

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Civil Justice Committee</u>	<u>7 Y, 0 N, w/CS</u>	<u>Shaddock</u>	<u>Bond</u>
2) <u>Elder &amp; Long-Term Care Committee</u>	<u></u>	<u></u>	<u></u>
3) <u>Economic Development, Trade &amp; Banking Committee</u>	<u></u>	<u></u>	<u></u>
4) <u>Justice Council</u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

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### SUMMARY ANALYSIS

The Trust Code is that portion of the Florida Statutes which pertains to the administration of trusts. This bill creates a comprehensive new trust code loosely modeled on the Uniform Trust Code of 2000, with a number of changes that center primarily on updating current Florida law. This bill seeks to include the requirements for trust creation, the treatment of revocable trusts, and the rights of creditors within this new Trust Code. Some current provisions of the trust code -- in particular, those dealing with representation and with trust modification, termination and reformation -- are updated and expanded.

Significant changes to current law include:

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

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

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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**DATE:** 1/27/2006

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

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

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

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

#### B. EFFECT OF PROPOSED CHANGES: <sup>1</sup>

##### **Background**

A trust is generally defined as:

a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. . . . [A] "beneficiary of a trust" [is] one who has an equitable interest in property subject to a trust and who enjoys the benefit of the administration of the trust by a trustee. The trustee is the person who holds the legal title to the property held in trust, for the benefit of the beneficiary. The settlor, or trustor, is the person who creates the trust.<sup>2</sup>

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

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

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<sup>1</sup> The bulk of this analysis is specifically derived from "Florida Trust Code Executive Summary" and "Florida Trust Code Scrivener's Summary" which was graciously supplied by The Ad Hoc Trust Code Revision Committee, hereinafter referred to as the "Committee". The Committee labored for four years to prepared a thorough new trust code for Florida. The Committee was co-chaired by Brian J. Felcoski and Laird A. Lile. Other members included William F. Belcher, Debra L. Boje, Sandra F. Diamond, Robert W. Goldman, John G. Grimsley, Rohan Kelley, William R. Lane, Jr., William T. Marks, Barry F. Spivey, F. Gordon Spoor, Laura P. Stephenson, Bruce M. Stone, Donald R. Tescher, Marjorie E. Wolasky and G. Charles Wohlust. Professor David F. Powell of the Florida State University College of Law served as Committee Scrivener.

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

<sup>3</sup> Section 731.201(17), F.S.

<sup>4</sup> 90 C.J.S. Trusts s.2.

<sup>5</sup> Section 731.201(35), F.S.

<sup>6</sup> 55A Fla. Jur. 2d Trusts s.2.

An express trust is a trust intentionally created by the direct and positive act of the settlor, by some writing, deed, or will, or oral declaration. Express trusts are distinguishable from trusts by operation of law, resulting and constructive, in that the latter are respectively founded on an intention of the parties to a transaction implied in law, or on fraud or wrong irrespective of the intention of the parties concerned.<sup>7</sup>

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

### What Is Different Under HB 425?<sup>8</sup>

By way of preview, the following is a brief catalogue of some of the more important changes Chapter 736, referenced herein as the Florida Trust Code ("FTC" or the "Code"), makes to existing Florida law. Each of these is examined in greater depth later in this Analysis.

- **Representation:** The FTC includes the very useful representation provisions found in the Uniform Code but expands the provision dealing with representation by a holder of a power of appointment<sup>9</sup> and adds a new provision permitting a settlor to designate a representative (e.g., a trust protector).<sup>10</sup>
- **Trust Creation:** The requirement that trusts containing land be evidenced by a signed writing is affirmed; the unique Florida requirement that the testamentary aspects of trusts be executed with the formalities required for a will is limited to revocable trusts;<sup>11</sup> and the capacity needed to create a revocable trust is specified to be the same as that required for the execution of a will.<sup>12</sup>
- **Trust Modification:** In general, the FTC includes the Uniform Code provisions dealing with trust creation, modification and termination, although UTC section 411, which has been the subject of considerable discussion on estate planning list serves, was replaced with Florida's existing trust modification provisions.<sup>13</sup>
- **Charitable Trusts:** The authority the Attorney General has at common law to enforce charitable trusts is codified<sup>14</sup> and standing to enforce charitable trusts is extended to the settlors who create them<sup>15</sup> and to charitable organizations designated in an instrument to receive distributions from them.<sup>16</sup>
- **Creditor's Rights:** For trusts created after the effective date of the Code, a spendthrift clause must restrain both voluntary and involuntary alienation,<sup>17</sup> and the exceptions for child support

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<sup>7</sup> *Id.* at s.8

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

<sup>9</sup> See s. 736.0302, F.S. discussed *infra* at p. 14.

<sup>10</sup> See s. 736.0306, F.S. discussed *infra* at p. 15.

<sup>11</sup> See s. 736.0403, F.S. discussed *infra* at p. 18.

<sup>12</sup> See s. 736.0601, F.S. discussed *infra* at p. 28.

<sup>13</sup> See ss. 736.4113 - .412, F.S. discussed *infra* beginning at p. 19.

<sup>14</sup> See s. 736.0110(3), F.S.

<sup>15</sup> See s. 736.0405(3), F.S.

<sup>16</sup> See s. 736.0110(1), F.S.

<sup>17</sup> See s. 736.0502(1), F.S., discussed *infra* at p. 26.

and alimony are no longer "last resort" exceptions.<sup>18</sup> Note that the Code does NOT permit the creation of self-settled asset protection trusts or adversely affect the asset protection features of third-party trusts.

- **Revocable Trusts:** With respect to revocable trusts, the Code provides that trusts are revocable by default,<sup>19</sup> that a method of revocation expressed in an instrument is exclusive,<sup>20</sup> and that while a trust is revocable, the trustee owes duties only to the settlor.<sup>21</sup> This last principle also applies when a beneficiary has a right of withdrawal over trust property. That is, a holder of a right of withdrawal is treated as a settlor while the power is exercisable.<sup>22</sup>
- **Affiliated Services:** A trustee is permitted to engage in affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company<sup>23</sup> and receiving additional compensation for that investment.<sup>24</sup>
- **Miscellaneous and Conforming:** The existing antilapse statute for inter vivos trusts is replaced with a new provision more broadly applicable to the descendibility of future interests in both testamentary and inter vivos trusts;<sup>25</sup> the Worthier Title Doctrine is abolished;<sup>26</sup> sections 731.103 (evidence of death or status) and 731.201, F.S. (definitions) now apply to chapter 736; a new definition for "power of appointment" has been added to section 731.201, F.S.; section 731.303, F.S. (representation) no longer applies to proceedings involving trusts; and section 732.603, F.S. (antilapse) now applies only to outright devises and appointments.<sup>27</sup>

## What Is the Same?

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

- Section 737.204, F.S. dealing with the employment of agents and the review of compensation.<sup>28</sup>
- Section 737.206, F.S. dealing with the effect of fraud, duress, mistake and undue influence.<sup>29</sup>
- Sections 737.4031 and 737.4032, F.S. dealing with judicial and nonjudicial modification of trusts.<sup>30</sup>
- Sections 737.3054 and 737.308, F.S. dealing with a trustee's duty to pay the expenses and obligations of a settlor's estate and to provide a notice of trust at the settlor's death.<sup>31</sup>
- Section 737.306(6), F.S. dealing with the protection of successor trustees.<sup>32</sup>

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<sup>18</sup> See s. 736.0503(2), F.S., discussed infra at p. 25.

<sup>19</sup> See s. 736.0602(1), F.S., discussed infra at p. 29.

<sup>20</sup> See s. 736.0602(3)(b), F.S., discussed infra at p.29 .

<sup>21</sup> See s. 736.0603(1), F.S., discussed infra at p. 28.

<sup>22</sup> See s. 736.0603(2), F.S., discussed infra at p. 28.

<sup>23</sup> See s. 736.0802(5), F.S., discussed infra at p. 39.

<sup>24</sup> See s. 736.0802(5), F.S..

<sup>25</sup> See s. 736.0926, F.S., discussed infra at p. 56.

<sup>26</sup> See s. 689.175, F.S., discussed infra at p. 61. Black's defines this doctrine as "[t]he common-law doctrine that if a beneficiary of a will would receive an identical interest as an heir under the laws of intestacy, the person takes the interest as an heir rather than as a beneficiary." Black's Law Dictionary, 1639 (rev. 8th ed. 2004).

<sup>27</sup> See s. 732.603, F.S., discussed infra at p. 55.

<sup>28</sup> See s. 736.0206, F.S., discussed infra at p. 12.

<sup>29</sup> See s. 736.0406, F.S., discussed infra at p. 16.

<sup>30</sup> See ss. 736.04113 through .0412, F.S., discussed infra beginning at p. 19.

<sup>31</sup> See ss. 736.0505 and .05055, F.S., discussed infra at p. 28.

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

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

## The Code in Depth

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

### General Provisions and Definitions (Part I)

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

<sup>32</sup> See s. 736.08125, F.S., discussed *infra* at p. 40.

<sup>33</sup> See s. 736.08135, F.S., discussed *infra* at p. 40.

<sup>34</sup> See s. 736.0814(2) and (3), F.S., discussed *infra* at p. 44.

<sup>35</sup> See s. 736.08163, F.S., discussed *infra* at p. 42.

<sup>36</sup> See s. 736.08165, F.S., discussed *infra* at p. 37.

<sup>37</sup> See s. 736.0904 through .09047, F.S., discussed *infra* at p.48.

<sup>38</sup> See s. 736.0905 and .09103, F.S., discussed *infra* at pp. 49.

<sup>39</sup> See s. 736.0914, F.S., discussed *infra* at p. 46.

<sup>40</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 s. 736.0102 the same as UTC s. 102, etc. In the many instances where an FTC section is identical to or is based on a corresponding section of the UTC, the extensive comments to the UTC section provide important additional guidance and authority. The parallel numbering scheme used in the FTC should facilitate reference to the appropriate UTC comment. Unfortunately though, it was not possible to continue the parallel numbering scheme throughout the entire Code. Under the numbering scheme used in the UTC, a section such as 1010 would appear in Article Ten. Under the numbering scheme dictated by the Florida statutes, a section 736.01010 would appear in Part I, somewhere between sections 736.0101 and 736.0102. Accordingly, the desired parallelism between the two codes breaks down beginning with Part X of the Code.

<sup>41</sup> Sections 736.0101 and 736.0112, F.S. are not discussed in this summary. The former merely specifies a citation form and internal title for the Florida Trust Code. Section 736.0112, F.S. dispenses with local qualification for certain foreign trustees who receive distributions from a local estate. The section is identical to s. 737.105, F.S.

<sup>42</sup> See s. 736.0102, F.S.

<sup>43</sup> See s. 736.0103, F.S.

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

## Scope and Applicability

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

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

## Important Definitions

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

## Beneficiaries and Qualified Beneficiaries

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

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

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<sup>44</sup> See s. 736.0105 and .0106, F.S.

<sup>45</sup> See s. 736.0104, F.S.

<sup>46</sup> See s. 736.0109, F.S.

<sup>47</sup> See s. 736.0108, F.S.

<sup>48</sup> See s. 736.0111, F.S.

<sup>49</sup> *I.e.*, resulting and constructive trusts.

<sup>50</sup> See s. 736.0102, F.S.

<sup>51</sup> On the retroactive application of the Code, see "*Effective date*", *infra* p. 60.

<sup>52</sup> The designation is ineffective if it is contrary to a strong public policy of this state. See s. 736.0107(3), F.S.

<sup>53</sup> In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction where the settlor resides at the time the trust was first created will control. Section 736.0107(2), F.S. With respect to any particular matter, the designation is not effective if it is contrary to a strong public policy of this state. Section 736.0107(3), F.S.

<sup>54</sup> Section 736.0107(3), F.S.

<sup>55</sup> See s. 736.0103(3), F.S.

<sup>56</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.

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

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

**Example 2 — Meaning of Qualified Beneficiary.** Same facts as **Example 1**. The qualified beneficiaries of D’s trust, *as of his death*, include S, C1, C2 and Bob. S is included because she is a permissible distributee.<sup>60</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 she to die at that time).<sup>61</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>62</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.

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

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

<sup>58</sup> It is this latter term that the Code employs in the various provisions dealing with notice and consent.

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

<sup>60</sup> Section 736.0105(14)(a), F.S.

<sup>61</sup> Section 736.0105(14)(b), F.S.

<sup>62</sup> Section 736.0105(14)(c), F.S.

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

- The Code extends the rights of a qualified beneficiary to any charitable organization expressly designated to receive distributions from a charitable trust if the organization would otherwise meet the definition of a qualified beneficiary.<sup>64</sup>
- In addition, the Code authorizes the Attorney General<sup>65</sup> to assert the rights of a qualified beneficiary with respect to charitable trusts.<sup>66</sup>

### Other Important Terms

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

- The term "affiliate" is defined as any person or entity that directly or indirectly through one or more intermediaries owns or controls, is owned or controlled by, or is under common control or ownership, with the fiduciary.<sup>67</sup>
- The term "settlor" includes anyone who either creates or transfers property to a trust, including a testator.<sup>68</sup>
- The term "trustee" includes additional, successor, and cotrustees;<sup>69</sup>
- A trust is "revocable" if it is revocable by the settlor without the consent of either the trustee or an adverse person;<sup>70</sup>
- A power of appointment<sup>71</sup> is a "general power" if it is exercisable in favor of it's holder, the holder's estate, or the creditors of either the holder or the holder's estate;<sup>72</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>73</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>74</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>75</sup> This should be contrasted with the more expansive

<sup>64</sup> See s. 736.0110(1), F.S. The rights referred to in the section are the right to information and the right to participate in actions taken with the consent of the qualified beneficiaries.

<sup>65</sup> The Committee had extensive discussion about giving the Attorney General the rights of a qualified beneficiary with respect to charitable trusts. On the one hand, the Committee recognized the common law authority of the Attorney General to police charitable trusts on behalf of the public. On the other hand, the Committee saw no advantage to requiring trustees to send unwanted and unneeded information to the Attorney General. The approach adopted in the Code is a compromise. Under the Code, a trustee of a charitable trust has no duty to send notices, information, accountings, etc. to the Attorney General unless and until he or she asserts the rights of a qualified beneficiary with respect to the trust.

<sup>66</sup> See s. 736.0110(3), F.S.

<sup>67</sup> See s. 736.0103(2), F.S.

<sup>68</sup> See s. 736.0103(16), F.S.

<sup>69</sup> See s. 736.0103(21), F.S.

<sup>70</sup> See s. 736.0103(15), F.S.

<sup>71</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>72</sup> See s. 736.0103(6), F.S.

<sup>73</sup> See s. 736.0103(12), F.S.

<sup>74</sup> See s. 736.0103(2), F.S.



“terms of a trust” includes both the terms specified in a trust instrument and such terms as might be established by other evidence admissible in a judicial proceeding; and<sup>76</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>77</sup>

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

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

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

- Those relating to the requirements for the creation of a trust including trust formalities<sup>79</sup> and the requirement that the purpose of a trust be lawful, possible to achieve, and not contrary to public policy.<sup>80</sup>
- Those containing public policy restrictions on the designation of a principal place of administration<sup>81</sup> and the effect of penalty,<sup>82</sup> spendthrift,<sup>83</sup> and exculpatory clauses.<sup>84</sup>
- Those covering procedural matters including jurisdiction,<sup>85</sup> venue,<sup>86</sup> and limitations on commencing judicial actions.<sup>87</sup>
- Those dealing with court powers, including the power to adjust a trustee's compensation;<sup>88</sup> to act in the interests of justice;<sup>89</sup> to require, dispense with, modify, or terminate a trustee's bond;<sup>90</sup> and, except as otherwise provided elsewhere in the Code, the power to modify or terminate a private or charitable trust.<sup>91</sup>

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<sup>75</sup> See s. 736.0103(20), F.S.

<sup>76</sup> See s. 736.0103(19), F.S. The difference between the two concepts can be seen in the context of an oral trust of personal property. Such a trust would have terms but no instrument.

<sup>77</sup> See s. 737.0103(9), F.S.

<sup>78</sup> See s. 736.0105(1), F.S.

<sup>79</sup> See s. 736.0105(2)(a), F.S.

<sup>80</sup> See s. 736.0105(2)(c), F.S.

<sup>81</sup> See s. 736.0105(2)(p), F.S.

<sup>82</sup> See s. 736.0105(2)(u), F.S.

<sup>83</sup> See s. 736.0105(2)(e), F.S.

<sup>84</sup> See s. 736.0105(2)(k), F.S.

<sup>85</sup> See s. 736.0105(2)(o), F.S.

<sup>86</sup> *Id.*

<sup>87</sup> See s. 736.0105(2)(m), F.S.

<sup>88</sup> See s. 736.0105(2)(g), F.S.

<sup>89</sup> See s. 736.0105(2)(n), F.S.

<sup>90</sup> See s. 736.0105(2)(f), F.S.

<sup>91</sup> See s. 736.0105(2)(d), F.S.

- 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>92</sup> the duty to notify, account to<sup>93</sup>, and respond to requests for information by qualified beneficiaries;<sup>94</sup> and with respect to a revocable trust, the duty to file a notice of trust at the death of the settlor<sup>95</sup> and to pay the expenses and obligations of the settlor's estate.<sup>96</sup>
- Certain miscellaneous provisions including one giving qualified beneficiaries and the trustee of a dynasty trust the power to amend or terminate the trust<sup>97</sup> and another specifying the rights of third parties who interact with the trust, such as bona fide purchasers, tort or contractual claimants.<sup>98</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>99</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>100</sup>

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

<sup>92</sup> See s. 736.0105(2)(b), F.S.

<sup>93</sup> The committee expressed the following comment. If the experience of other jurisdictions is an indication, it is likely that the mandatory provisions dealing with the duty to account and to provide information to qualified beneficiaries will be the subject of keen interest and discussion. This is understandable because these provisions involve a necessary balancing between a settlor's control and privacy interests on the one hand and the competing interest the beneficiaries have in accessing the information necessary protect their interests on the other. More is said about this elsewhere in this Summary. *See Representation; Privacy; and the Right to Information*, *infra* at p.16. By way of preview, however, the Florida Code balances these interests differently from the Uniform Code in three important respects. First, the duty the UTC imposes on a trustee to notify qualified beneficiaries of the existence of the trust, the identity of the trustee, and their right to reports is mandatory only with respect to qualified beneficiaries who have attained age 25. The FTC makes no distinction based on the age of qualified beneficiaries. Compare UTC s. 105(b)(8) with s. 736.0105(2)(h), F.S. Second, the UTC gives all beneficiaries a right to request reports and information reasonably related to the administration of the trust. Under the FTC, all rights to accountings, reports and information and to a copy of the trust instrument itself are restricted to qualified beneficiaries. Compare UTC s. 813(a) and 105(b)(9) with s. 736.0813, F.S., discussed *infra* p. 40. Finally, revisions and additions to the representation provisions in Part III of the Code provide a means by which settlors can effectively withhold information from one or more qualified beneficiaries. See ss. 736.0302 and 736.0306, F.S., discussed *infra* at pp. 14 and 15, respectively.

<sup>94</sup> See ss. 736.0105(2)(h) – (j), F.S.

<sup>95</sup> See s. 736.0105(2)(t), F.S.

<sup>96</sup> See s. 736.0105(2)(s), F.S.

<sup>97</sup> See s. 736.0105(2)(r), F.S.

<sup>98</sup> See s. 736.0105(2)(l), F.S.

<sup>99</sup> Section 736.0108(4), F.S.

<sup>100</sup> See s. 736.0108(5), F.S. The contents of the required notice is set out in s. 736.0108(6), F.S.

<sup>101</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 ss. 736.0108(2) and (3), F.S. with s. 737.101(1)-(3), F.S.

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

## Factual Knowledge

Section 736.0104, F.S. clarifies when a person is considered to have knowledge of a fact. That occurs if the person has actual knowledge of the fact, has received a notice or notification of it, or, under all of the facts and circumstances known to the person, has reason to know it.<sup>103</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>104</sup>

## Methods and Waiver of Notice

Section 736.0109, F.S. provides that notice of judicial proceedings is to be given as provided in the Florida Rules of Civil Procedure.<sup>105</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>106</sup> Notice and the sending of documents are not required for persons whose identity or location is not reasonably ascertainable by the trustee<sup>107</sup> or who have waived the sending of the notice or document.<sup>108</sup>

## Nonjudicial Settlement Agreements

Under the Code, interested persons<sup>109</sup> may enter into a binding nonjudicial settlement agreement<sup>110</sup> 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>111</sup> and
- The agreement does not produce a result that is not authorized under other provisions of the Code.<sup>112</sup>

## Qualifications of Foreign Trustee

The Code dispenses with local qualifications for certain foreign trustees who receive distributions from a local estate.<sup>113</sup>

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<sup>103</sup> Section 736.0104(1), F.S.

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

<sup>105</sup> Section 736.0108(4), F.S.

<sup>106</sup> See s. 736.0108(1), particularly the last sentence which contains a list of acceptable methods, including a properly directed facsimile or other electronic message.

<sup>107</sup> Section 736.0108(2), F.S.

<sup>108</sup> Section 736.0108(3), F.S.

<sup>109</sup> In this context, interested persons is defined to be those persons whose interest would be affected by the settlement. Section 736.0111(1), F.S.

<sup>110</sup> Corporate trustees are quick to note the usefulness of nonjudicial settlement agreements in harmonious situations to avoid the expense and delays of formal accountings at the termination of a trust. They can be useful in a variety of other contexts as well. For a nonexclusive list of matters that can be resolved by a nonjudicial settlement agreement, see s. 736.0111(4), F.S. One can only assume that the comfort level banks have with this technique will increase under the Code, both because settlement agreements are now authorized by statute and because the representation provisions in Part III should make it easier to get all interested persons "on board."

<sup>111</sup> Court approval may be requested by any interested person. Section 736.0111(5), F.S.

<sup>112</sup> See s. 736.0111(2) and (3), F.S.

<sup>113</sup> Section 737.105, F.S., is essentially identical to s. 736.0112, F.S.

## Judicial Proceedings (Part II)

Part II collects in one place a number of the rules applicable to judicial proceedings involving the validity, administration, and distribution of trusts.<sup>114</sup> Among these are provisions that affirm that, in the absence of a court order, trusts are not subject to continuing judicial supervision;<sup>115</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>116</sup> and that the circuit court has original jurisdiction with respect to all matters arising under the Code.<sup>117</sup>

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

- Section 736.0204, F.S. dealing with venue for actions and proceedings concerning trusts.<sup>118</sup> The section is identical to s. 737.202, F.S.<sup>119</sup>
- Section 736.0205, F.S. dealing with the dismissal of trust proceedings involving matters relating to foreign trusts. The section is identical to s. 737.203, F.S.
- Section 736.0206, F.S., providing for notice and other rules relating to proceedings for the review of the employment of agents and the compensation of the trustee and trust employees. The section is identical to s. 737.204, F.S.
- Section 736.0207, F.S. preventing actions to contest the validity of a trust while it remains revocable. This aspect of the section is identical to s. 737.2065, F.S. In addition, s. 736.0207, F.S. includes a new exception for court approved actions by the guardian of the property of an incompetent settlor.

Lastly, s. 736.0202, F.S.<sup>120</sup> 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>121</sup> With respect to a trust having its principal place of administration in Florida, s. 736.0202, F.S. provides that:

- A trustee submits to the jurisdiction of Florida courts either by accepting the trusteeship or by moving the principal place of administration to this state;
- The beneficiaries are subject to the jurisdiction of Florida courts with respect to any matter involving the trust; and
- Recipients who accept a distribution from a trust submit personally to the jurisdiction of Florida courts regarding any matter involving the distribution.<sup>122 123</sup>

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<sup>114</sup> For a nonexclusive list of possible judicial proceedings, see s. 736.0201(4), F.S. The power of courts to take actions in judicial proceedings involving trusts may not be changed in a trust instrument. See s. 736.0105(2)(n), F.S.

<sup>115</sup> See s. 736.0201(3), F.S.

<sup>116</sup> See s. 736.0201(1), F.S.

<sup>117</sup> See s. 736.0203, F.S. This is a mandatory provision. See s. 736.0105(2)(o), F.S.

<sup>118</sup> This is a mandatory provision. See s. 736.0105(2)(o), F.S.

<sup>119</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.

<sup>120</sup> Chapter 737, F.S. has no provision corresponding to s. 736.0602, F.S. Jurisdiction under existing law is obtained under the general long arm statutes found in ch. 48, F.S. The Committee believes that the inclusion of a long arm statute tailored specifically to trust matters is a beneficial addition to Florida law.

<sup>121</sup> Section 736.0202(3), F.S.

<sup>122</sup> Section 736.0202, F.S. is a mandatory provision. See s. 736.0105(2)(o), F.S.

<sup>123</sup> More is said about this provision for personal jurisdiction in the Constitutional Issues section, *infra* at p. 67.

## Representation (Part III)

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

### Background

In the context in which it is used here, "representation" refers to the authority of one person to act on behalf of another.<sup>124</sup> Under the Code, notice, information, accountings and reports sent to a representative have the same effect as those sent to the person being represented. And actions taken by a representative bind the person being represented to the same extent as actions taken by the person being represented.<sup>125</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 itself – present special considerations and are discussed in greater detail later. The remaining representation types include:

- **Fiduciary:** This category includes those provisions which permit a guardian of the property to represent a ward;<sup>126</sup> an attorney-in-fact to represent a principal;<sup>127</sup> and a trustee or personal representative to represent the beneficiaries of a trust or estate, as the case may be.<sup>128</sup> The Code also provides that a parent may represent an unborn or minor child if no guardian of the property has been appointed.<sup>129</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>130</sup> The classic example of virtual representation involves the representation of minor beneficiaries of a class gift by other adult members of the class.

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<sup>124</sup> The concept of representation is not new to Florida law. Section 731.303, F.S. provides for limited representation in the administration of, or in judicial proceedings involving, decedent's estates and trusts. If the FTC is enacted, a conforming amendment to s. 731.303, F.S., will restrict its application to decedent's estates so all representation regarding trusts will be controlled by the provisions in the FTC. But the Code representation provisions are more extensive. They permit representatives to initiate or consent to actions and to receive accountings and information in both judicial and nonjudicial contests. They apply generically across all provision of the Code. And to a limited extent, they apply to settlors as well as to beneficiaries. See e.g., s. 736.0301(3), F.S. providing that notice or consent given to or by a representative of an incapacitated settlor is binding of the settlor's behalf.

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

<sup>126</sup> See ss. 736.0303(1) and (2), F.S.

<sup>127</sup> See s. 736.0303(3), F.S.

<sup>128</sup> See ss. 736.0303(4) and (5), F.S.

<sup>129</sup> See s. 736.0303(6), F.S.

<sup>130</sup> See s. 736.0304, F.S.

- **Court appointed:** The court may appoint a representative for a person the court determines is not otherwise adequately represented.<sup>131</sup> 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>132</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. Representation by holders of powers of appointment and by settlor-designated persons are the exceptions. As detailed more fully below, the former are subject to a fraud or bad faith restriction; the latter are restricted more directly by limitations on who may be designated as a representative.

## Special Florida Provisions

### Representation by Holders of a Power of Appointment

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

### The Fraud and Bad Faith Limitation

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

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<sup>131</sup> See s. 736.0305(1), F.S.

<sup>132</sup> See s. 736.0305(3), F.S.

<sup>133</sup> See s. 731.303(1), F.S.

<sup>134</sup> Compare UTC s. 302.

<sup>135</sup> Even so, the rationale supporting this type of representation varies with the type of power. For general powers, the rationale lies in the essential equivalency of these powers to ownership. The Committee believes the same rationale supports representation in the case of broadly drafted nongeneral powers, such as a testamentary power to appoint to anyone in the world except the holder of the power, the estate of the holder or the creditors of either. The restrictions on the objects of this type of power exist for tax purposes only.

The supporting rationale for more restrictive nongeneral powers is different. A commonly encountered example of this type of power would be a trust "to pay the income to spouse for life, then to distribute principal to such of settlor's descendants as spouse appoints by will with gift in default of appointment to the descendants per stirpes." In the Committee's view, these powers are used either because existing Florida law permits their use as a means to cut off the flow of information about the trust to the remaindermen during the life tenant's life or because they add flexibility to the trust disposition. In either case, practically speaking, holders of this type of power act as an agent of the creator of the power. If a settlor has sufficient confidence in the holder of a limited nongeneral power to vest him or her with the authority to determine the beneficial ownership of trust property, there is every reason to assume that the settlor would want the power holder to represent the objects and takers in default in other respects. Hence, representation by the holder of a limited special power is a mere manifestation of a principle expressed more formally elsewhere in the Code<sup>135</sup> that a trust settlor should be able to designate persons to serve as representatives of trust beneficiaries.

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

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

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

### **Powers Held by Trustees**

Section 736.0302, F.S. places two other restrictions on the ability of a power holder to represent others under part III of the Code. Both address the same concern – that trustees not be in a position to approve their own actions and accountings. Thus, s. 736.0302, F.S. does not apply to the distribution powers of a trustee.<sup>139</sup> Nor may a beneficiary with a power represent others while the beneficiary is serving as sole trustee.<sup>140</sup>

### **Designated Representatives**

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

### **Trustee May Not Serve as Designated Representative**

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

### **Certain Beneficiaries Serving as Designated Representatives**

The second restriction, which is also mandatory,<sup>143</sup> 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

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

<sup>138</sup> In a conforming amendment, a fraud and bad faith restriction was also added to s. 731.301(1), F.S.

<sup>139</sup> Section 736.0302(2)(b), F.S.

<sup>140</sup> Section 736.0302(2)(c), F.S.

<sup>141</sup> Section 736.0306(2), F.S.

<sup>142</sup> See s. 736.0105(2)(h), F.S.

<sup>143</sup> See *Id.*

- 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>144</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 on the one hand, and the interests qualified beneficiaries have in accessing trust information on the other. Because, the trustee's duty to notify, account to, and respond to requests for information by qualified beneficiaries is mandatory, a settlor may not directly affect this duty in the trust instrument. Nevertheless, with the judicious use of the representation provisions, particularly the power of appointment and designated representative provisions, it should be possible to prevent one or more qualified beneficiaries from gaining access to information the settlor does not wish them to have.<sup>145</sup>

## **Trust Creation, Validity, Modification and Termination (Part IV)**

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

### **Trust Creation and Validity**

Under the Code, a trust may be created by inter vivos or testamentary transfer, by a settlor's self declaration of trust, or by the exercise of a power of appointment.<sup>146</sup> In broad outline and subject to further refinement below, to create a trust a settlor having the capacity to do so<sup>147</sup> must intend to create a trust<sup>148</sup> for a purpose that is lawful, consistent with public policy and possible to achieve.<sup>149</sup> The trust must not be passive, meaning that the trustee must have enforceable duties to perform.<sup>150</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>151</sup>

### **Ascertainable Beneficiaries**

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

<sup>144</sup> See ss. 736.0306(3)(a) and (b), F.S.

<sup>145</sup> Although a settlor may be motivated by a desire to restrict access to information about a trust, the settlor's intent in this regard is merely precatory. That is, a trustee who gives notices, accountings, etc., directly to a person who is represented by another under the Code is not individually liable for doing so. Section 736.0301(5), F.S.

<sup>146</sup> Section 736.0401, F.S.

<sup>147</sup> Section 736.0402(1)(a), F.S.

<sup>148</sup> Section 736.0402(1)(b), F.S.

<sup>149</sup> Section 736.0404, F.S.

<sup>150</sup> Section 736.0402(1)(d), F.S. Accord, *Elvins v. Seestedt*, 141 Fla. 266, 193 So. 54, 126 A.L.R. 1001 (1940); *Watson v. St. Petersburg Bank and Trust Company*, 146 So.2d 383 (Fla. 2d DCA 1962); *Baum v. Corn*, 167 So.2d 740 (Fla. 2d DCA 1964). The requirement that the trustee's duties be enforceable means that the same person may not be the sole trustee and sole beneficiary of the trust. Section 736.0402(1)(e), F.S. Accord, *Wiley v. Hoggson*, 90 Fla. 343, 106 So. 408 (1925).

<sup>151</sup> Section 736.0406, F.S.

<sup>152</sup> Section 736.0402(1)(c), F.S. The reason is obvious enough. It is the beneficiaries who have standing to enforce the trust, and beneficiaries, courts, and trustees alike need to know who they are.

<sup>153</sup> Section 736.0402(2), F.S.

<sup>154</sup> In a departure from orthodox common law, a power of a trustee to select from a class of indefinite beneficiaries (such as friends) is not invalid under the Code. Instead, the trustee is given a reasonable time to make a selection. If the



## 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>155</sup> The ascertainable beneficiary requirement does not apply to such trusts<sup>156</sup> because the enforcement of charitable trusts is provided by other mechanisms.<sup>157</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>158</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>159</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>160</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>161</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>162</sup> Hence, this type of trust need not have ascertainable beneficiaries either.<sup>163</sup>

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trustee fails to do so, the trustee's power fails and the property passes to those who would have taken it had the power never been conferred. Section 736.0402(3), F.S. Accord, Restatement (Third) of Trusts s. 46 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts s. 122 (1959); Restatement (Second) of Property: Donative Transfers s. 12.1 cmt. e (1986). In this regard, the Code overrules *Kunce v. Robinson*, 469 So.2d 874 (Fla. 3rd DCA 1985).

<sup>155</sup> Section 736.0405(1), F.S. Where the intent to create a charitable trust is present but the terms of the trust do not indicate a particular purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries.

Section 736.0405(3), F.S.

<sup>156</sup> Section 736.0402(1)(c)1, F.S.

<sup>157</sup> Although not stated explicitly, the Code continues the common law rule that charitable trusts are enforced by the state Attorney General. See s. 736.0110(3), F.S. under which the Attorney General may assert the right of a qualified beneficiary with respect to charitable trusts. In addition, the rights of a qualified beneficiary are given to charitable organizations expressly designated to receive distributions under the terms of a charitable trust. See s. 736.0110(1), F.S. Finally, in a departure from common law, the Code gives settlors standing to enforce the charitable trusts they create. Section 736.0405(3), F.S.

<sup>158</sup> See generally, s. 736.0408, F.S. This provision is similar to s. 737.116, F.S.

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

<sup>160</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), F.S.

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

<sup>162</sup> Section 736.0409(2), F.S. Also like an animal trust, except to the extent the court determines that the value of the property is excessive, trust property must be applied for its intended use and any property not required for that purpose

## 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>164</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.<sup>165</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>166</sup> provided only that their terms can be established by clear and convincing evidence.<sup>167</sup> Trusts containing Florida real property, however, must be evidenced by a signed writing.<sup>168</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. More importantly, since 1995, s. 737.111, F.S. has provided that the testamentary aspects of most trusts<sup>169</sup> are void unless the trusts are executed with the formalities required for a will.<sup>170</sup> Similar requirements are imposed by section 736.0403(2)(b) of the Code, but only with respect to revocable trusts<sup>171</sup> created by Florida domiciliaries<sup>172</sup> on or after the effective date of the Code.<sup>173</sup> The practical bottom line then is that, under the Code, if revocable trusts

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

<sup>163</sup> Section 736.0402(1)(c)3, F.S.

<sup>164</sup> Section 736.0403(1), F.S.

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

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

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

<sup>168</sup> See s. 736.0403(2)(a), F.S. providing that trusts containing land must comply with s. 689.05, F.S.

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

<sup>170</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>171</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), F.S. The decision to restrict s. 736.0403(2), F.S. to revocable trust follows from the Committee's belief that compliance with testamentary formalities is justifiable as a matter of principle only for that class of trusts that operate as will substitutes. Revocable trusts serve that purpose, irrevocable trusts do not. Stated differently, irrevocable outright transfers need not comply with testamentary formalities and the Committee could find no convincing justification for treating irrevocable transfers in trust any differently.

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

<sup>173</sup> Section 737.111, F.S. continues to apply to trust created before that date. Section 736.0402(4), F.S.

are to serve the function they are intended to serve – to pass property at the death of the settlor to others – they must be executed with the formalities required for a will.

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

- The section applies both at the creation of a revocable trust and to any subsequent amendments.<sup>174</sup>
- A failure to comply with the requirements of s. 736.0403(2)(b), F.S. does not result in the initial invalidity of a revocable trust. Rather, only the testamentary aspects of the trust are void. As under existing law, testamentary aspects means "those provisions of the trust that dispose of the trust property on or after the settlor's death other to the settlor's estate."<sup>175</sup>
- The formalities required are those for a will in Florida. Complying with the formalities for a will in some other state is not enough.
- Section 736.0403(2)(b), F.S. has no applicability to trusts created by non Florida domiciliaries whether or not the trust was executed in Florida.<sup>176</sup>
- Conversely, s. 736.0403(2)(b), F.S. does not contain an "out" for trusts executed in other states. The section applies to revocable trusts created by Florida domiciliaries regardless of the place of execution and regardless of the location of the property held in the trust.<sup>177</sup>

## Trust Modification and Termination

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

## Incorporation of Existing Florida Statutes

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

## Common Features

The three sections under consideration here – ss. 736.1113, 736.1115 and 736.0412, F.S. – are all in addition to and not in derogation of common law rights to modify, amend, terminate trusts.<sup>178</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:

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

<sup>175</sup> See s. 736.0403(2), F.S., final sentence.

<sup>176</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>177</sup> Because of the differences between s. 737.111, F.S. and new section 736.0403(2)(b), F.S., the latter applies only to trusts created on or after the effective date of the Code. Section 736.0403(4), F.S. Section 737.111, F.S. continues to apply to trusts created before that date.

<sup>178</sup> See ss. 736.04113(4), 736.04115(5) and 736.0412(6), F.S.

- 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>179</sup>

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

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

### **Judicial Modification Consistent with Settlor's Intent**

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

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

The court's authority to modify a trust under s. 736.04113, F.S. is included on the list of mandatory provisions.<sup>185</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.

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<sup>179</sup> See ss. 736.04113(2), 736.04115(1), and 736.0412(1), F.S.

<sup>180</sup> The Committee expressed the following comment concerning the settlor's intent. It may come as a surprise to some that two of the Code sections may be used to modify or terminate a trust in a manner that is inconsistent with the intent of the settlor. It is worth emphasizing, however, that this possibility is not new with the Code. It exists under the modification provisions in ch. 737, F.S. as well. The Code's organization and restructuring of these sections just makes this possibility more apparent. Then too, it is also worth noting that, with some tradeoffs, a settlor can preclude modifications and terminations that are inconsistent with his or her intent in the governing instrument. This ability, which involves an interplay between the modification sections and the Rule against Perpetuities, is detailed more fully later.

<sup>181</sup> See s. 736.04113(1), F.S.

<sup>182</sup> Section 736.04113(1), F.S.

<sup>183</sup> Section 736.04113(3)(a), F.S.

<sup>184</sup> Section 736.04113(3)(b), F.S.

<sup>185</sup> See s. 736.0105(2)(j), F.S.

## Judicial Modification in the Best Interest of the Beneficiaries

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

## Nonjudicial Modification of Irrevocable Trusts

Section 736.0412, F.S. provides for the nonjudicial modification of a trust. Under it, a qualifying trust may be modified in any of the ways described previously upon the unanimous agreement of the trustee and all qualified beneficiaries,<sup>189</sup> although neither a spendthrift clause nor a provision in a trust instrument prohibiting amendment or revocation of a trust prevents modifications under the section.<sup>190</sup> The objection of a nonconsenting beneficiary, however, might.

## Protection of Nonconsenting Beneficiaries

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

## Qualification Criteria

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

- First, the trust must have been created after 2000.<sup>191</sup>
- Second, nonjudicial modification is not permitted for any trust for which a charitable deduction is allowed or allowable under the Internal Revenue Code until such time, if ever, that all charitable interests in the trust have terminated.<sup>192</sup>

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

<sup>187</sup> Section 736.04115(2)(c), F.S.

<sup>188</sup> Section 736.04115(2)(b), F.S.

<sup>189</sup> Section 736.0412(1), F.S.

<sup>190</sup> Section 736.0412(2), F.S.

<sup>191</sup> Section 736.0412(4)(a), F.S.

<sup>192</sup> Section 736.0412(4)(b), F.S. This restriction is intended to preserved deductibility of charitable trusts for federal tax purposes.

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

## Other Modification and Termination Provisions

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

### Modification or Termination of Uneconomic Trusts

Code s. 736.0414, F.S. provides a mechanism for a trustee or court to modify or terminate an uneconomic trust. The section is not mandatory; modifications and terminations under the section 736.0414 may be precluded by an express provision in the trust instrument.<sup>195</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.<sup>196</sup> Before proceeding, notice must be given to the qualified beneficiaries.<sup>197</sup> If one or more of them object, they may commence a judicial proceeding to disapprove the trustee's termination.<sup>198</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>199</sup>

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>200</sup>

### Modification to Achieve Settlor's Tax Objectives

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

<sup>193</sup> See s. 736.0412(1), F.S.

<sup>194</sup> Assuming the above criteria are met, a final consideration involves the applicable Rule Against Perpetuities associated with the trust. Section 736.0412, F.S. involves a tradeoff with the Rule Against Perpetuities similar to that detailed above for s. 736.04113, F.S. That is, nonjudicial modification is not only permissible, it's availability is mandatory for trusts having a perpetuities period in excess of the common law and 90-year statutory periods.<sup>194</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, F.S. The governing instrument, may however, provide to the contrary. See s. 736.0412(4)(b), F.S.

<sup>195</sup> Although the existence of a spendthrift clause is not itself sufficient to preclude applicability of the section. Section 736.0414(4), F.S.

<sup>196</sup> Section 736.0414(1), F.S.

<sup>197</sup> *Id.*

<sup>198</sup> See s. 736.0414(3), F.S.

<sup>199</sup> Section 736.0414(2), F.S.

<sup>200</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), F.S.

<sup>201</sup> Code s. 736.0416, F.S. provides an important state law authority for this type of modification. It does not, and can not, however, insure that the modification will be recognized for tax purposes. In general, tax recognition requires either that

## Trust Reformation

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

### Cy Pres

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

### Reformation to Correct Mistakes

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

### Trust Division and Combination

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

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

- First, the authority of the trustee is circumscribed by a requirement that the severance or combination not impair any beneficiary's rights.
- Second, notice must be given to qualified beneficiaries and any beneficiary may commence a proceeding to disapprove a proposed severance or combination.<sup>206</sup>

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the modification occur before the event giving rise to the tax or that the modification be authorized by the Internal Revenue Code or Treasury Regulations promulgated thereunder. See Rev. Rul. 73-142, 1973-1 C.B. 405.

<sup>202</sup> This aspect of the Uniform Code is discussed further in the comments to UTC s. 413.

<sup>203</sup> Existing Florida case law supports reformation to cure scrivener's errors. See *Robinson v. Robinson*, 720 So. 2d 540 (Fla. 4th DCA 1998). Section 736.0415, F.S. is broader, however, as it allows reformation for mistakes both in the expression and in the inducement.

<sup>204</sup> See s. 737.403, F.S.

<sup>205</sup> See s. 737.403(b), F.S.

<sup>206</sup> Section 736.0410(2), F.S.

- Lastly, the types of actions permitted under s. 736.0417, F.S. may exceed what are permissible from a tax standpoint. Trustees should exercise caution as tax law requirements for trust combinations and severances vary with the context.

### **Creditors Claims; Spendthrift and Discretionary Trusts (Part V)**

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

#### **Third Party Trusts**

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

#### **No Spendthrift Provision**

With respect to third party trusts, s. 736.0501, F.S. provides the basic statement of creditor remedy. Under the section, as long as the trust does not contain a valid spendthrift provision, a court may "authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or by other means."<sup>207</sup> Importantly, the rights given to creditors under the section are limited to those cases where a beneficiary has a right to distributions. If distributions are discretionary, a beneficiary has no "attachable" trust interest. Thus, s. 736.0504(1), F.S. provides that a creditor of a beneficiary may not compel a distribution that is subject to a trustee's discretion whether or not the discretion is subject to a standard and whether or not the trustee has abused the discretion.<sup>208</sup> In addition, s. 736.0504(2), F.S. insures that the same rules apply even if the beneficiary is the trustee, provided the trustee's discretion to distribute for its own benefit is limited by an ascertainable standard.<sup>209</sup>

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

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

<sup>209</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 ss. 736.0814(2) and (3), F.S. under which a power of a trustee other than a settlor or a spouse of a settlor to distribute to itself is automatically restricted by an ascertainable standard. Section 736.0504(2), F.S. is derived from UTC section 504(e). The purpose of the provision is explained in the following comment to the UTC section:

The UTC, as previously drafted, did not specifically address the issue of whether a creditor of a beneficiary may reach the beneficial interest of a beneficiary who is also a trustee. However, Restatement (Third) of Trusts s.60, comment g, which was approved by the American law Institute in 1999, provides that the beneficial interest of a beneficiary/trustee may be reached by the beneficiary/trustee's creditors. Because the UTC is supplemented by the common law (see UTC Section 106), this Restatement rule might also apply in states enacting the UTC. The drafting committee has concluded that adoption of the Restatement rule would unduly disrupt standard estate planning and should be limited. Consequently, Section 504 is amended to provide that the provisions of this section, which generally prohibit a creditor of a beneficiary from reaching a beneficiary's discretionary interest, apply even if the beneficiary is also a trustee or cotrustee. The beneficiary-trustee



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

### Spendthrift Trusts

Code s. 736.0502, F.S. gives statutory recognition to spendthrift provisions.<sup>211</sup> Assuming a trust has a valid spendthrift provision:

- A beneficiary may not transfer his beneficial interest in the trust; and
- With some exceptions discussed next, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before it is received by the beneficiary.<sup>212</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>213</sup> That is not allowable under the Code. Under s. 736.0502(1), F.S., a spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest. Because this limitation is mandatory and is a change in existing law, the requirement does not apply to any trust in existence on the effective date of the Code.<sup>214</sup>

### Exception Creditors

When it comes to the effectiveness of spendthrift provisions, not all creditors are created equal. For public policy reasons, some creditors may proceed against a beneficiary's interest in a trust even

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is protected from creditor claims to the extent the beneficiary-trustee's discretion is protected by an ascertainable standard as defined in the relevant Internal Revenue Code sections. The result is that the beneficiary's trustee's interest is protected to the extent it is also exempt from federal estate tax. The amendment thereby achieves its main purpose, which is to protect the trustee-beneficiary of a bypass trust from creditor claims.

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

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

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

<sup>210</sup> Section 736.0504(3), F.S.

<sup>211</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 is sufficient to do the trick. See s. 736.0502(2), F.S.

<sup>212</sup> Section 736.0502(3).

<sup>213</sup> Although neither court discussed the point, the spendthrift clauses upheld in *Bacardi v. White*, 463 So. 2d 218 (Fla. 1885) and *Mason v. Mason*, 789 So. 2d 895 (Fla. 3d DCA 2001) both permitted limited transfers to family members.

<sup>214</sup> Section 736.0502(1), F.S.

though the trust includes a spendthrift clause. Thus, s. 736.0503(2), F.S. provides that a spendthrift clause is unenforceable against:

- A claim by a beneficiary's child, spouse, or former spouse for support or maintenance;
- A judgment creditor (such as an attorney) who has provided services for the protection of a beneficiary's interest in the trust; or
- A claim by a state or the United States, but only to the extent a separate statute so provides.

### **Remedies Available to Exception Creditors**

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

### **Key Change From Existing Law**

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

### **Mandatory Distributions**

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

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<sup>215</sup> See s. 736.0503(3), F.S. This subsection also preserves the existing procedures available under the Uniform Interstate Family Support Act. See Ch. 88, F.S.

<sup>216</sup> See s. 736.0504(1), F.S., discussed supra, p. 24, which applies whether or not a trust contains a spendthrift provision.

<sup>217</sup> 463 So. 2d 218 (Fla. 1985).

<sup>218</sup> Accord, *Mason v. Mason*, 789 So. 2d 895 (Fla. 3d DCA 2001).

<sup>219</sup> Section 736.0506(2), F.S.

<sup>220</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), F.S.

## Self-settled Trusts

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

## Creditor Remedies

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

- While a trust is revocable, the trust property is subject to the claims of the settlor's creditors;<sup>221</sup> and
- In the case of an irrevocable trust, a settlor's creditor or assignee may reach the maximum that can be distributed to or for the benefit of the settlor.<sup>222 223</sup>

## Withdrawal Powers

While the remedies given in the Code to creditors of settlors of self-settled trusts are not new, there is one aspect of s. 736.0505, F.S. that may be. Under s. 736.0505(2)(a), F.S., during the period it may be exercised, a holder of a withdrawal power over trust property is treated the same as a settlor of a revocable trust with respect to the property subject to the power.<sup>224</sup> 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>225</sup> the rule in section 736.0505(2)(a), F.S. appears consistent with the supreme court's decision in *Croom v. Ocala Plumbing & Electric Co.*<sup>226</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>227</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, the Committee views s. 736.0505(2)(b), F.S. to be a change in existing law.<sup>228</sup>

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<sup>221</sup> Section 736.0505(1)(a), F.S. Accord UTC s. 505(a)(1); Restatement (Third) of Trusts s. 25 comment e (Tentative Draft No. 1, approved 1996). But see Restatement (Second) of Trusts s. 330 comment o (1959) indicating that the rule with respect to revocable trusts at common law is different.

<sup>222</sup> Section 736.0505(1)(b), F.S. Accord UTC s. 505(a)(2); Restatement (Third) of Trusts s. 58(2) and comment e (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts s. 156 (1959).

<sup>223</sup> Neither of these rules is surprising. As both are consistent with accepted general principles of law, the Committee believed that s. 736.0505(1), F.S. does not change existing Florida law. Of course, not all states follow these rules. Recent, legislation in some states gives greater creditor protection to irrevocable self-settled trusts.

<sup>224</sup> Section 736.0505(2)(a), F.S.

<sup>225</sup> See s. 736.0103(12), F.S.

<sup>226</sup> 62 Fla. 460 (1911). *Croom* is discussed further at note 209.

<sup>227</sup> See s. 736.0505(2)(b), F.S.

<sup>228</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 ss. 736.0505(b)(1) and (2), F.S. For powers drafted not to exceed these limits, the property subject to the power will be subject to the power holder's creditors before

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

Chapter 737, F.S. includes provisions which establish a workable and important mechanism by which the assets of a deceased settlor's revocable trust must be applied in payment of the expenses of administration and the obligations of a settlor's estate. The Code incorporates these provisions without change. Thus, in a mandatory provision, s. 736.05053, F.S. obligates a trustee of a trust described in s. 733.707(3), F.S.<sup>229</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 mandatory provision, Code s. 736.05055, F.S. carries forward the requirements found in s. 737.308, F.S., including the requirement imposed on a trustee of a trust described in s. 733.707(3), F.S. to file a notice of trust with the court of the county of the settlor's domicile and the court having jurisdiction of the settlor's estate.

### Revocable Trusts (Part VI)

Part VI of the Code gathers in one place most of the provisions relating to revocable trusts, which the Code defines to be a trust that may be revoked by the settlor without the consent of either a trustee or a person having an adverse interest.<sup>230</sup> In an initial mandatory provision, s. 736.0601, F.S. clarifies that the capacity required to create a revocable trust is the same as that needed to execute a will.<sup>231</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.<sup>232</sup>

### 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>233</sup> As a consequence:

- No other person is entitled to notices, information, accountings, or reports;<sup>234</sup> and
- A trustee may follow a direction of the settlor that is contrary to the trust instrument.<sup>235</sup>

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the lapse, release, etc., but not thereafter. Initially, the Committee favored a rule that would have excepted lapsing powers altogether (even while they were exercisable) provided the powers lapsed within the restrictions of the gift tax annual exclusion or transfer tax safe harbors. Such an exception, however, would invite abuse as unrestricted and unlimited withdrawal powers could be brought within the scope of the exception simply by providing that they are to lapse at some nominal rate (such as \$100 per year). Ultimately, the Committee accepted the treatment described in the text which is also the treatment given to withdrawal powers under the Uniform Code. See UTC s. 505(b).

<sup>229</sup> Sections 736.05053 and 736.05055, F.S. refer to trusts described in s. 733.707(3), F.S. rather than to revocable trusts because s. 733.707(3), F.S. is a broader concept. In addition, the section contains safeguards to prevent adverse tax consequences.

<sup>230</sup> Section 736.0103(15), F.S.

<sup>231</sup> As a section dealing with the requirements for creating a trust, s. 736.0601, F.S. is made mandatory by s. 736.0105(2)(a), F.S.

<sup>232</sup> As for the capacity to execute a revocable trust, all of the Committee agreed that it should be the same as that required to execute a will. But some on the Committee preferred that the standard for both be raised to that required to make an irrevocable *intervivos* gift.

<sup>233</sup> Section 736.0603(1), F.S.

<sup>234</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), F.S.

<sup>235</sup> See s. 736.0808(1), F.S. discussed *infra* at p. 43.

The situations where a trustee's duties are restricted by section 736.0603 are not limited to traditional revocable trusts. Under s. 736.0603(2), F.S., during the period the power may be exercised, a holder of a power of withdrawal is given the rights of a settlor of a revocable trust with respect to the property subject to the power.<sup>236</sup> Hence, if upon attaining a specified age, a beneficiary is given a continuing right to withdraw all trust property, the trustee has no duty to send notices, information, accountings, or reports to any other beneficiary.<sup>237</sup>

### Trusts are Revocable by Default

In an important change from prior law, the Code provides that trusts are revocable by default. That is, unless the trust instrument states that the trust is irrevocable, the trust may be amended or revoked by the settlor.<sup>238</sup>

This change is prospective only. It conforms Florida law to that of California, Texas and a growing number of other states, including those that have adopted the Uniform Code. The new rule reflects the view that most well drafted trust instruments explicitly say whether they are revocable. When a trust instrument does not clarify this, the implication is that the instrument was not drafted by an experienced attorney in which case the trust was probably intended to be revocable.<sup>239</sup>

### Revocation Methodology

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

- If the instrument does this, the provision in the instrument is exclusive in the sense that the trust can be revoked or amended only by substantially complying with the method stated in the instrument.<sup>240</sup>
- If the instrument does not specify a method, any clear and convincing manifestation of the settlor's intent to revoke is sufficient,<sup>241</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>242</sup>

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

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<sup>236</sup> Accord UTC s. 603(b).

<sup>237</sup> Section 736.0603(2), F.S. is not restricted to withdrawal powers that extend to the entire trust. It applies in the case of powers to withdraw only a portion of a trust, including lapsing powers so commonly included for tax purposes. With respect to these powers, however, the impact of s. 736.0602(2), F.S. should be minor, first because its applicability would be limited to the portion of the trust that is subject to the withdrawal power, and second because the section ceases to apply once the power lapses.

<sup>238</sup> Section 736.0602(1), F.S. Under the Code, if a trust is revocable, it may also be amended. See generally the comments to UTC s. 601 citing Restatement (Third) of Trusts s. 63 cmt. g (Tentative Draft No. 3, approved 2001); Restatement (Second of Trusts s. 331 cmt. g & h (1959) to the same effect. See also s. 736.0602(1), F.S.

<sup>239</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>240</sup> Section 736.0602(3)(a), F.S. 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>241</sup> Section 736.0602(3)(b)2, F.S. Accord *Macfarlane v. First National Bank of Miami*, 203 So. 257 (Fla. 3d DCA 1967).

<sup>242</sup> Section 736.0602(3)(b)1, F.S.

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

Recall that under s. 736.0403(2)(b), F.S., the testamentary aspects of a revocable trust executed by a Florida domiciliary are void unless the trust instrument is executed in the manner required for wills. Under the Code, the term trust instrument includes trust amendments.<sup>243</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), F.S.

The question of whether trust *revocations* must also comply with s. 736.0403(2)(b), F.S. is less clear. The better position is that they do not, as the effect of a revocation is to return the property to the settlor free of trust.<sup>244</sup> It is an unnecessary stretch to say that such a result is a trust "amendment" to which s. 736.0403(2)(b), F.S. would apply. Nevertheless, there is sufficient uncertainty on the issue that compliance with s. 736.0403(2)(b), F.S. for all amendments and revocations would appear prudent.

## Revocations on Behalf of a Settlor

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

- An attorney in fact, but only as authorized by s. 709.08, F.S.;<sup>245</sup> or
- A guardian of the property, but only as authorized in s. 744.441, F.S.<sup>246</sup>

## Trusts with more than one Settlor

As defined in the Code, "settlor" includes anyone who transfers property to a new or existing trust.<sup>247</sup> Under this definition, a trust can have more than one settlor. In such cases, s. 736.0602(2), F.S. specifies default rules for how the trust may be revoked or amended. As a general principle, each settlor may unilaterally revoke or amend his or her trust portion. But an exception applies if a trust consists of community property. To that extent, either spouse may revoke the trust, but amendments require the joinder of both. In all cases, if a trust is revoked or amended by fewer than all settlors, the trustee must promptly notify the other settlors of that fact.<sup>248</sup>

## Protection of Trustees

If a trust is revoked, the Code directs the trustee to deliver the trust property as the settlor directs.<sup>249</sup> Of course, nothing insures that directions from the settlor will be forthcoming and, particularly where no method is specified in the trust instrument, it is possible that a trust could be amended or revoked without the trustee's knowledge. In such cases, the Code holds the unknowing trustee harmless for distributions made and other actions taken on the assumption that the trust has not been amended or revoked.<sup>250</sup>

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<sup>243</sup> Section 736.0103(20), F.S.

<sup>244</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>245</sup> Section 736.0602(5), F.S.

<sup>246</sup> Section 736.0602(6), F.S.

<sup>247</sup> Section 736.0103(16), F.S.

<sup>248</sup> See s. 736.0602(2), F.S. The restrictions placed on trusts holding community property are intended to facilitate the ability to transfer community property to a trust without destroying its community property characteristics. See comments to UTC s. 602.

<sup>249</sup> Section 736.0602(4), F.S.

<sup>250</sup> Section 736.0602(7), F.S.

## 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>251</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>252</sup> Part VI's contribution to this area is s. 736.0604, F.S. This section sets out the period of limitations for contesting a trust that was revocable at the settlor's death. On a person by person basis, a trustee can have the advantage of a short six month limitations period by sending the person a copy of the trust instrument and a notice informing the person of the trust's existence, the trustee's name and address, and the time allowed for commencing a proceeding. As is true across the entire Code, the representation provisions of Part III are available to a trustee who wishes to comply with the requirements of s. 736.0604, F.S.<sup>253</sup>

### Office of Trustee (Part VII)

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

### Accepting or Declining the Office

A person designated in a trust instrument to serve as trustee may decline to do so. Prior to acceptance, a trustee who knows of his designation of trustee is deemed to decline the trusteeship if the person does not accept the designation within a reasonable time.<sup>254</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>255</sup>

### Actions not Constituting Acceptance

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

- Act to preserve trust property (provided the person sends a notice of the person's decision to decline the trusteeship to at least one qualified beneficiary within a reasonable time of taking the action); or
- Inspect or investigate trust property for any purpose including to determine potential liability under environmental or other law.<sup>256</sup>

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<sup>251</sup> See s. 736.0406, F.S.

<sup>252</sup> See s. 736.0207, F.S.

<sup>253</sup> This important new provision attempts to strike a balance between the need for a reasonable period to bring an action contesting the validity of a revocable trust and the sometimes competing interest the trust beneficiaries have in an expeditious resolution of their rights and a distribution of their shares.

<sup>254</sup> Section 736.0701(2), F.S.

<sup>255</sup> Section 736.0701(1)(a) and (b), F.S.

<sup>256</sup> Section 736.0701(3)(a) and (b), F.S.

## Trustee's Bond

A trustee need not give bond unless required by the terms of the trust or the court finds that a bond is needed to protect the interests of the beneficiaries.<sup>257</sup> In the former case, the court may dispense with a bond required in an instrument. And in all cases, it may specify the amount of the bond, its liabilities, and whether sureties are necessary. The court may modify or terminate a bond or surety at any time.<sup>258</sup>

## Resignations and Removals

### Resignations

A trustee may resign with court approval.<sup>259</sup> In addition, the Code provides a mechanism for trustees to resign without court approval. A trustee may resign by giving at least 30 days notice to the settlor (if living), the cotrustees (if any) and all qualified beneficiaries.<sup>260</sup> In either case, a trustee's resignation does not discharge any liability of the resigning trustee or any sureties on the trustee's bond.<sup>261</sup>

The ability of a trustee to resign without court intervention was new. There was no counterpart under prior law.<sup>262</sup> Subsequently, new s. 737.309, F.S. was enacted to permit this. Note that under the Code, however, the trustee's right to resign is a mandatory provision. It may not be denied or curtailed in the trust instrument.<sup>263</sup>

### Removals

Court removal of a trustee may be sought by the settlor, a cotrustee, or any beneficiary. The Code also recognizes the ability of a court to remove a trustee on its own initiative.<sup>264</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>265</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>266</sup>

The Code's provision giving a settlor the right to seek removal of a trustee is probably an expansion of existing law.<sup>267</sup> So is the "unfitness" criteria at least if and to the extent it permits removal in anticipation of an actual breach.<sup>268</sup>

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<sup>257</sup> Section 736.0702(1), F.S.

<sup>258</sup> Section 736.0702(2), F.S. The Committee notes that the power a court has to modify or terminate a bond under this subsection includes the power to modify any required surety.

<sup>259</sup> Section 736.0705(1)(b), F.S. The court may impose conditions and enter orders reasonable necessary to protect trust property. Section 736.0705(2), F.S.

<sup>260</sup> Section 736.0505(1)(a), F.S.

<sup>261</sup> Section 736.0705(3), F.S.

<sup>262</sup> Prior Florida law followed the general rule that a trustee who has accepted a trusteeship cannot resign except in accordance with the terms of the trust, upon consent of all beneficiaries, or with approval of a court of competent jurisdiction. See e.g., *Stearns v. Fraleigh*, 39 Fla. 603, 23 So. 18 (1897); *Strong v. Willis*, 3 Fla. 1244 (1850). See also J. Grimsley, Florida Law of Trusts, s. 4-3; Restatement (Second) of Trusts s. 106(b) (Ali 1957).

<sup>263</sup> See s. 736.0105(2)(o), F.S.

<sup>264</sup> Section 736.0706(1), F.S.

<sup>265</sup> Section 736.0706(2)(a) – (c), F.S.

<sup>266</sup> See s. 736.0706(3), F.S. On the remedies generally available for a breach of trust, see s. 736.1001(2), F.S. discussed *infra* at p. 46.

<sup>267</sup> See *Sanders v. Citizens Nat. Bank of Leesburg*, 585 So. 2d 1064 (Fla. 5th DCA 1991) holding that the settlor of an irrevocable trust who has retained no beneficial interest in the trust corpus cannot maintain an action to enforce the trust.

<sup>268</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. 5th DCA 1987); *Robinson v.*



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

- The removal best serve the interests of all beneficiaries;
- It not be inconsistent with a material purpose of the trust; and
- A suitable cotrustee or successor trustee be available.<sup>269</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 entitle to it.<sup>270</sup> Pending that, unless a cotrustee remains in office or the court orders otherwise, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect trust property.<sup>271</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>272</sup> In addition, the court has residual authority to appoint a successor trustee if an otherwise unfilled vacancy in the trusteeship occurs.<sup>273</sup> A vacancy in a trusteeship can occur for a number of reasons including the inability to identify a designated trustee, the fact that a designated trustee declines the office, is adjudicated to be incapacitated, resigns, is disqualified, is removed or dies.<sup>274</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>275</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>276</sup>

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

<sup>269</sup> Section 736.0706(2)(d), F.S. The necessity of getting the joinder of all qualified beneficiaries may be facilitated by the representation provisions of Part III of the Code. Moreover, it may be possible to use ss. 736.04113 or 736.04115, F.S. to remove a trustee without meeting the requirements of section 736.0706(2)(d), F.S.

<sup>270</sup> Section 736.0707(2), F.S. The provisions of this subsection are explicitly stated to be in addition to and not in derogation of the rights of a removed or resigning trustee under common law. The intent of this statement is to insure that the subsection is not read as overruling the holding in *Merrill Lynch Trust Co. v. Alzheimer's Lifeliners Assoc. Inc. Et. al.*, 832 So. 2d 948 (Fla. 2d DCA 2002).

<sup>271</sup> Section 736.0706(3), F.S.

<sup>272</sup> Section 736.0704(5), F.S.

<sup>273</sup> See ss. 736.0704(3)(c) and (4)(c), F.S.

<sup>274</sup> These reasons are detailed in s. 736.0704(1), F.S.

<sup>275</sup> Section 736.0704(2), F.S. If a vacancy in a cotrusteeship occurs, the remaining trustees (or a majority of the remaining trustees) may act for the trust. Section 736.0703(2), F.S. *Accord* s. 737.404(2), F.S.

<sup>276</sup> Section 736.0704(3) and (4), F.S. The ability of qualified beneficiaries (or named charities) to designate a successor trustee is an expansion of existing Florida law. See *Van Roy v. Hunter*, 96 Fla. 194, 117 So. 887 (1928) (a vacancy in a trusteeship would be filled by a court if the instrument did not provide for a successor or a method of selecting a successor).

## **Cotrustees Duty to Participate**

With some exceptions noted below, the Code imposes upon cotrustees a duty to participate in the administration of the trust.<sup>277</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>278</sup>

### **Failure to Participate**

A cotrustee's participation is excused if the cotrustee is unavailable because of absence, illness, disqualification or other temporary incapacity,<sup>279</sup> in which cases the remaining trustee or a majority of the remaining trustees may act for the trust if prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property.<sup>280</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>281</sup>

### **Delegation among Cotrustees**

Delegation is permitted under the Code only of those functions the settlor did not reasonably expect the trustees to perform jointly.<sup>282</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>283</sup>

### **Liability of Nonjoining or Dissenting Trustees**

In general, a trustee who does not join in an action by another trustee is not liable for the action.<sup>284</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>285</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>286</sup>

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<sup>277</sup> Section 736.0703(3), F.S.

<sup>278</sup> Section 736.0703(1), F.S.

<sup>279</sup> Section 736.0703(3), F.S.

<sup>280</sup> Section 736.0703(4), F.S.

<sup>281</sup> Section 736.0703(3), F.S.

<sup>282</sup> Section 736.0703(5), F.S. Irrevocable delegations are not permitted under this subsection. A trustee may revoke a delegation previously made. Compare UTC s. 703(e).

<sup>283</sup> On this, see s. 518.112, F.S.

<sup>284</sup> Section 736.0703(6), F.S.

<sup>285</sup> Section 736.0703(7)(a) and (b), F.S. The corresponding provision in the Uniform Code refers to "serious" breaches of trust. See UTC s. 703. The Committee removed "serious" because it did not feel the word clarified the meaning of the section. Mere technical breaches would not appear to be a problem under the subsection as they would not normally result in damages to the trust or its beneficiaries. The "seriousness" of other breaches will be reflected in the standard of reasonable care required by the subsection.

<sup>286</sup> Section 736.0703(8), F.S. Unlike the similar provision in existing law, s. 736.0703(8) does not require the notice of the dissent to be in writing. Compare s. 737.404, F.S.

## Compensation and Reimbursement of Trustees

A trustee is entitled to reasonable compensation,<sup>287</sup> including reasonable additional compensation for other services the trustee renders in connection with the administration of the trust.<sup>288</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>289</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>290</sup>

## Duties and Powers of Trustee (Part VIII)

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

### Duties of a Trustee

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

### Compendium of Statutory Duties

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

### Duty to Administer in Good Faith

A trustee has a duty to administer the trust in good faith and in accordance with its terms and the interests of the beneficiaries.<sup>291</sup> This is a mandatory duty which may not be relaxed or curtailed in the trust instrument.<sup>292</sup>

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<sup>287</sup> Section 736.0708(1), F.S. On the factors to be taken into account in determining a reasonable compensation, see *West Coast Hospital Association v. Florida Nat'l Bank of Jacksonville*, 100 So. 2d 807 (1958) citing with favor Bogert, *Trusts and Trustees*, s 976.

<sup>288</sup> Section 736.0708(3), F.S. There is no existing statute covering the compensation of multiple trustees and the Code does not address this issue either. Compare s. 733.716(5), F.S. dealing with the compensation of multiple personal representatives.

<sup>289</sup> Section 736.0708(2), F.S. The authority of the Court to adjust a trustee's compensation in this manner under existing law is unsettled.

<sup>290</sup> Section 736.0709(1) and (2), F.S. This section accords with existing law on the subject. See s. 737.402(2)(s), F.S. See also, *First Union Nat'l Bank v. Jones*, 768 So. 2d 1213 (Fla. 4th DCA 2000).

<sup>291</sup> Section 736.0801, F.S. This section is identical to UTC s. 801. The requirement of good faith imposed by the section is consistent with existing Florida case law. See *Mesler v. Holly*, 318 So. 2d 530 (Fla. 2nd DCA 1975); *Hoppe v. Hoppe*, 370 So. 2d 374 (Fla. 4th DCA 1978).

<sup>292</sup> Section 736.0105(2)(b), F.S.

## **Duty of Loyalty**

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

## **Duty of Impartiality**

When a trust has more than one beneficiary, a trustee must administer the trust impartially giving due regard to the respective interests of the beneficiaries.<sup>293</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>294</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>295</sup>

## **Duty to use Special Skills**

A trustee with special skills or expertise has a duty to use those special skills.<sup>296</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>297</sup>

## **Duty to Keep Accurate Records**

A trustee must keep clear, distinct, and accurate records.<sup>298</sup>

## **Duty not to Commingle and to Earmark**

A trustee must keep trust property separate from the trustee's own property and must, to the extent feasible, cause the interest of the trust to appear in any records maintained by third parties.<sup>299</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>300</sup>

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<sup>293</sup> Section 736.0803, F.S.

<sup>294</sup> Section 736.0804, F.S. This is a more generalized statement of the duty relating to trust investments that appears in Florida's Prudent Investor Act. See s. 518.11(a), F.S.

<sup>295</sup> Section 736.0805, F.S.

<sup>296</sup> This duty also extends to a trustee who is named trustee on the basis of the trustee's representation that the trustee possesses special skills or expertise. S. 736.0806, F.S. This duty also appears in the Florida Prudent Investor Act. See s. 518.11(1)(a), F.S.

<sup>297</sup> See ss. 736.0809 and 736.0812, F.S.

<sup>298</sup> Section 736.0810(1), F.S.

<sup>299</sup> Section 736.0810(2) and (3), F.S.

<sup>300</sup> Section 736.0810(4), F.S.

## **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>301</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>302</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>303</sup> However, this duty is subject to important exceptions which are elaborated more fully below.

## **Duty to Inform and Account**

A trustee must keep qualified beneficiaries reasonably informed of the trust and its administration.<sup>304</sup> This mandatory duty is also discussed more fully below.

## **Duty to Administer Pending Outcome of Contest or other Proceeding**

In general, while a proceeding to determine the validity or the beneficiaries of all or a part of a trust is pending, a trustee has a duty to administer the trust as if no proceeding had been commenced. An exception applies to actions and distributions in contravention of the rights of persons who may be affected by the outcome of the proceeding. A trustee may not take such actions or make such distributions except upon court direction after notice and good cause shown.<sup>305</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>306</sup>

## **More on the Duty of Loyalty**

Under the Code, as between the trustee and the beneficiaries, a trustee has a duty to administer the trust solely in the interests of the beneficiaries.<sup>307</sup> Among other things, this means that in the absence of a contrary provision in the trust instrument, a court order, or a specific statutory exception:

- A trustee may not engage in any sale, encumbrance or transaction for its own personal account or that involves a conflict between the trustee's personal and fiduciary interests,<sup>308</sup>

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<sup>301</sup> Section 736.08105, F.S.

<sup>302</sup> Section 736.0811, F.S.

<sup>303</sup> See s. 736.0812, F.S.

<sup>304</sup> See s. 732.813, F.S.

<sup>305</sup> See s. 736.08165, F.S. This section is identical to s. 737.208, F.S.

<sup>306</sup> Section 736.0817, F.S. The final sentence of the section stating that "the provisions of the section are in addition to and are not in derogation of the rights of a trustee under the common law with respect to final distribution of a trust" are intended to insure that this section does not override the holdings of cases such as *First Union Nat'l Bank v. Jones*, 768 So. 2d 1213 (Fla. 4th DCA 2000) and *Merrill Lynch Trust Co. v. Alzheimer's Lifeliners Ass'n, Inc.*, 832 So. 2d 948 (Fla. 2d DCA 2002).

<sup>307</sup> See generally, s. 736.0802, F.S.

<sup>308</sup> Section 736.0802(2), F.S.

- An investment by a trustee in an investment owned or controlled by the trustee or affiliate is not presumed to be a conflict;<sup>309</sup>
- A trustee may not usurp an opportunity properly belonging to the trust;<sup>310</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>311</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>312</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.<sup>313</sup>

### The Voidable Per Se Rule

With some exceptions discussed later, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's personal and fiduciary interests is voidable by an affected beneficiary.<sup>314</sup>

The fact that an offending transaction is voidable rather than void is a change in Florida law.<sup>315</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 in good faith.<sup>316</sup>
- A beneficiary's action can be precluded by an effective consent, ratification, or release<sup>317</sup> or by a failure to commence an action within the applicable limitations period.<sup>318</sup>

### The Presumptively Voidable Rule

To be contrasted with the transactions described above are those entered into between the trustee and persons who have close business<sup>319</sup> or personal ties<sup>320</sup> to the trustee. Such transactions are only

<sup>309</sup> Section 736.0802(5)(a), F.S.

<sup>310</sup> See s. 736.0802(4), F.S.

<sup>311</sup> Section 736.0802(6), F.S.

<sup>312</sup> Id. Accord UTC s. 802(g). The comments to the UTC section contain the following statement with respect to this duty: "Thus, for example, a trustee whose duty of impartiality would require the trust to make current distributions for the support of current beneficiaries may not evade that duty by holding assets in corporate form and pleading the discretion of corporate directors to determine dividend policy. Rather, the trust must vote for corporate directors who will follow a dividend policy consistent with the trustee's trust-law duty of impartiality."

<sup>313</sup> Section 736.0802(9), F.S.

<sup>314</sup> Section 736.0802(2), F.S. This is a per se rule. Hence, good faith and reasonableness are not defenses. Neither is the presence of consideration, a lack of harm, or the presence of a profit or benefit to the trust, although each of these factors may impact on a beneficiary's decision whether to act on the breach.

<sup>315</sup> Compare *Barnhart v. Hovde*, 490 So. 2d 1271 (Fla. 3d DCA 1986) (Where trustee failed to get court approval in advance of a transaction involving a conflict of interest, the transaction was void).

<sup>316</sup> See s. 736.0802(2), F.S., introductory clause. On the protection of persons dealing with a trustee, see s. 736.1016, discussed *infra* at p. 51.

<sup>317</sup> Section 736.0802(2)(d). On the effectiveness of consents, ratifications and releases, see s. 736.1012, F.S. See also the representation provisions of Part III of the Code.

<sup>318</sup> Section 736.0802(2)(c), F.S. On the statute of limitations on proceedings against trustees, see s. 736.1005, F.S., discussed *infra* at p. 49.

<sup>319</sup> This includes an officer, director, employee, agent, or attorney of the trustee or a corporation or other person or enterprise in which the trustee (or a person owning a significant interest in the trust) has an interest that might affect the trustee's best judgment. Section 736.0802(c) and (d), F.S.

presumed to be affected by a conflict between the personal and fiduciary interests of the trustee.<sup>321</sup> Accordingly, the transactions are not voidable per se; they are voidable only if the presumption is not rebutted.<sup>322</sup>

## Affiliated Services

A trustee is permitted to engage in affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company. Such a transaction is not presumed to be affected by a conflict between personal and fiduciary interests so long as the investment complies with chapters 518<sup>323</sup> and 660<sup>324</sup>, and the trustee complies with the disclosure requirements.<sup>325</sup> The requirements of disclosure are that all qualified beneficiaries are: noticed regarding the investment; provided the identity of the investments; and the nature of the relationship of the trustee to the affiliate.<sup>326</sup>

## Exceptions

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

- Payment of reasonable compensation to the trustee or an agreement between a trustee and beneficiary relating to the appointment or compensation of the trustee;<sup>327</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>328</sup>
- A deposit of trust money in a regulated financial-service institution operated by the trustee;<sup>329</sup>
- An advance by the trustee of money for the protection of the trust,<sup>330</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<sup>331</sup> or the employment of agents to perform any act of administration, whether or not discretionary.<sup>332</sup>

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<sup>320</sup> This includes the trustee's spouse and the trustee's descendants, siblings, parents or the spouse of any of them. Section 736.0802(3)(a) and (b), F.S.

<sup>321</sup> Section 736.0802(3), F.S.

<sup>322</sup> According to the comments to UTC section 802 from which s. 736.0802, F.S. is partially derived, factors relevant to this determination include the fairness of any consideration involved and whether the other terms of the transaction are similar to those that would be found in a transaction involving an independent party.

<sup>323</sup> See in particular s. 518.11, F.S., Florida's Prudent Investor rule which provides that a fiduciary has the responsibility to invest assets as a prudent investor would considering the purposes of the trust. In seeking to satisfy this standard, the trustee must exercise reasonable care and caution.

<sup>324</sup> Ch. 660, F.S. governs trust business and in part precludes self dealing, s. 660.40, F.S.

<sup>325</sup> Section 736.0802(5)(a), F.S.

<sup>326</sup> The requirements of s. 736.0802(5), F.S. do not apply to qualified investment instruments or to a trust for which a right of revocation exists, s. 736.0802(5)(e)(1), F.S. However, the requirements of s. 736.0802(5), F.S. do apply to irrevocable trusts created on or after July 1, 2007, the assets of which are valued in excess of five million dollars on the date the trust was created, s. 736.0802(5)(e)(2), F.S.

<sup>327</sup> Section 736.0802(7)(a) and (b), F.S.

<sup>328</sup> Section 736.0802(7)(c), F.S.

<sup>329</sup> Section 736.0802(7)(d), F.S.

<sup>330</sup> Section 736.0802(7)(e), F.S.

<sup>331</sup> Section 736.0802(8), F.S. The trustee may act without independent investigation on their recommendations.

<sup>332</sup> *Id.*

## 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>333</sup> This duty is qualified, however, by s. 736.08125, F.S. which details several instances where a successor trustee has no personal liability for actions<sup>334</sup> of a prior trustee.<sup>335</sup>

Under Code s. 736.08125, F.S., there is no personal liability, nor is there any *duty* to institute proceedings against a prior trustee.<sup>336</sup>

- When the successor trustee succeeds a settlor serving as trustee of a revocable trust;
- As to any beneficiary who has waived a required accounting, but only as to the periods included in the waiver;
- As to any beneficiary who has effectively released the successor trustee of its duty to institute a proceeding or file a claim; or
- As to any person who is not a qualified beneficiary.<sup>337</sup>

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

- For any action or claim that the qualified beneficiary is barred from bring against the prior trustee;<sup>338</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>339</sup> or
- If a super majority of the eligible beneficiaries have released the successor trustee.<sup>340</sup>

## Duty to Inform and Account

Under s. 736.0813, F.S., a trustee must keep the qualified beneficiaries of an irrevocable<sup>341</sup> trust reasonably informed of the trust and its administration.<sup>342</sup> The extent of this duty, which is limited to the

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<sup>333</sup> Section 736.0812, F.S.

<sup>334</sup> The term actions includes a failure to act. Section 736.0103(1), F.S.

<sup>335</sup> Section 736.08125, F.S. is substantively similar to s. 737.306(3) - (6), F.S. As under existing law, the section speaks only to the personal liability of successor trustees. Nothing in the section affects the liability of a prior trustee or the right of a successor trustee or any beneficiary to proceed against the prior trustee. Section 736.08125(7), F.S.

<sup>336</sup> Or the estate of a prior trustee.

<sup>337</sup> Section 736.08125(1) – (4), F.S.

<sup>338</sup> Section 736.08125(5)(c), F.S.

<sup>339</sup> In addition informing the qualified beneficiary of the trustee's acceptance of the trusteeship in accordance with section 736.0813(1)(a), F.S. (see *infra* p. 40), the written notice must advise the beneficiary that the right to proceed against the successor trust will be barred unless the beneficiary delivers a written request to the trustee within 6 months after the date of the trustee's acceptance. Section 736.08125(5)(b), F.S.

<sup>340</sup> Section 736.08125(5)(a), F.S. For purpose of this final exception, eligible beneficiaries is defined to be a subset of the qualified beneficiaries. The intermediate qualified beneficiaries described in s. 736.0103(14)(b), F.S. are excluded from the subset unless, at the time the determination is being made, there are no qualified beneficiaries described in section 736.0103(14)(c), F.S. See s. 736.08125(6)(a), F.S. A super majority of eligible beneficiaries means at least two-thirds in interest of the eligible beneficiaries if their interests are reasonably ascertainable; otherwise, it means at least two-thirds in number of the eligible beneficiaries. Section 736.08125(6)(b), F.S.

<sup>341</sup> While a trust is revocable, a trustee's duty to inform and account is owed only to the settlor. Section 736.0603(1), F.S.; 736.0813(4), F.S.



qualified beneficiaries, is described in detail in the five paragraphs of s. 736.0813(1), F.S., each of which is included on the list of mandatory provisions.<sup>343</sup> According to these paragraphs, a trustee's duty to inform and account includes, but is not limited to, a duty with respect to the qualified beneficiaries to:

- Notify them of the trustee's acceptance of the trust and the full name and address of the trustee within 60 days after the trustee's acceptance;<sup>344</sup>
- Notify them of the existence of the trust, the identity of the settlor, the right to request a copy of the trust instrument, and the right to accountings within 60 days of when the trustee acquires knowledge of the creation of an irrevocable trust or that a formerly revocable trust has become irrevocable;<sup>345</sup>
- Upon reasonable request, furnish them with a complete copy of the trust instrument;<sup>346</sup>
- 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;<sup>347</sup> and
- Upon reasonable request, provide them with relevant information about the trust's assets and liabilities and the particulars of the trust administration.<sup>348</sup>

## Trustee Powers

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

## General Powers

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

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<sup>342</sup> The representation provisions of Part III of the Code apply with respect to the rights of a qualified beneficiary under s. 736.0813, F.S.. Section 736.0813(3), F.S.

<sup>343</sup> See s. 736.0105(2)(q) – (s), F.S. Section 736.0813, F.S. applies only with respect to accountings rendered for periods beginning on or after January 1, 2008.

<sup>344</sup> Section 736.0813(1)(a), F.S.

<sup>345</sup> Section 736.0813(1)(b), F.S.

<sup>346</sup> Section 736.0813(1)(c), F.S.

<sup>347</sup> Section 736.0813(1)(d), F.S.

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

## Specific Powers

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

- Exercise federal, state and local tax elections;<sup>349</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>350</sup>
- Make loans, including to a beneficiary, with terms and conditions that are fair and reasonable under the circumstances,<sup>351</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>352</sup>

## Environmental Powers

Code s. 736.08163, F.S. incorporates almost verbatim<sup>353</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, F.S., a trustee may delegate duties and powers that a prudent trustee of comparable skill could properly delegate under the circumstances. The trustee must exercise reasonable care, skill and caution in selecting the agent, in defining the scope and terms of the delegation, and in supervising the agent.<sup>354</sup> In accepting a delegation, an agent submits to the jurisdiction of Florida courts<sup>355</sup> and thereafter owes a duty to exercise reasonable care to comply with the terms of the delegation.<sup>356</sup> A trustee who properly delegates duties and powers under the strictures of s. 736.0807, F.S. is not liable for the acts of the agent.<sup>357</sup>

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<sup>349</sup> Section 736.0816(17), F.S.

<sup>350</sup> Section 736.0816(18), F.S.

<sup>351</sup> Section 736.0816(19), F.S. The trustee has a lien on future distributions for repayment of any loans.

<sup>352</sup> Section 736.0816(25), F.S.

<sup>353</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 section 736.08163 in favor of the more generally applicable definition found in s. 736.0103(5), F.S.

<sup>354</sup> See s. 736.0807(1), F.S.

<sup>355</sup> Section 736.0807(4), F.S.

<sup>356</sup> Section 736.0807(2), F.S.

<sup>357</sup> Current law permits delegations of: investment functions (including special provisions relating to life insurance trusts) under s. 518.112, F.S., and somewhat more indirectly, functions relating to trust administration under the general authority to employ agents under s. 737.402(2)(y), F.S. The former remain available under the Code. The provisions of s. 737.402(2)(y), F.S. are replaced with the Code's more comprehensive s. 736.0807, F.S. under which any duty or power may be delegated provided the delegation would be proper for a trustee of comparable skill. Apart from its increased scope, Code s. 736.0807, F.S. makes one other important change. Section 737.402(2)(y), F.S. states that trustees may act without independent investigation of an agent's recommendations. A similar statement is found in Code s. 736.0816(20), F.S. The apparent conflict between this provision and the duties imposed in s. 736.0807(1)(c), F.S. is a matter of uncertainty. Section 736.0807, however, contemplates a continuing duty to review and monitor an agent's actions and performance. See s. 736.0807(1)(c), F.S.

## Powers to Direct

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

### By Settlor of Revocable Trust

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>358</sup>

The two caveats relate to the formalities required for a settlor's direction to be effective. To the extent the direction relates to an act that is either expressly prohibited or is not authorized in the terms of the trust, as opposed to one relating to an exercise of discretion the trustee already possesses, the direction is, in effect, a trust amendment.<sup>359</sup> As such, the direction must be manifested in a manner that substantially complies with any provisions in the trust instrument pertaining to trust amendments.<sup>360</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), F.S.<sup>361</sup> That is, it must be made in a written instrument executed with testamentary formalities.<sup>362</sup>

### Other Directions

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

- Is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries; and
- Is liable for any loss resulting from a breach of that duty.<sup>363</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>364</sup> or the power to direct the actions of the trustee in which latter case the trustee may act in accordance with a direction unless the direction is either manifestly contrary to the terms of the trust or the trustee knows that the direction would constitute a serious breach of the power holder's fiduciary duty described above.<sup>365</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 ch. 737, F.S.

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<sup>358</sup> Section 736.0808(1), F.S.

<sup>359</sup> On the equivalency of a settlor's direction to a trust amendment, see the comments to UTC s. 808.

<sup>360</sup> Section 736.0701(1)(a), F.S., discussed supra p. 29.

<sup>361</sup> Section 736.0403(2)(b), F.S. is discussed supra p. 30.

<sup>362</sup> As a matter of best practice, because of the concerns discussed in the preceding paragraph, whenever possible, trustees of revocable trusts should insist that settlor's directions be made in a written instrument executed with testamentary formalities and that they substantially comply in other respects with the terms of the trust.

<sup>363</sup> Section 736.0808(4), F.S.

<sup>364</sup> A power to direct trust modification or termination may also be given to a trustee. See s. 736.0808(3), F.S.

<sup>365</sup> Section 736.0808(2), F.S.

## Duty to Distribute Income of Marital Trust

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

## Limitations on a Trustee's Power to Distribute to Itself

Code ss. 736.0814(2)-(5), F.S. are intended to protect trustees who are also beneficiaries of the trust from having adverse estate tax consequences because of their distribution and administration powers with respect to the trust. The section is based on and serves an identical purpose to current s. 737.402(4), F.S. Under s. 736.0814(2), F.S., in the absence of an express provision in the terms of a trust indicating that one or more of the following rules are not to apply, a trustee may not directly or indirectly:<sup>366</sup>

- Make distributions of income or principal to or for its own benefit other than distributions subject to an ascertainable standard;<sup>367</sup>
- Make distributions of income or principal to satisfy the trustee's support obligations,<sup>368</sup> or
- Make discretionary allocations of receipts or expenses to directly enlarge or shift beneficial interests in the trust.<sup>369</sup>

## Alternative Exercise

A power whose exercise is limited or prohibited under the above rules may be exercised by any remaining trustees, or in the absence of a remaining trustee, by a person appointed by the Court on application of any qualified beneficiary.<sup>370</sup>

## Exceptions

Notwithstanding the prohibitions listed above, exceptions are provided for:

- Trustees (whether the settlor or other person) of revocable or amendable trusts,<sup>371</sup>
- A power held by the trust settlor,<sup>372</sup> 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,<sup>373</sup> or a trust qualifying for the annual exclusion under s. 2503(c) of the Internal Revenue Code.<sup>374</sup>

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<sup>366</sup> *E.g.*, through an exercise of a power to remove or to replace a trustee in a manner that causes some other person to do an act the trustee is prohibited under the section from doing directly. See s. 736.0814(2)(d), F.S. See also the statement in s. 736.0814(5), F.S. that a person who has the right to remove or to replace a trustee does not, by virtue of that authority, possess the powers of the trustee who may be removed or replaced. The effectiveness of this statement for tax purposes is unclear.

<sup>367</sup> Section 736.0814(2)(a), F.S.

<sup>368</sup> Section 736.0814(2)(c), F.S.

<sup>369</sup> Section 736.0814(2)(b), F.S.

<sup>370</sup> Section 736.0814(4), F.S.

<sup>371</sup> Section 736.0814(3)(c), F.S.

<sup>372</sup> Section 736.0814(3)(a), F.S.

<sup>373</sup> Section 736.0814(3)(b), F.S.

<sup>374</sup> Section 736.0814(3)(d), F.S.

## Trust Investments (Part IX)

As was mentioned previously, Part IX of the Code consists of a single section that incorporates the provisions of ch. 518, F.S.; Florida's Prudent Investor rule. This rule provides that a fiduciary has the responsibility to invest assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust.<sup>375</sup> In seeking to satisfy this standard, the trustee must exercise reasonable care and caution.<sup>376</sup>

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

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

#### Liability of Trustees for Breach of Trust

A trustee is not an insurer. Thus, absent a breach of trust, a trustee is not liable for a loss or depreciation in trust value or for not making a profit.<sup>377</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>378</sup>

#### Protection of Trustees from Liability

##### When Trustee Acts in Reasonable Reliance on Trust Instrument

Although a breach of trust has occurred, new Code s. 736.1006, F.S. insulates a trustee from liability if the breach resulted from the trustee's reasonable reliance on the terms of the trust as expressed in the trust instrument.<sup>379</sup>

##### For Losses Resulting from Certain Unknown External Events

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

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

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

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<sup>375</sup> Section 518.11(1)(a), F.S.

<sup>376</sup> *Id.*

<sup>377</sup> Section 736.1003, F.S. Accord *Boalt v. Hanson*, 412 So. 2d 880 (Fla. 3d DCA 1982); *Wohl v. Lewy*, 505 So. 2d 525 (Fla. 3d DCA 1987).

<sup>378</sup> See s. 736.1002(1), F.S.

<sup>379</sup> 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.

- 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. 736.1008, F.S. restricts the enforceability of a term in a trust that attempts to relieve a trustee of liability for a breach of trust. The restrictions are mandatory; they may not be relaxed in the trust instrument.<sup>380</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 the beneficiaries.<sup>381</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>382</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>383 384</sup>

### Remedies and Damages for Breach of Trust

Section 736.1001(2), F.S. contains a nonexclusive list of actions a court may take with respect to a breach of trust.<sup>385</sup> 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

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<sup>380</sup> Section 736.0105(2)(u), F.S.

<sup>381</sup> Section 736.1011(1)(a), F.S.

<sup>382</sup> Section 736.1011(1)(b), F.S.

<sup>383</sup> Section 736.1011(2), F.S.

<sup>384</sup> Section 736.1011, F.S. is derived from Uniform Code s. 1008. The Committee added the requirement that a term drafted by or at the direction of the trustee be *directly* communicated to the settlor to indicate the Committee's disapproval of a statement in the comments to UTC s. 1008 that disclosure to the settlor's attorney would suffice for this purpose.

<sup>385</sup> In the absence of extenuating circumstances such as bad faith, gross negligence or recurring breaches, the Committee believed that a court's focus in fashioning a remedy for a breach of trust normally should be the redress of the damage caused by the breach and not the punishment of the trustee. Accordingly, s. 736.1001(3), F.S. suggests that the appropriate remedy for a breach involving a failure to distribute trust property is an order requiring the trustee to make distributions in an amount necessary to restore the trust beneficiaries to their appropriate position. Where the breach involves an improper distribution, the trust may be made whole by compelling the recipient of the distribution to return the distribution. In this regard, Code s. 736.1018, F.S. provides that persons receiving improper distributions must return the assets or funds together with any income or interest, or, if the person does not have the property, its value on the date of disposition together with any income or gain received by the person. Section 736.1018, F.S. is identical to s. 737.209, F.S. When this remedy is unavailable or insufficient, s. 736.1001(3), F.S. suggests that that the appropriate remedy for a breach that has resulted in an improper distribution is an order directing the trustee to withhold future distributions. Note however, that the remedies suggested in s. 736.1001(3), F.S. are aspirational. Courts are not bound by them. In appropriate situations, courts may adopt a remedy from the more comprehensive list found in s. 736.1001(2), F.S. or may order any other relief they find appropriate.

- Impose a lien or a constructive trust on trust property and recover wrongfully disposed of trust property or its proceeds.

## Damages

In those cases where the court finds that it is appropriate for a trustee to respond in damages for a breach of trust, s. 736.1002, F.S. states that the trustee's liability is the greater of any profit the trustee made from the breach and the amount required to restore the trust to what it would have been but for the breach, including lost income, capital gain, or appreciation that would have resulted from a property administration.<sup>386</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>387</sup> The rules discussed below apply both to cases filed after the effective date of the Code and to causes of action for breach of trust pending on that date.<sup>388</sup>

Section 736.1002(2), F.S. sets out the basic principle that, if more than one person is liable to the beneficiaries for a breach of trust, each liable person is entitled to pro rata contribution from the others. There are exceptions. No contribution is available for breaches committed in bad faith or to the extent a liable person benefits from the breach.<sup>389</sup>

Section 736.1002(3), F.S. specifies how the pro rata contribution is to be determined. In addition to stating that general principles of equity apply,<sup>390</sup> s. 736.1002(3), F.S. clarifies that pro rata in this context means in proportion to the relative degrees of fault.<sup>391</sup> Importantly, this determination anticipates more than a mere counting of the number of liable persons. Some evaluation of their relative fault is required. In making this evaluation, a court may treat the collective liability of a group as a single share.<sup>392</sup>

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

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

<sup>386</sup> See s. 736.1002(1), F.S.

<sup>387</sup> Much of s. 736.1002, F.S. is based on s. 768.31(4), F.S. dealing with contribution among joint tortfeasors. By its terms, that section does not apply to breaches of trust or other fiduciary obligations. Section 768.31(2)(g), F.S.

<sup>388</sup> Section 736.1002(7), F.S.

<sup>389</sup> Section 736.1002 (2), F.S.

<sup>390</sup> Section 736.1002 (3)(c), F.S.

<sup>391</sup> Section 736.1002 (a), F.S.

<sup>392</sup> Section 736.1002 (3)(b), F.S.

## Costs and Fees

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

- **Section 736.1004, F.S.:** This section is derived from a combination of s. 737.188, F.S. and s. 737.4033, F.S. It applies to costs (including attorney's and guardian ad litem's fees) incurred in actions for breach of a fiduciary duty or challenging an exercise or nonexercise of a trustee's power and in proceedings to modify a trust under ss. 736.04133 - 736.0412, F.S.<sup>393</sup> The section directs the court to award taxable costs and fees as in chancery actions<sup>394</sup> and authorizes the court to direct payment from the party's interest, from other property, or from both. Section 736.1004, F.S. makes no change in Florida law.
- **Section 736.1005, F.S.:** This section is substantively identical to that portion of s. 737.2035, F.S. relating to attorney's fees. Under it, an attorney who has rendered services to a trust may apply to the court for an award of reasonable compensation for those services. The section is directed primarily at the compensation of attorneys of beneficiaries and others who render services that benefit the trust. The section authorizes the court to direct from which part of the trust the fees are to be paid. The section also continues the requirement of written notice to nonadverse trustees and the authority of the court to adjust the attorney's compensation for services rendered prior to the notice.
- **Section 736.1006, F.S.:** This section is substantively identical to that portion of s. 737.2035, F.S. that relates to costs other than attorney's fees. Section 736.1006, F.S. provides that a court may award costs as in chancery proceedings in all trust proceedings. The court may also direct the part of the trust from which the costs are to be paid.
- **Section 736.1007, F.S.:** This section is substantively identical to s. 737.2041, F.S. It contains rules relating to the compensation of attorneys for ordinary and extraordinary services rendered in conjunction with the administration of a revocable trust after the settlor's death; the impact of a fee agreement between the attorney and the trustee or settlor; and the authority of the court to determine reasonable compensation and to award costs and fees in proceedings involved in determining that compensation.

## Liability of Trustees to Third Parties

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

## General Rules for Contracts and Torts

With respect to contracts, a trustee is not personally liable on contracts entered into as a fiduciary in the course of administration of a trust unless the contract so provides or the trustee failed to reveal its fiduciary capacity.<sup>395 396</sup>

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<sup>393</sup> Judicial proceedings arising with respect to s. 736.0412, F.S. actually arise under s. 736.0410(2), F.S.

<sup>394</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>395</sup> Section 736.1013(1), F.S.

<sup>396</sup> Unlike existing law, the Code contains no exception for contracts for attorney's fees.



With respect to torts, a trustee is personally liable for torts committed in the course of administration of a trust or for obligations arising from the ownership or control of trust property only if the trustee is personally fault.<sup>397</sup>

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>398</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>399</sup>

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

Code s. 736.1015, F.S. is new to Florida law.<sup>400</sup> 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>401</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>402</sup>

### **Limitations on Actions Against Trustees**

Code s. 736.1008, F.S. specifies limitations periods for claims by a beneficiary against a trustee for breach of trust.<sup>403</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.

### **When Trustee has Issued a Written Limitation Notice**

The shortest limitations period provided in s. 736.1008, F.S. is six months. This period applies to actions on matters the trustee has adequately disclosed on a trust accounting or other trust disclosure

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<sup>397</sup> Section 736.1013(2), F.S. *Accord* s. 737.306(1)(b), F.S.

<sup>398</sup> Section 736.1013(3), F.S. *Accord* s. 737.306(1)(c), F.S.

<sup>399</sup> Section 736.1013(4), F.S. *Accord* s. 737.306(2), F.S.

<sup>400</sup> The section is derived from UTC. Section 736.1015, F.S. protects only trustees; it does not protect settlors. To the contrary, the section specifically provides that when a trustee of a revocable trust holds a general partnership interest, the settlor is personally liable for contracts and other partnership obligations as if the settlor were a general partner. Section 736.1015 (3), F.S.

<sup>401</sup> Section 736.1015(2), F.S.

<sup>402</sup> Section 736.1015(1), F.S.

<sup>403</sup> For the limitations period applicable to actions contesting the validity of a revocable trust after the settlor's death, see s. 736.0604, F.S. discussed *supra* at p. 31.

document when the trustee has provided the beneficiary with a related limitation notice.<sup>404</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>405</sup>

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

### **When There is no Limitation Notice**

A significantly longer limitations period applies to claims involving matters adequately disclosed on a trust accounting when no related limitation notice is sent to the beneficiary. Here, s. 736.1008(1)(a), F.S. provides that the claims are barred as provided in ch. 95, F.S. Normally, this will result in a four year limitations with the period beginning on the date of receipt of the adequate disclosure.<sup>406</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 twelve years, the discovery rule provides that the limitations period does not begin until the later of the time the facts giving rise to the action are discovered or the time the facts should have been discovered by an exercise of due diligence.<sup>407</sup>

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

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

- The trustee has issued its final accounting for the trust; and
- The trustee has given written notice to the beneficiary of the availability of trust records for examination and that claims based on matters not adequately disclosed in that accounting may be barred unless the action is commenced within the applicable limitations period provided in ch. 95, F.S.<sup>408</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>409</sup>

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

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

As to both situations, s. 736.1008(3), F.S. provides that the applicable limitations period is determined under ch. 95, F.S. That is, the normal limitations period will be the four year period described in s.

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<sup>404</sup> See s. 736.1008(2), F.S.

<sup>405</sup> See s. 736.1008(4)(c), F.S.

<sup>406</sup> See s. 95.11(3), F.S. See also s. 736.1008(1)(a), F.S.

<sup>407</sup> Here again, Code s. 736.1008, F.S. is identical to s. 737.307, F.S.

<sup>408</sup> See s. 736.1008(1)(b), F.S.

<sup>409</sup> Section 736.1008(1)(b), F.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>410</sup>

### **Protection of Persons other than Beneficiaries Dealing with the Trustee**

The Code contains two sections of interest to persons other than beneficiaries who deal with trustees. Code s. 736.1016, F.S., which is based on Uniform Code s. 1012, provides protection against liability for persons who deal with a trustee in good faith. The section is similar to, but slightly more expansive than, current s. 737.405, F.S. Code s. 736.1017, F.S. which is derived from Uniform Code s. 1013 and for which there is no counterpart in ch. 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, F.S. provides protection to persons (other than beneficiaries) who assist or deal for value with a trustee in good faith and without knowledge that:

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

In addition, the section:

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

Section 736.1016, F.S. is included on the list of mandatory provisions; the protections it provides may not be altered in a trust instrument.<sup>411</sup> The section is similar to current s. 737.405, F.S. Two noteworthy areas of difference include:

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

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

Except when it is required by law or a judicial proceeding concerning the trust, instead of furnishing a complete copy of a trust instrument to a person (other than a beneficiary) who requests it, Code s.

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

<sup>411</sup> See s. 736.0105(2)(v), F.S.

736.1017, F.S. provides that the trustee may furnish a certification of trust.<sup>412</sup> The section sets out certain required information that must be included in the certification<sup>413</sup> among which is a statement that the trust has not been revoked, modified, or amended in any manner that would cause the representations in the certificate to be incorrect.<sup>414</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>415</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>416 417</sup>

### **Rules of Construction (Part XI)**

Part XI contains a series of default rules of construction. As an initial matter, it is worth repeating the admonitions found in the initial section of the Part that, except for the provisions included on the mandatory list in s. 736.0105(2), F.S. (of which there is only one — s. 736.1108 dealing with penalty clauses for contesting trusts), the intent of the settlor as expressed in the terms of the trust controls the legal effect of the trust dispositions. In ascertaining that intent, however, in the absence of a contrary indication in the terms of a trust, the rules of construction set out in Part XI of the Code apply.<sup>418</sup>

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

### **Carryover Provisions from Existing Law Construction of Generic Terms**

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

### **Multi-Generational Class Gifts**

Code s. 736.1103, F.S. provides that gifts to multi-generational classes (such as descendants, heirs, etc.) are per stirpes. This provision is identical in intent to s. 737.624, F.S., although the wording of the

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<sup>412</sup> Section 736.1017(1) and (8), F.S..

<sup>413</sup> See s. 736.1017 (1), F.S. for a list of the required contents. A certification of trust need not include the dispositive terms of the trust. Section 736.1017 (4), F.S.

<sup>414</sup> Section 736.1017 (3), F.S.

<sup>415</sup> Section 736.1017 (5), F.S.

<sup>416</sup> See s. 736. 1017(6) and (7), F.S.

<sup>417</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, knowledge of a trust's terms may not be inferred solely because the recipient is in possession of a copy of the trust instrument. See s. 736.1017(6), F.S., final sentence.

<sup>418</sup> See s. 736.1016, F.S..

section was revised to eliminate a potential conflict between this section and new s. 736.1106, F.S. discussed below.

### **Unlawful and Intentional Killings**

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

### **Effect of Dissolution of Marriage on Revocable Trust**

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

### **Change in Securities; Accessions; Nonademption**

Code s. 736.1107, F.S. addresses some commonly occurring constructional issues that arise when a trust beneficiary is entitled to a distribution of specific securities (as opposed to their equivalent value).<sup>419</sup> The section gives the beneficiary:

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

### **Trust Contest Penalty Clauses**

Code s. 736.1108, F.S. is a mandatory provision the initial subsection of which is identical to s. 737.207, F.S. The subsection provides that trust in terrorem clauses<sup>420</sup> are unenforceable. The second subsection of s. 736.1108, F.S. is new. It is an effective date provision that incorporates the effective date of the legislation originally creating current s. 737.207, F.S. Trusts created before October 1, 1993 are not subject to either provision.<sup>421</sup>

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

Code s. 736.1106, F.S. is new.<sup>422</sup> Like current s. 737.6035, F.S. which it will replace, s. 736.1106, F.S. is concerned with antilapse and the descendibility of beneficial interests in trusts. The new section is applicable to all trusts except those which are irrevocable on the effective date of the Code.<sup>423</sup>

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<sup>419</sup> Section 736.1107, F.S. is the trust law counterpart to s. 732.605, F.S. in the Probate Code and is identical in all respect to current s. 737.622, F.S.

<sup>420</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), F.S.

<sup>421</sup> For this purpose, a revocable trust is treated as if it was created when the right of revocation terminates. Section 736.1108(2), F.S.

<sup>422</sup> Section 736.1106, F.S. is the trust law equivalent of s. 732.603, F.S. (the Probate Code antilapse statute). As is explained more fully below, adoption of s. 736.1106, F.S. requires that conforming amendments be made to s. 732.603,

## 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>424</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 W.<sup>425</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>426</sup>

## Concerns Regarding Current Statutes

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

- The failure to address how these sections apply to powers of appointment, if at all;
- The inadvertent and inappropriate application of s. 737.6035, F.S. to some present interests in trust; and
- The failure of s. 732.603, F.S. to address the situation of a related beneficiary dying without surviving descendants after the testator but before the expiration of the life tenant's interest.
- The failure of s. 737.6035, F.S. to clarify how beneficial interests in inter vivos trusts are to be handled when they are not saved for some other beneficiary under the section.<sup>427</sup>

Of necessity, the formulation of the new Florida Trust Code required a reexamination of s. 737.6035, F.S. In turn, a Committee decision to remedy the problems it found in that section required changes in s. 732.603, F.S. as well. Together, these two provisions constitute a new coordinated and more comprehensive default regime covering antilapse and descendibility issues in both testamentary and nontestamentary contexts. Discussion begins with the changes made to s. 732.603, F.S.<sup>428</sup>

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F.S. as well. As these two provisions are related, discussion of the conforming changes that are being made to s. 732.603, F.S. appear below instead of later in the Summary where other conforming changes are considered.

<sup>423</sup> Section 736.1106(5), F.S.

<sup>424</sup> See s. 731.201(9), F.S.

<sup>425</sup> The 2001 changes became effective January 1, 2002.

<sup>426</sup> Section 737.6035, F.S. became effective on June 12, 2003.

<sup>427</sup> For more on these and other problems with s. 732.603, F.S. and s. 737.6035, F.S., see David Powell, *Lapse, Antilapse, an Descendible Beneficial Interests in Trusts*, in ADMINISTRATION OF TRUSTS IN FLORIDA ch 7 (4th Ed. The Florida Bar 2005).

<sup>428</sup> In the interest of clarity, the analysis uses the adjective "new" when referencing the newly formulated version of section 732.603.

## Revisions to s. 732.603, F.S.

As detailed above, under existing law, lapse and descendibility rules for testamentary trusts appear in s. 732.603, F.S. of the Probate Code while the companion rules for living trusts appear in s. 737.6035, F.S. The division of labor under the new regime is different. Because Code s. 736.1106, F.S. applies to both testamentary and to living trusts, s. 732.603, F.S. is restored to its pre-2002 state. That is, the new version applies only to outright testamentary dispositions.<sup>429</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.

## Powers of Appointment

Current s. 732.603, F.S. is not clear on whether and how it applies to outright interests created by the exercise of testamentary powers of appointment. In contrast, new s. 732.603, F.S. explicitly applies to these interests.<sup>430</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 new s. 732.603, F.S. assumes that there is no contrary intent indicated in either D's will or in the instrument in which F created D's power.
- GC takes in C's place under new s. 732.603, F.S. only if the relationship test specified in the section is met with respect to F and C. Thus, if F is unrelated to C, the section does not apply whether or not C is related to D.
- In general, it is immaterial to the application of new s. 732.603, F.S. whether D's power is a general one or a special one. With the latter, however, there exists the possibility that the person in whose favor the section operates is outside the class of permissible objects of the power.<sup>431</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>432</sup>

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<sup>429</sup> New s. 732.603(4), F.S.

<sup>430</sup> See new s. 732.603(2), F.S.

<sup>431</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>432</sup> See new s. 732.603(2), F.S., final sentence.

## Words of Survivorship and other Indications of Contrary Intent

Like its predecessor, new s. 732.603, F.S. yields to an indication of a contrary intent. This would include a direction in the testator's will that lapsed gifts are to be added to the residue or that they are to pass instead to an alternate beneficiary. In this regard, the new section also codifies existing Florida case law which holds that mere words of survivorship associated with a testamentary disposition are a sufficient indication of contrary intent.<sup>433</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>434</sup>

## Beneficial Interests in Trust

### General Effect of s. 736.1106, F.S.

With some exceptions discussed below, Code s. 736.1106, F.S. applies when a beneficiary of a future interest in either a testamentary or an inter vivos trust dies before the point at which the beneficiary's interest becomes possessory.<sup>435</sup> In such situations, s. 736.1106, F.S. does two things:

- First, it provides that the deceased beneficiary's future interest in the trust is contingent on the beneficiary surviving the point at which the interest takes in possession.
- Second, unless a contrary intent appears in the trust instrument, s. 736.1106, F.S. creates a per stirptual alternate gift in such of the deceased beneficiary's descendants as are living at that time.<sup>436</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, F.S. creates a per stirptual alternate gift of C's interest in favor of GC-1 and GC-2.<sup>437</sup>

### Situations where s. 736.1106, F.S. Applies

Section 736.1106, F.S. applies to a broad array of situations where the beneficiary of a future interest<sup>438</sup> 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:

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<sup>433</sup> See *Williams v. Williams*, 152 Fla. 255, 9 So. 2d 798 (Fla. 1942) (dealing with former s. 731.20, F.S.); *In re Estate of Wagner*, 423 So. 2d 400 (Fla. 2d DCA 1982).

<sup>434</sup> See new s. 732.603(3)(a), F.S.

<sup>435</sup> The section refers to this as the "distribution date." See s. 736.1106(1)(b), F.S.

<sup>436</sup> Section 736.1106(2), F.S.

<sup>437</sup> Astute readers will readily see that the effect of s. 736.1106, F.S. is to turn C's vested interest into a contingent one with alternate gift in his descendants. Note that the alternate gift is in the descendants of D who survive W. If GC-1 predeceased W survived by a child GGC, the remainder will pass half to GGC and half to GC-2 at W's death. It is immaterial whether GGC was born before or after C's death. The result of the situation described in the comment is the same whether GC-1 predeceased W in fact or in law. See s. 736.1106(1)(e), F.S.

<sup>438</sup> Section 736.1106, F.S. applies only to future interests. See s. 736.1106(1)(a), F.S.



- Whether the trust in which C held his interest was created by standard transfer or by an exercise of a power of appointment, and in the latter case, whether the power was general or special.
- Whether the transfer (or appointment) by which the trust was created was an inter vivos or testamentary one.
- With respect to an inter vivos trust, whether the trust is revocable or irrevocable.
- With respect to a testamentary trust, whether C survived the testator or not.
- Whether, the predeceasing beneficiary is an individual or a member of a class.<sup>439</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, F.S.

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

- It is not subject to estate taxation at C's death;
- 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, F.S. *will* accord with D's probable intent. But the advantages listed above exist regardless of any relationship between D and C. If D's contrary intent in a particular case outweighs the listed advantages, D is free to negate application of s. 736.1106, F.S. in the trust instrument. Unless he does so, however, the better default rule is for the section to apply regardless of any relationship test.

### Language Indicating a Contrary Intent

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

<sup>439</sup> See s. 736.1106(1)(a) and (c), F.S.

- Expressing a different alternate taker in the instrument;
- Stating the intent that the designated beneficiary's descendants not share in the gift; or
- Attaching words of survivorship to the remainder beneficiary' interest.<sup>440</sup>

By contrast, the mere presence of a residuary clause in a settlor's will is not a sufficient indication of a contrary intent to the application of the second principle and this is true even if the will specifically provides that lapsed or failed gifts are to pass under the residuary clause.<sup>441</sup>

### Disposition of Remainder Interests when there is no Alternate Taker

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

### Interests Created by Traditional Transfer

If the interest was created in a nonresiduary devise in the *transferor's* will, the interest will pass as part of the transferor's residuary estate.<sup>442</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>443</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.<sup>444</sup>

### Interests Created by Appointment

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

- First, prior to application of the above rules, preference is given to the power donor's gift-in-default clause, if any.<sup>445</sup>
- Second, in the application of the above rules, the *transferor* of an interest created by the exercise of a general power is specified to be the donee of the power while the *transferor* for interests created by the exercise of a special power is specified to be the donor of the power.<sup>446</sup>

<sup>440</sup> On the effectiveness of using words of survivorship for this purpose, see s. 736.1106(3)(a), F.S.

<sup>441</sup> See s. 736.1106(3)(b), F.S.

<sup>442</sup> Section 736.1106(4)(b), F.S.

<sup>443</sup> Section 736.1106(4)(c), F.S.

<sup>444</sup> Some additional observations about the above example: if D's brother B had died before W, the property would pass exclusively to sister S because the class of D's heirs is determined as if D had died intestate at W's death when the remainder interest takes in present possession; the result in the Example (original or as modified above) is the same if D had created the trust by inter vivos transfer instead of by will; in the case of an inter vivos trust, the result is also the same whether the trust is revocable or irrevocable and whether D predeceases W or not, and since there is no relationship test under s. 736.1106, F.S., all of the above remains true even if D and C are unrelated to each other.

<sup>445</sup> See s. 736.1106(4)(a), F.S.

## Charitable Trusts (Part XII)

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

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

- **Section 736.1201, F.S.:** This section is derived from s. 737.501, F.S. The order of the definitions for "charitable organization" and "Internal Revenue Code" were switched and changes were made to the definitions of Internal Revenue Code and State attorney. The definition of the former was updated to the 1986 Code and the definition of the latter was tied to the state attorney for the judicial circuit of the principal place of administration of the trust under s. 736.0108, F.S.
- **Section 736.1202, F.S.:** This section is identical to s. 737.502, F.S.
- **Section 736.1203, F.S.:** This section is derived from s. 737.503, F.S. A cross reference to s. 737.505, F.S. was updated to Code s. 736.1203, F.S.
- **Section 736.1204, F.S.:** Section 736.1204, F.S. is derived from s. 737.504, F.S. Gender specific references were replaced with gender neutral ones, cross references to s. 737.505, F.S. were updated to Code s. 736.1205, F.S., and some section references were clarified as referring to the Internal Revenue Code.
- **Section 736.1205, F.S.:** This section is derived from s. 737.505, F.S. Cross references to s. 737.504, F.S. were updated to Code s. 736.1204, F.S.
- **Section 736.1206, F.S.:** This section is derived from s. 737.506, F.S. References to s. 737.504(2), F.S. were updated to Code s. 736.1204(2), F.S.
- **Section 736.1207, F.S.:** This section is identical to s. 737.507, F.S.
- **Section 736.1208, F.S.:** This section is identical to s. 737.508, F.S.
- **Section 736.1209, F.S.:** This section is derived from s. 737.509, F.S. A reference to s. 737.510, F.S. was deleted and references to s. 737.508(5), F.S. were updated to Code s. 736.1208(5), F.S.
- **Section 736.1210, F.S.:** This section is identical to s. 737.511, F.S.

## Miscellaneous (Part XIII)

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

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<sup>446</sup> See s. 736.1106(4), F.S., final paragraph.

## Electronic Records and Signatures

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

## Investment of Fiduciary Funds Permitted

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

## Severability

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

## Investment of Fiduciary Funds

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

## Effective date

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

- The Code does not affect any act done prior to its effective date.<sup>447</sup>
- The Code does not affect the running of any limitations period that began before the effective date of the Code, even if the statute specifying the period is repealed or superseded by the Code.<sup>448</sup>
- The Code applies to all judicial proceedings concerning trusts commenced on or after its effective date.<sup>449</sup>
- The Code also applies to judicial proceedings commenced before that date unless the court finds its application would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of the parties.<sup>450</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>451</sup>

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<sup>447</sup> Section 736.1303(1)(e), F.S.

<sup>448</sup> Section 736.1303(2), F.S.

<sup>449</sup> Section 736.1303(1)(b), F.S.

<sup>450</sup> Section 736.1303(1)(d), F.S.

<sup>451</sup> Section 736.1303(1)(a), F.S.

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

<b>Specific Effective Dates of Code Provisions to Limit Retroactivity</b>		
<b>Section</b>	<b>Title or topic</b>	<b>Effective date:</b>
736.0403	Trusts created in other jurisdictions; formalities required for revocable trusts	Trusts created after the effective date of the Code.
736.04115	Judicial modification of irrevocable trust when modification is in best interest of beneficiaries	Inapplicable to trusts created before January 1, 2001. Revocable trusts are deemed created at the time they become irrevocable.
736.0412	Nonjudicial modification of irrevocable trust	Inapplicable to trusts created before January 1, 2001. Revocable trusts are deemed created at the time they become irrevocable.
736.0813	Duty to inform and account	In general, applies only to trust accountings rendered for accounting periods beginning on or after January 1, 2008. Paragraphs (1)(a) and (b) do not apply to trustees who accept a trusteeship before the effective date of the Code or to trusts that are irrevocable before that date.
736.08135	Trust accountings	Applies only to trust accountings rendered for accounting periods beginning on or after January 1, 2003.
736.08163	Powers of trustees relating to environmental or human health laws or to trust property contaminated with hazardous or toxic substances; liability	Does not apply to trusts created before July 1, 1995, unless the trust is amended to incorporate the provisions of the section.
736.1008	Limitations on proceedings against trustees	Applies to trust accountings for accounting periods beginning on or after January 1, 2008, and to written reports, other than trust accountings, received by a beneficiary on or after January 1, 2008.
736.1108	Penalty clause for contest	Applies to trusts created on or after October 1, 1993. Revocable trusts are treated as created when the right of revocation terminates.

### **Conforming Changes**

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

- **Section 518.117, F.S.:** *New.* This section authorizes investment of fiduciary funds pursuant to s. 660.417, F.S.
- **Section 660.25, F.S.:** *Revised.* This section provides a definition for "investment instrument."
- **Section 660.417, F.S.:** *Revised.* This section authorizes trustees to engage in affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company.
- **Section 689.075(4), F.S.:** *Revised.* The second sentence of this subsection was deleted as obsolete.
- **Section 689.175, F.S.:** *New.* This section abolishes the Doctrine of Worthier title as both a rule of law and a rule of construction. The purposes originally served by that doctrine are no longer relevant and its application can create adverse tax consequences and can impair the validity of special needs trusts.
- **Section 731.103, F.S.:** *Revised.* The section is made applicable to new ch. 736; the provision specifying the applicability of the rules of evidence in civil actions is moved to new s. 731.1035, F.S. (below); subsection (4) permitting proof of death by direct or circumstantial evidence before expiration of 5-year time period is added to conform this section to s. 737.626(4), F.S.
- **Section 731.1035, F.S.:** *New.* This new section is separated out from s. 731.103, F.S. (see above). It specifies that the rules of evidence in civil action apply to proceedings under Probate Code.
- **Section 731.201(2) and (9), F.S.:** *Revised.* In both of these subsections, a reference to beneficiaries described in s. 737.303(4)(b), F.S. is changed to qualified beneficiary as defined in the new Code.
- **Section 731.201(27), F.S.:** *New.* This section adds a new definition of "power of appointment."
- **Section 731.303, F.S.:** *Revised.* This section is amended to limit it to proceedings involving estates and not those involving trusts. In addition, the portions of the section dealing with representation by holders of powers of appointment are subjected to the same restrictions that appear in Code s. 736.0302, F.S. That is, representation does not apply to matters involving a trustee's fraud or bad faith, a power of a trustee to distribute property or to a power held by a person who is the sole trustee.
- **Section 732.513, F.S.:** *Revised.* Subsection (c) of the section is deleted to remove the implication that a pour over to a revocable trust that is not executed in the manner required for wills is effective.
- **Section 732.603, F.S.:** *Rewritten.* The revisions to this section have been discussed in detail previously.<sup>452</sup>
- **Section 732.604, F.S.:** *Clarified.* Subsection (2) of this section is revised to clarify the meaning it was intended to have all along.
- **Section 732.611, F.S.:** *Clarified.* The wording of this section was changed to better reflect its intended purpose.

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<sup>452</sup> See "

Revisions to s. 732.603, F.S.", supra p. 55.

- **Section 732.212, F.S.: Revised.** A reference in this section to beneficiaries described in s. 737.303(4)(b), F.S. is changed to qualified beneficiary as defined in the new Code.
- **Section 738.104, F.S.: Revised.** This section is amended in several places to change references to the previously defined term "beneficiaries" to a newly defined term "eligible beneficiaries." Under the new version, it is the eligible beneficiaries of a trust who have standing to object to the use of a trustee's power to adjust with respect to trusts in existence on January 1, 2003. The new term excludes from the class of beneficiaries with standing the middle tier qualified beneficiaries described in Code s. 736.0103(14)(b), F.S. unless there is no third tier qualified beneficiary described in s. 736.0103(14)(c), F.S. The practical effect of the revisions are two fold. First, for most trusts the term eligible beneficiaries will have a meaning very similar to the term "beneficiaries" under the current version of the section. For those trusts where the term differs, the revisions are intended to insure that there will always be two categories of qualified beneficiaries with standing to object to an exercise of the trustee's adjustment power.
- **Section 744.331(6)(b) and (f), F.S.: Revised.** These are companion revisions to the change made in Code s. 736.0207, F.S. permitting court approved contests of a revocable trust by a settlor's guardian prior to the settlor's death. Paragraph (b) requires that a court determine whether a sufficient alternative to guardianship exists for a person the court finds to be incapable of exercising delegable rights. If so, the court is precluded from appointing a guardian. If not, the court is required to appoint a guardian for the incapacitated person. Paragraph (f) provides that an incapacitated person's trust, trust amendment, or durable power of attorney is not to be considered a sufficient alternative to guardianship if an interested person files a verified statement that he or she has a reasonable factual basis for believing in good faith that the trust, trust amendment or durable power is invalid.
- **Section 744.441(11), F.S.: Revised.** The new language added to this subsection is also a related to new Code s. 736.0207, F.S. Subsection (11) directs that before authorizing a guardian to bring an action under s. 736.0207, F.S., the court must find that the action appears to be in the ward's best interest during the ward's probable lifetime.
- **Section 744.462, F.S.: New.** This new section provides for the reporting of a court's finding as to the validity of a ward's trust, trust amendment, and power of attorney and for the continued review by the court of the sufficiency of guardianship alternatives, the continued need for a guardian, and the extent of the need for delegation of the ward's rights.

#### C. SECTION DIRECTORY:

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

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

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

**Section 4.** Creating Part IV of chapter 736, F.S., consisting of sections 736.0401, 736.0402, 736.0403, 736.0404, 736.0405, 736.0406, 736.0407, 736.0408, 736.0409, 736.0410, 736.04113, 736.04115, 736.0412, 736.0413, 736.0414, 736.0415, 736.0416, and 736.0417. This section encompasses the

methods and requirements for the creation of a trust, trust validity, trust modification, and trust termination.

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

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

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

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

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

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

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

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

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



- Section 14.** This section amends paragraph (a) of subsection (5) of s. 497.458, F.S., relating to the disposition of proceeds received on contracts.
- Section 15.** This section creates s. 518.117, F.S., relating to what investments of fiduciary funds are permissible.
- Section 16.** This section amends subsection (2) of s. 607.0802, F.S., relating to qualifications of directors.
- Section 17.** This section amends subsection (2) of s. 617.0802, F.S., relating to qualifications of directors.
- Section 18.** This section amends subsections (6) and (7) of s. 660.25, F.S., defining "investment instrument," and correcting references from ch. 737, F.S. to s. 736.
- Section 19.** This section amends s. 660.417, F.S., to permit a trustee to engage in affiliated services; a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company
- Section 20.** This section amends paragraphs (a), (d), and (e) of subsection (1) and subsections (2), (3), (9), and (10) of s. 660.46, F.S., relating to the substitution of fiduciaries.
- Section 21.** This section amends s. 660.418, F.S., to correctly reference s. 736 and not ch. 737, F.S.
- Section 22.** This section amends subsection (5) of s. 689.071, F.S., to correctly reference s. 736 and not ch. 737, F.S.
- Section 23.** This section amends subsections (1) and (4) of s. 689.075, F.S., relating to inter vivos trusts; powers retained by settlor.
- Section 24.** This section creates s. 689.175, F.S., abolishing the Worthier title doctrine.
- Section 25.** This section amends subsection (8) of s. 709.08, F.S., to correctly reference s. 736 and not ch. 737, F.S.
- Section 26.** This section amends paragraph (c) of subsection (2) of s. 721.08, F.S., to correctly reference sections of s. 736 and not ch. 737, F.S.
- Section 27.** This section amends paragraph (e) of subsection (1) of s. 721.53, F.S., to correctly reference sections of s. 736 and not ch. 737, F.S.
- Section 28.** This section amends s. 731.103, F.S., regarding evidence as to death or status.
- Section 29.** This section creates s. 731.1035, F.S., providing in proceedings under the code, the rules of evidence in civil actions are applicable unless specifically changed by the code.
- Section 30.** This section amends s. 731.201, F.S., regarding general definitions.
- Section 31.** This section amends paragraph (a) of subsection (1) and subsection (5) of s. 731.303, F.S., regarding representation.
- Section 32.** This section amends subsection (5) of s. 732.2075, F.S., to correctly reference a section of s. 736 and not ch. 737, F.S.
- Section 33.** This section amends subsection (2) of s. 732.513, F.S., relating to devises to trustee.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

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

None.

### D. FISCAL COMMENTS:

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

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

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

Personal Jurisdiction:

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

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

distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this state regarding any matter involving the distribution.

The Committee's Scrivener's Summary provides that "F.S. chapter 737 has no provision corresponding to section 736.0602<sup>453</sup>. Jurisdiction under existing law is obtained under the general long arm statutes found in F.S. chapter 48. The Committee believes that the inclusion of a long arm statute tailored specifically to trust matters is a beneficial addition to Florida law."<sup>454</sup>

Even assuming, for the sake of argument, that the provisions of the Florida Long Arm Statute have been satisfied,<sup>455</sup> federal due process requirements cannot be minimized. 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>456</sup>

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<sup>453</sup> The report points to s. 736.602, F.S., however s. 736.0602, F.S. pertains to revocation or amendment of revocable trusts, therefore it would seem that the reference to s. 736.602, F.S. is merely a scrivener's error and it will be considered as such.

<sup>454</sup> Committee's Scrivener's Summary, page 12.

<sup>455</sup> Section 48.193, F.S. provides:

- (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:
  - (a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.
  - (b) Committing a tortious act within this state.
  - (c) Owning, using, possessing, or holding a mortgage or other lien on any real property within this state.
  - (d) Contracting to insure any person, property, or risk located within this state at the time of contracting.
  - (e) With respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintaining a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.
  - (f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:
    1. The defendant was engaged in solicitation or service activities within this state; or
    2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.
  - (g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.
  - (h) With respect to a proceeding for paternity, engaging in the act of sexual intercourse within this state with respect to which a child may have been conceived.
- (2) A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.
- (3) Service of process upon any person who is subject to the jurisdiction of the courts of this state as provided in this section may be made by personally serving the process upon the defendant outside this state, as provided in s. 48.194. The service shall have the same effect as if it had been personally served within this state.
- (4) If a defendant in his or her pleadings demands affirmative relief on causes of action unrelated to the transaction forming the basis of the plaintiff's claim, the defendant shall thereafter in that action be subject to the jurisdiction of the court for any cause of action, regardless of its basis, which the plaintiff may by amendment assert against the defendant.
- (5) Nothing contained in this section limits or affects the right to serve any process in any other manner now or hereinafter provided by law.

<sup>456</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985)(citations omitted).

Nevertheless, the U.S. Supreme Court maintains that the "constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum."<sup>457</sup> The Court will look to the individuals "conduct and connection with the forum State" to determine if that person "should reasonably anticipate being haled into court there."<sup>458</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>459</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>460</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>461</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>462</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, F.S., which authorizes personal jurisdiction over an out of state resident solely upon the receipt of a distribution from a trust located in Florida, may perhaps be challenged by a nonresident whose only contact with Florida was cashing a check received in the mail.

#### Formalities for Creation of a Trust:

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

The Committee's Scrivener's Report provides the following analysis of this section:<sup>463</sup>

A failure to comply with the requirements of section 736.0403(2)(b) does not result in the initial invalidity of a revocable trust. Rather, only the testamentary aspects of the trust are void. As under existing law, testamentary aspects means "those provisions of the trust that dispose of the trust property on or after the settlor's death other to the settlor's estate."

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<sup>457</sup> *Rudzewicz*, 471 U.S. 474-75 (citations omitted).

<sup>458</sup> *Id.*

<sup>459</sup> *Id.*

<sup>460</sup> *Rudzewicz*, 471 U.S. at 475-76. (emphasis in original)(citations omitted).

<sup>461</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>462</sup> *Id.* (citing *Rudzewicz*, 471 U.S. 462 (1985)).

<sup>463</sup> Committee Report, pages 19-20.

The formalities required are those for a will in Florida. Complying with the formalities for a will in some other state is not enough.

Section 736.0403(2)(b) has no applicability to trusts created by non Florida domiciliaries whether or not the trust was executed in Florida.

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

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

**B. RULE-MAKING AUTHORITY:**

None.

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

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

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

- Changed the presumption on an unproductive trust to that of current law (\$50,000 dollars);
- Removed the definition of "person" from the bill;
- Modified the governing law provisions of s. 736.0107, F.S. to provide that in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction where the settlor resides at the time the trust is created controls. Moreover, a designation in the terms of the trust is not controlling as to any matter for which the designation would be contrary to a strong public policy of Florida;
- Removed "the interest of the beneficiaries" from consideration of a trustees' duty where to administer the trust;
- Authorized a trustee to invest in investment instruments that are controlled by the trustee or its affiliate or from which the trustee or affiliate receives compensation, provides for notice of this to beneficiaries, and establishes a method by which a beneficiary may file an objection with the trustee;
- Created s. 518.117, F.S., authorizing a fiduciary to invest fiduciary funds pursuant to s. 660.417, F.S.; so long as the investment complies with among other things Florida's Prudent Investor Rule. This rule provides that a fiduciary has the responsibility to invest assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust.<sup>464</sup> In seeking to satisfy this standard, the trustee must exercise reasonable care and caution;

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<sup>464</sup> Section 518.11(1)(a), F.S.

- Amended s. 660.417, F.S., regarding investments by fiduciaries, to add that a bank or trust company is not precluded from investing in investment instruments offered by that bank or trust company; and

The bill was then reported favorably with a committee substitute.