters involving a trustee’s fraud or bad faith, to 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.
- **Section 732.604, F.S.** – *Clarified*. Subsection (2) of this section is revised for clarify.
- **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

- that have standing to object to the use of a trustee's power to adjust with respect to trusts in existence on January 1, 2003. The new term excludes from the class of beneficiaries with standing the middle tier qualified beneficiaries described in Code s. 736.0103(14)(b) unless there is no third tier qualified beneficiary described in s. 736.0103(14)(c). The practical effects 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 ensure that there will always be two categories of qualified beneficiaries with standing to object to an exercise of the trustee's adjustment power.
- **Section 744.331(6)(b) and (f), F.S. – Revised.** These are companion revisions to the change made in Code s. 736.0207, 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 related to new Code s. 736.0207. Subsection (11) directs that before authorizing a guardian to bring an action under s. 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– 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.

#### IV. Constitutional Issues:

##### A. Municipality/County Mandates Restrictions:

None.

##### B. Public Records/Open Meetings Issues:

None.

##### C. Trust Funds Restrictions:

None.

**D. Other Constitutional Issues:****Retroactivity**

Florida courts have found that the Legislature has the authority to apply a law retroactively as long as the new law does not impair a vested right.<sup>396</sup> Courts have used a weighing process to decide whether to sustain the retroactive application of a statute which has three considerations: the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected.<sup>397</sup>

Section 736.1303 provides that the new Code applies retroactively to all trusts, whenever created, except where stated otherwise in the text of the bill. Although this has the advantage of avoiding the maintenance of two systems of trust law for extended periods of time, in some instances retroactive application can be constitutionally impermissible (e.g., where it impairs vested rights) or unfair. To address the issue of retroactivity, the bill provides varying effective dates and provides the court with discretion in its application of the new code in order to limit the default retroactivity.

**Personal Jurisdiction**

Section 736.0202 pertains to personal jurisdiction by Florida courts over the trustee, beneficiaries, and recipients of trust distributions. Specifically, s. 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.

As discussed above, current chapter 737, F.S, has no provision corresponding to section 736.0202. Jurisdiction under existing law is obtained under the general long arm statutes found in chapter 48, F.S.

Even assuming, for the sake of argument, that the provisions of the Florida Long Arm Statute have been satisfied, federal due process requirements must be addressed. The U.S. Supreme 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.”<sup>398</sup>

Nevertheless, the U.S. Supreme Court maintains that the “constitutional touchstone remains whether the defendant purposefully established ‘minimum contacts’ in the

---

<sup>396</sup> *Dept. of Transportation v. Knowles*, 402 So. 2d 1155, 1157 (Fla. 1981); *Village of El Portal v. City of Miami Shores*, 362 So. 2d 275, 277 (Fla. 1978); *McCord v. Smith*, 43 So. 2d 704, 708-709 (Fla. 1949).

<sup>397</sup> *Knowles*, 402 So. 2d at 1158.

<sup>398</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985).

forum.”<sup>399</sup> The Court will look to the individual’s “conduct and connection with the forum State” to determine if that person “should reasonably anticipate being haled into court there.”<sup>400</sup> 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.”<sup>401</sup>

“This ‘purposeful availment’ requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts, or of the ‘unilateral activity of another party or a third person. Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a “substantial connection” with the forum State.”<sup>402</sup>

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.’”<sup>403</sup> 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.”<sup>404</sup> 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.

### **Conflict of Laws**

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.”

---

<sup>399</sup> *Id.* at 474-75.

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Rudzewicz*, 471 U.S. at 475-76. (emphasis in original).

<sup>403</sup> *Georgia Insurers Insolvency Pool v. Brewer*, 602 So. 2d 1264, 1268 (Fla. 1992)(citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

<sup>404</sup> *Id.* (citing *Rudzewicz*, 471 U.S. 462 (1985)).

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, s. 736.0403(2)(b) does not contain an “out” for trusts executed in other states by Florida domiciliaries. The section applies to testamentary aspects of 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 New York with testamentary aspects which seeks to solely dispose of property located in New York unless New York has identical formalities to Florida required for the execution of a will. Such a result may create a potential conflicts of laws problem.

## **V. Economic Impact and Fiscal Note:**

### **A. Tax/Fee Issues:**

None.

### **B. Private Sector Impact:**

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

Traditionally, self-settled trusts have been treated harshly when it comes to creditors’ rights. Under Code s. 736.0505(1), whether or not a trust includes a spendthrift provision, property in a revocable trust is subject to the claims of the settlor’s creditors. 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.

### **C. Government Sector Impact:**

None.

## **VI. Technical Deficiencies:**

In s. 736.403(4), which provides for formalities of a revocable trust created in another jurisdiction, the committee substitute replaced the words “This section” with “Paragraph (2)(b).” This was revised to reflect that the exception to retroactive application of s. 736.403 only applies to (2)(b) (the requirement that the testamentary aspects of revocable trusts created in other jurisdictions be executed in the manner provided for wills in Florida) and not the entire section.

The second sentence of this subsection providing that “[s.] 737.111, as in effect prior to the effective date of this code, continue to apply to trusts created before the effective date of this code,” was not revised to reflect the section’s more narrow application to (2)(b) (i.e., testamentary aspects of revocable trusts, only). The Legislature may wish to clarify this second sentence so that it tracks with the more narrow application of this subsection adopted in the committee substitute.

**VII. Related Issues:**

None.

---

This Senate staff analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

---



## **VIII. Summary of Amendments:**

None.

---

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

---