

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1183 Administration of Trusts
SPONSOR(S): Hooper and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 2606

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Constitution & Civil Law</u>	<u>6 Y, 0 N</u>	<u>Thomas</u>	<u>Birtman</u>
2) <u>Safety & Security Council</u>	<u>14 Y, 0 N, As CS</u>	<u>Thomas</u>	<u>Havlicak</u>
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

In 2006, the Florida Legislature substantially revised provisions of the Florida Statutes relating to land trusts and Florida's Trust Code. The land trust is a modified form of a conventional trust agreement that is limited to an arrangement where the trustee holds title to the real property; however, all the active managerial and administrative powers are reserved to the beneficiaries. The Trust Code is that portion of the Florida Statutes which pertains to the administration of trusts. The bill modifies the Florida Land Trust Act and several sections of Florida's Trust Code to:

- amend the definition of "land trust" to provide that the Florida Land Trust Act applies only to trusts in which ownership is vested in the trustee and that the recorded land trust instrument does not create an entity;
- provide that the trustee of a land trust is vested with both legal and equitable title and full rights of ownership;
- provide that the Florida Land Trust Act applies whether or not the recorded land trust instrument names any trust beneficiaries;
- provide that the liability provisions for trustees in s. 736.08125, F.S., apply to trustees of land trusts;
- provide that the provisions relating to representation in the administration of or in judicial proceedings involving estates of decedents do not apply to the administration of trusts;
- provide that the provisions relating to the rights of a beneficiary's creditor or assignee do not override the provisions relating to discretionary trusts in s. 736.0504, F.S.;
- provide that the grandfathering provision relating to a spendthrift provision in a trust applies to any trust instrument executed prior to July 1, 2007, even if that trust does not yet exist prior to that date;
- provide that the exceptions to a spendthrift provision in a trust do not override the provisions relating to discretionary trusts in s. 736.0504, F.S.;
- provide that the protections given to the discretionary interests of a trustee outrank the interests of a creditor;
- revise effective date provisions and provide applicability;
- rewrite the phrase "interest from income" to "income interest;" and
- correct statutory cross-references.

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

The bill becomes effective on July 1, 2007.

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

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FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

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

B. EFFECT OF PROPOSED CHANGES:

Land Trusts

Background

In 1963, the Florida Legislature created s. 689.071, F.S., which statutorily recognized the Florida Land Trust.¹ In 2006, the Florida Legislature substantially revised this section and entitled it the Florida Land Trust Act (these changes became effective on October 1, 2006).² This Act provided the first Florida statutory definition of a "land trust."³ Florida's courts have held that the statutory land trust is not an ordinary inter vivos trust⁴ that is administered under Florida's trust administration laws in ch. 737, F.S.⁵

The essential purpose of a land trust is to provide a flexible and practical method for the acquisition, financing, and disposition of real estate. Illinois appears to have been the first state to recognize the land trust, and for that reason, the land trust is often referred to as the "Illinois Land Trust."⁶ The land trust is a modified form of a conventional trust agreement; however, it is limited to an arrangement where the trustee holds title to the real property but all the active managerial and administrative powers are reserved to the beneficiaries. The land trust is created through the use of two instruments: 1) a deed in trust, where the real property is conveyed to the trustee, and 2) a trust agreement under which the trustee acts.

In a land trust, the trustee receives the legal title to the real property, but the usual attributes of real estate fee ownership are retained by the beneficiary. The beneficiary retains only a personal property interest. The trustee to a land trust is the party designated in the trust agreement to hold legal and equitable title to the land trust property. The beneficiary is the party designated in the trust agreement as having control of the management, operation, rental and sale of the trust property, the right to the earnings and proceeds of the trust property, as well as, the power to direct the trustee with regard to the trust property. The power of direction is the right to control the trustee's disposition of title to the real property and the execution of trust documents.

Under the Florida Land Trust Act, the trustee of a land trust is considered to be vested with both "legal and equitable title" to the property described in the recorded instrument.⁷ However, the Act's operative provision in subsection 689.071(3), F.S., provides that the recorded instrument vests the trustee with "full rights of ownership" rather than using the phrase "legal and equitable title." Under existing land trust practice, these two quoted phrases are considered to have the same meaning.

¹ Sections 1 through 6, ch. 63-468, L.O.F.

² Chapter 2006-274, L.O.F.

³ Section 689.071(2)(d), F.S.

⁴ An "inter vivos trust" is a "trust that is created and takes effect during the settlor's lifetime. -- Also termed living trust." Black's Law Dictionary (8th ed. 2004).

⁵ *Taylor v. Richmond's New Approach Association, Inc.*, 351 So.2d 1094 (Fla. 2d DCA 1977). Florida's new Trust Code, and the repeal of the existing Trust Code in ch. 737, F.S., will take effect July 1, 2007, and will be codified in ch. 736, F.S. See ch. 2006-217, L.O.F.

⁶ *Hart v. Seymour*, 147 Ill. 598 (Ill. 1893).

⁷ Paragraphs 689.071(2)(d) and (2)(e), F.S.

Effect of Bill

The bill amends the definition of "land trust" in subsection 689.071(2)(d), F.S., to provide that the definition, and therefore the Florida Land Trust Act, applies only to trusts in which the land trustee is vested with the authority prescribed by subsection 689.071(3), F.S., which is amended to provide that the recorded trust instrument vests the trustee with legal and equitable title. The bill further amends the definition to provide that the recorded land trust instrument does not create an entity, regardless of whether the relationship among the beneficiaries and the trustee is deemed to be an entity under other applicable law.

The bill corrects statutory cross-references to Florida's Trust Code that will become incorrect when the new Florida Trust Code becomes effective on July 1, 2007.

The bill amends subsection 689.071(7), F.S., to provide that the liability provisions for trustees in s. 736.08125, F.S., apply to trustees of land trusts. These liability provisions state that there is no personal liability on the part of the trustee, nor is there any duty to institute proceedings against a prior trustee or the estate of a prior trustee:

- As to a successor trustee who succeeds a trustee who was also the settlor of a trust that was revocable during the time that the settlor served as trustee;
- As to any beneficiary who has waived a required accounting, but only as to the periods included in the waiver;
- As to any beneficiary who has effectively released the successor trustee of its duty to institute a proceeding or file a claim; or
- As to any person who is not an eligible beneficiary.

The bill amends subsection 689.071(9), F.S., to correct a statutory cross-reference regarding succession of trustees.

TRUSTS

Background

The Trust Code is that portion of the Florida Statutes which pertains to the administration of trusts. Florida's body of statutory law specific to trusts is presently found in ch. 737, F.S., and encompasses: trust registration; the jurisdiction of the courts; the duties and liabilities of trustees; the powers of the trustee; charitable trusts; and rules of construction for trusts. This chapter sets forth the default rules for trust administration which can be limited or altered by the grantor (creator of the trust) in the trust instrument. Trust provisions in statute are also supplemented by case law in areas such as requirements for trust creation, treatment of revocable trusts, and rights of creditors.

However, ch. 737, F.S., is set for repeal on July 1, 2007.⁸ This repeal is a result of the 2006 Legislature adopting a new Trust Code that will become effective July 1, 2007.⁹ The new Trust Code is based on the updated Uniform Trust Code and is codified as ch. 736, F.S.¹⁰

The comprehensive new Trust Code is modeled on the Uniform Trust Code of 2000, with a number of changes that center primarily on updating current Florida law. The National Conference of Commissioners on Uniform State Laws adopted the Uniform Trust Code (UTC) in 2000 and it has been enacted in some form in 18 states and the District of Columbia. In Florida, the Ad Hoc Trust Code Revision Committee (the committee) of the Florida Bar reviewed and revised the UTC to account for

⁸ Section 48, ch. 2006-217, L.O.F.

⁹ Chapter 2006-217, L.O.F.

¹⁰ Sections 1-13, ch. 2006-217, L.O.F.

distinctions found in Florida statutory and case law. The product of the committee's work was the basis for the new Florida Trust Code.

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.¹¹

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."¹² 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.¹³ "Trustee" includes "an original, additional, surviving, or successor trustee, whether or not appointed or confirmed by court."¹⁴

Effect of Bill

The bill amends s. 731.201, F.S., to correct a statutory cross-reference to land trusts within the definition of "trust" for purposes of the probate code.

The bill amends s. 731.303, F.S., relating to representation in the administration of or in judicial proceedings involving estates of decedents or trusts, to provide that the section does not apply to the administration of trusts.

The bill amends s. 736.0102, F.S., relating to the scope of the Florida Trust Code, to correct a statutory cross-reference regarding land trusts.

The bill amends s. 736.0501, F.S., relating to the rights of a beneficiary's creditor or assignee, to specifically provide that the section does not override the provisions relating to discretionary trusts in s. 736.0504, F.S. Presently, this section applies to trusts that do not contain a spendthrift provision¹⁵ and provides the basic statement of creditor remedies. Under this section, as long as the trust does not contain a valid spendthrift provision, a court may "authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or by other means." 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.

The bill amends s. 736.0502, F.S., relating to a spendthrift provision in a trust, to provide that the grandfathering provision placed in this section last year applies to any trust instrument executed prior to July 1, 2007, even if that trust does not yet exist prior to that date. Presently, this section gives statutory recognition to spendthrift provisions. Assuming a trust has a valid spendthrift provision, a beneficiary may not transfer his or her beneficial interest in the trust. Additionally, with some exceptions provided in s. 736.0503, F.S., 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.

¹¹ 55A Fla. Jur. 2d Trusts s. 1.

¹² Section 731.201(17), F.S.

¹³ 90 C.J.S. Trusts s. 2.

¹⁴ Section 731.201(35), F.S.

¹⁵ "Spendthrift provision" means a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest.

Section 736.0103(17), F.S.

The bill amends s. 736.0503, F.S., relating to exceptions to a spendthrift provision in a trust, to specifically provide that the section does not override the provisions relating to discretionary trusts in s. 36.0504, F.S. Regardless of the effectiveness of spendthrift provisions, this section provides some instances where a creditor may proceed against a beneficiary's interest in a trust even though the trust includes a spendthrift clause. This section provides exceptions for claims 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; and
- A state or the United States, but only to the extent provided in a statute separate from the Trust Code.

In order to provide that the protections given to the discretionary interests of a trustee trump the interests of a creditor, the bill amends s. 736.0504, F.S., relating to discretionary trusts to:

- define the term "discretionary distribution" to mean "a distribution that is subject to the trustee's discretion whether or not the discretion is expressed in the form of a standard of distribution and whether or not the trustee has abused the discretion."
- provide that regardless of whether a trust contains a spendthrift provision, if a trustee is authorized to make discretionary distributions to or for the benefit of a beneficiary, a creditor of the beneficiary may not:
 - compel a distribution that is subject to the trustee's discretion; or
 - attach or otherwise reach the interest, if any, that the beneficiary may have as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary.

The bill amends s. 736.0813, F.S., relating to the duty of a trustee to inform a qualified beneficiary. The provisions of this section apply to trust accountings rendered for accounting periods beginning on or after January 1, 2008. This section is scheduled to become effective on January 1, 2008.¹⁶ However, the existing provisions¹⁷ relating to the duty to inform are scheduled to repeal July 1, 2007.¹⁸ The bill provides that this section applies to trust accountings rendered for accounting periods beginning on or after July 1, 2007. This will avoid the existence of any gap between the repeal of the old provisions and the creation of the new statute.

The bill amends s. 736.1008, F.S., relating to limitations on proceedings against trustees. The provisions of this section apply 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. This section is scheduled to become effective on January 1, 2008.¹⁹ However, the existing provisions²⁰ that provide similar limitations are scheduled to repeal July 1, 2007.²¹ The bill provides that this section applies to trust accountings for accounting periods beginning on or after July 1, 2007, and to written reports, other than trust accountings, received by a beneficiary on or after July 1, 2007. This will avoid the existence of any gap between the repeal of the old statute of limitations and the creation of the new statute.

¹⁶ Section 49, ch. 2006-217, L.O.F.

¹⁷ Section 737.303, F.S.

¹⁸ Section 48, ch. 2006-217, L.O.F.

¹⁹ Section 49, ch. 2006-217, L.O.F.

²⁰ Section 737.307, F.S.

²¹ Section 48, ch. 2006-217, L.O.F.

The bill amends s. 736.1011, F.S., relating to exculpation of a trustee, to revise provisions relating to exculpatory terms in a trust instrument to provide that an exculpatory term drafted or caused to be drafted by the trustee is not an abuse of a fiduciary or confidential relationship if the terms are directly communicated to the independent attorney of the trust settlor. The bill further provides that this section only applies to trusts created on or after July 1, 2007.

The bill amends s. 736.1106, F.S., relating to antilapse and survivorship with respect to future interests under terms of inter vivos and testamentary trusts.²² The change will specifically provide that the old antilapse statute provisions will continue to apply to trusts executed after June 12, 2003.²³

The bill amends s. 736.1204, F.S., relating to powers and duties of a trustee of a private foundation trust or a split interest trust. The change rewrites the phrase "interest from income" to "income interest" to properly reflect usage in this area of law.

The bill amends s. 736.1209, F.S., relating to election of law for charitable trusts to correct a statutory cross-reference.

The bill amends s. 736.1001, F.S., relating to remedies for beach of trust trusts to correct a statutory cross-reference.

C. SECTION DIRECTORY:

Section 1 amends s. 689.071, F.S., relating to the Florida Land Trust Act.

Section 2 amends s. 731.201, F.S., relating to general definitions.

Section 3 amends s. 731.303, F.S., relating to representation in the administration of or in judicial proceedings involving estates of decedents.

Section 4 amends s. 736.0102, F.S., relating to the scope of the Florida Trust Code.

Section 5 amends s. 736.0501, F.S., relating to the rights of a beneficiary's creditor or assignee.

Section 6 amends s. 736.0502, F.S., relating to a spendthrift provision in a trust.

Section 7 amends s. 736.0503, F.S., relating to exceptions to a spendthrift provision in a trust.

Section 8 amends s. 736.0504, F.S., relating to discretionary trusts.

Section 9 amends s. 736.0813, F.S., relating to the duty of a trustee to inform a qualified beneficiary.

Section 10 amends s. 736.1008, F.S., relating to limitations on proceedings against trustees.

Section 11 amends s. 736.1011, F.S., relating to exculpation of a trustee.

Section 12 amends s. 736.1106, F.S., relating to antilapse and survivorship with respect to future interests under terms of inter vivos and testamentary trusts.

Section 13 amends s. 736.1204, F.S., relating to powers and duties of a trustee of a private foundation trust or a split interest trust.

²² An "antilapse statute" is a "statute that substitutes certain heirs of some types of testamentary beneficiaries when the beneficiary has predeceased the testator and permits them to take the gift, which would otherwise fail and thus pass to the residuary beneficiary (if any) or to the intestate heirs." Black's Law Dictionary (8th ed. 2004).

²³ This is the date the last changes to the antilapse statutes became effective. See s. 18, ch. 2003-154, L.O.F.

Section 14 amends s. 736.1209, F.S., relating to election of law.

Section 15 amends s. 736.1001, F.S., relating to remedies for breach of trust.

Section 16 provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement was submitted by the original bill sponsor.

The chair of the Safety & Security Council chose not to submit any further comments regarding the council substitute.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 14, 2007, the Committee on Constitution & Civil Law adopted two amendments to the bill and reported the bill favorably as amended. The amendments:

- Revise provisions relating to exculpatory terms in a trust instrument to provide that an exculpatory term drafted or caused to be drafted by the trustee is not an abuse of a fiduciary or confidential relationship if the terms are directly communicated to the independent attorney of the trust settlor.
- Amend the definition of trust in the Probate Code to correct a statutory cross-reference to land trusts.

These same amendments were adopted by the Safety & Security Council on April 11, 2007, and the bill was reported favorably.

This analysis is addressed to the bill as amended by the Council.