



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Empower families -- This bill may affect families who use trust instruments in dealing with personal property.

Safeguard individual liberty -- This bill affects the options of an individual, organization or association regarding the conduct of his/her own affairs using trust instruments.

#### B. EFFECT OF PROPOSED CHANGES:

##### **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<sup>1</sup>. This repeal is a result of the 2006 Legislature adopting a new Trust Code that will become effective July 1, 2007.<sup>2</sup> The new Trust Code is based on the updated Uniform Trust Code and is codified as ch. 736, F.S.<sup>3</sup>

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 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.<sup>4</sup>

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<sup>1</sup> Section 48, ch. 2006-217, L.O.F.

<sup>2</sup> Chapter 2006-217, L.O.F.

<sup>3</sup> Sections 1-13, ch. 2006-217, L.O.F.

<sup>4</sup> 55A Fla. Jur. 2d Trusts s. 1.

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>5</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>6</sup> "Trustee" includes "an original, additional, surviving, or successor trustee, whether or not appointed or confirmed by court."<sup>7</sup>

### Investment of Fiduciary Funds

Section 640.417, F.S., governs the ability of a bank or trust company, or an affiliate of a bank or trust company, when acting as a fiduciary to make certain investments of fiduciary funds. Subsection (3) of this section takes effect July 1, 2007, and provides that:

(3) The fact that such bank or trust company or an affiliate of the bank or trust company owns or controls investment instruments shall not preclude the bank or trust company acting as a fiduciary from investing or reinvesting in such investment instruments, provided such investment instruments:

(a) Are held for sale by the bank or trust company or by an affiliate of the bank or trust company in the ordinary course of its business of providing investment services to its customers and do not include any such interests held by the bank or trust company or by an affiliate of the bank or trust company for its own account.

(b) Are sold primarily to accounts for which the bank or trust company is not acting as a fiduciary upon terms that are not more favorable to the buyer than the terms upon which they are sold to accounts for which the bank or trust company is acting as a fiduciary.

The bill amends paragraph (3)(b) to provide that investment is authorized when such investment meets paragraph (3)(a) and:

(b) Are sold primarily to accounts for which the bank or trust company is acting as a fiduciary, or are not sold to accounts for which the bank or trust company is acting as a fiduciary upon terms that are normally less favorable to the buyer than the terms upon which they are normally sold to accounts for which the bank or trust company is not acting as a fiduciary. [emphasis added]

This change can be summarized as follows:

#### **(3)(b) as in current law provides:**

Investment instruments being sold to fiduciary accounts must be sold primarily to non-fiduciary accounts on terms not more favorable to the non-fiduciary customers than the terms for the fiduciary customers.

#### **(3)(b) as proposed in the bill provides:**

Investments instruments being sold to fiduciary accounts must be sold primarily to fiduciary accounts

OR

Investments instruments being sold to fiduciary accounts must not be sold to fiduciary accounts on terms that are normally less favorable to the fiduciary customer than the terms for a non-fiduciary customer.

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<sup>5</sup> Section 731.201(17), F.S.

<sup>6</sup> 90 C.J.S. Trusts s.2.

<sup>7</sup> Section 731.201(35), F.S.

## Duty of Loyalty

A trustee has a duty to administer the trust solely in the interests of the beneficiaries.<sup>8</sup> In the absence of a contrary provision in the trust instrument, a court order,<sup>9</sup> 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>10</sup>
- A trustee may not usurp an opportunity properly belonging to the trust;<sup>11</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>12</sup>

With some exceptions, 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>13</sup>

To be contrasted with the transactions described above are those entered into between the trustee and persons who have close business<sup>14</sup> or personal ties<sup>15</sup> to the trustee. Such transactions are only presumed to be affected by a conflict between the personal and fiduciary interests of the trustee.<sup>16</sup> Accordingly, the transactions are not voidable per se; they are voidable only if the presumption is not rebutted.

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

- Payment of reasonable compensation to the trustee or an agreement between a trustee and beneficiary relating to the appointment or compensation of the trustee;<sup>17</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>18</sup>
- A deposit of trust money in a regulated financial-service institution operated by the trustee;<sup>19</sup>
- An advance by the trustee of money for the protection of the trust;<sup>20</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

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<sup>8</sup> See generally, s. 736.0802(1), F.S.

<sup>9</sup> A trustee who is faced with a transaction that might involve a breach of the duty of loyalty may petition the court for appointment of a special fiduciary to act with respect to the transaction. Section 736.0802(9), F.S.

<sup>10</sup> Section 736.0802(2), F.S. This rule does not apply to contracts entered into or claims acquired by the trustee prior to the time the person became or contemplated becoming trustee. Section 736.0802(2)(e), F.S.

<sup>11</sup> Section 736.0802(4), F.S.

<sup>12</sup> Section 736.0802(6), F.S.

<sup>13</sup> Section 736.0802(2), F.S.

<sup>14</sup> Section 736.0802(3)(c) and (d), F.S. This includes an officer, director, employee, agent, or attorney of the trustee or a corporation or other person or enterprise in which the trustee (or a person owning a significant interest in the trust) has an interest that might affect the trustee's best judgment.

<sup>15</sup> Section 736.0802(3)(a) and (b), F.S. This includes the trustee's spouse and the trustee's descendants, siblings, parents, or the spouse of any of them.

<sup>16</sup> Section 736.0802(3), F.S.

<sup>17</sup> Section 736.0802(7)(a) and (b), F.S.

<sup>18</sup> Section 736.0802(7)(c), F.S.

<sup>19</sup> Section 736.0802(7)(d), F.S.

<sup>20</sup> Section 736.0802(7)(e), F.S.

the performance of its administrative duties or the employment of agents to perform any act of administration, whether or not discretionary.<sup>21</sup>

The bill amends s. 736.0802(2), F.S., to create a new exception to the provisions making a sale, encumbrance, or other transaction voidable by a beneficiary. The new exception includes any transaction described in subsections (1),<sup>22</sup> (3),<sup>23</sup> or (6)<sup>24</sup> of s. 736.0816, F.S., relating to the specific powers of a trustee. Actions taken by the trustee under the provisions being added to the exception are voidable by a beneficiary under current law, provided such actions involve 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. Such actions would no longer be voidable pursuant to the provisions in the bill.

The bill amends s. 736.0802(5), F.S., to provide that the subsection, and its limits on a trustee making investments in investment instruments that are owned or controlled by the trustee, are only applicable within that subsection and are "not the exclusive authority for investing in investment instruments..." that are owned or controlled by the trustee. The bill further provides that a "trustee who invests trust funds in investment instruments" that are owned or controlled by the trustee is not required to comply with disclosure and notice requirements of the subsection if the trustee is authorized to make such investments pursuant to subsection (2) as discussed above or pursuant to any other law.

### **Affiliated Services**

After July 1, 2007, an exception is provided under the "Duty of Loyalty" provisions discussed above that authorizes a trustee to engage in affiliated services, whereby a bank or trust company trustee is not precluded from investing in investment instruments offered by that bank or trust company, provided certain notification requirements are met.<sup>25</sup> 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>26</sup> and 660,<sup>27</sup> and the trustee complies with the disclosure requirements.<sup>28</sup> The requirements of disclosure are that all qualified beneficiaries are: noticed regarding the investment; provided the identity of the investments; and informed of the nature of the relationship of the trustee to the affiliate.<sup>29</sup> However, if a trustee chooses not to initiate the affiliated investment opt out procedure and elects not to

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<sup>21</sup> Section 736.0802(8), F.S.

<sup>22</sup> Section 736.0816(1), F.S., reads: "Collect trust property and accept or reject additions to the trust property from a settlor, including an asset in which the trustee is personally interested, and hold property in the name of a nominee or in other form without disclosure of the trust so that title to the property may pass by delivery but the trustee is liable for any act of the nominee in connection with the property so held."

<sup>23</sup> Section 736.0816(3), F.S., reads: "Acquire an undivided interest in a trust asset, including, but not limited to, a money market mutual fund, mutual fund, or common trust fund, in which asset the trustee holds an undivided interest in any trust capacity, including any money market or other mutual fund from which the trustee or any affiliate or associate of the trustee is entitled to receive reasonable compensation for providing necessary services as an investment adviser, portfolio manager, or servicing agent. A trustee or affiliate or associate of the trustee may receive compensation for such services in addition to fees received for administering the trust provided such compensation is fully disclosed in writing to all qualified beneficiaries."

<sup>24</sup> Section 736.0816(6), F.S., reads: "Borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust and advance money for the protection of the trust."

<sup>25</sup> Section 736.0802(5), F.S.

<sup>26</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>27</sup> Chapter 660, F.S. governs trust business and in part precludes self-dealing (s. 660.40, F.S.).

<sup>28</sup> Section 736.0802(5)(a), F.S.

<sup>29</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., and to those beneficiaries which the grantor has not make a specific decision in the trust document about whether investments in proprietary products is permissible, s. 736.0802(5)(e)(2), F.S.

invest funds in affiliated investments, the law protects the trustee from liability for making that decision.<sup>30</sup>

The notification requirements provided under this exception are different for irrevocable trusts created on or after July 1, 2007, and for those created prior to July 1, 2007. For those irrevocable trusts created on or after July 1, 2007, the exception applies only to those irrevocable trust instruments that “expressly authorize the trustee, by specific reference to this subsection, to invest in investment instruments owned or controlled by the trustee or its affiliate.”<sup>31</sup> For those irrevocable trusts created prior to July 1, 2007, the exception “shall not apply until 60 days after the statement required in paragraph (f)<sup>32</sup> is provided and no objection is made or any objection which is made has been terminated.”<sup>33</sup>

The bill amends s. 736.0802(5)(e)3., F.S., to provide that for “investment instruments other than qualified investment instruments, paragraphs (a), (b), (c), and (d) shall apply to irrevocable trusts executed on or after July 1, 2007, that are not described in subparagraph 2. and to irrevocable trusts executed prior to July 1, 2007...” This change will allow the exception to the prohibition on a trustee making investments in investment instruments that are owned or controlled by the trustee to apply to those irrevocable trusts created on or after July 1, 2007, that do not “expressly authorize the trustee, by specific reference to this subsection, to invest in investment instruments owned or controlled by the trustee or its affiliate,”<sup>34</sup> provided the notification requirements are met and no objection is made.

### **Powers to Direct a Trustee**

For various reasons, the creator of a Florida trust may desire to confer upon a person other than the trustee one or more powers to manage assets, direct distributions, modify, or terminate a trust. These powers are normally exercised by the trustee. Such trust provisions may be highly desirable when assets contained in the trust are not within the management expertise of the trustee or when someone close to the family or grantor of the trust is in a better position to make distribution decisions. Under present law, there are not any statutory provisions addressing this area, however, the new Trust Code created s. 736.0808, F.S., effective July 1, 2007, to fill this gap.

Section 736.0808, F.S., addresses the ability for someone to have the power to direct the trustee’s actions and decisions with respect to a trust. While a trust is revocable, the grantor 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 grantor even when the direction is contrary to the terms of the trust.<sup>35</sup> The caveats relate to the formalities required for a grantor’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. As such, the direction must be

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<sup>30</sup> Section 736.0802(5)(g), F.S.

<sup>31</sup> Section 736.0802(5)(e)2., F.S.

<sup>32</sup> Paragraph (f) of subsection 736.0802(5), F.S., reads: (f)1. Any time prior to initially investing in any investment instrument described in this subsection other than a qualified investment instrument, the trustee of a trust described in subparagraph (e)3. shall provide to all qualified beneficiaries a statement containing the following:

a. The name, telephone number, street address, and mailing address of the trustee and of any individuals who may be contacted for further information.

b. A statement that, unless a super majority of the eligible beneficiaries objects to the application of this subsection to the trust within 60 days after the date the statement pursuant to this subsection was delivered, this subsection shall apply to the trust.

c. A statement that, if this subsection applies to the trust, the trustee will have the right to make investments in investment instruments, as defined in s. 660.25(6), which are owned or controlled by the trustee or its affiliate, or from which the trustee or its affiliate receives compensation for providing services in a capacity other than as trustee, and that the trustee or its affiliate may receive fees in addition to the trustee’s compensation for administering the trust.

<sup>33</sup> Section 736.0802(5)(e)3.a., F.S.

<sup>34</sup> Section 736.0802(5)(e)2., F.S.

<sup>35</sup> Section 736.0808(1), F.S.

manifested in a manner that substantially complies with any provisions in the trust instrument pertaining to creating trust amendments.<sup>36</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., i.e., it must be made in a written instrument executed with testamentary formalities.

With respect to a power to direct given to others (or to grantors 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.<sup>37</sup> 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. A power given to someone other than the grantor of a revocable trust may include the power to direct modification or termination of the trust,<sup>38</sup> or the power to direct the actions of the trustee. In the latter case, the trustee may act in accordance with a direction unless the direction is either manifestly contrary to the terms of the trust, or the trustee knows that the direction would constitute a serious breach of the power holder’s fiduciary duty described above.<sup>39</sup>

The bill amends s. 736.0808, F.S., to provide for the ability of the grantor to appoint trust advisors with limited duties and to protect the trustee from liability by virtue of the exercise by the trust advisor of its powers. The bill introduces a new term to the Florida Statutes, “trust advisor,” but does not define this term. The term refers to the person given power by the grantor, other than the trustee, to manage assets, direct distributions, modify, or terminate a trust. The bill provides that the acts of a grantor of a trust while the trust is revocable are to be treated as those of a “trust advisor.”

The bill provides that a trust instrument may confer on a person powers and discretions of a trust advisor, including the power and discretion to direct, consent to, or disapprove any investment action of the trustee,<sup>40</sup> any distribution of trust assets, and any modification or termination of the trust. When acting as a trust advisor, that person must act in the best interests of the trust. The trust advisor may act in the sole and absolute discretion of the trust advisor and their actions are binding on all other persons.

The bill removes the provision that the trustee must act in accordance with the direction of a person other than the trustee given power to direct the trustee by the grantor “unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.” The bill replaces this provision with the following:

The trustee shall not be liable, individually or as a fiduciary, for any loss that results from compliance with a direction of the trust advisor; for any loss that results from a failure to take any action that requires prior approval of the trust advisor if the trustee timely sought but failed to obtain that authorization; or for any failure to correct, address, or pursue redress against the trust advisor for any breach of trust or other act of the trust advisor in the exercise or failure to exercise the power of the trust advisor. The trustee is also relieved from any obligation to perform investment or suitability reviews, inquiries, or investigations or to make recommendations or evaluations with respect to any investments to the extent the trust advisor had authority to direct investment actions of the trustee. This subsection does not apply to a trust advisor appointed by the trustee unless the trust was revocable at the time of appointment, and the trustee who appointed the trust advisor was also the settlor of the trust.

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<sup>36</sup> Section 736.0808(1), F.S.

<sup>37</sup> Section 736.0808(4), F.S.

<sup>38</sup> A power to direct trust modification or termination may also be given to a trustee. See s. 736.0808(3), F.S.

<sup>39</sup> Section 736.0808(2), F.S.

<sup>40</sup> Investment actions of the trustee include, but are not limited to, acquisition, retention, purchase, sale, exchange, tender, encumbrance, or other transactions affecting ownership or rights of trust property and the investment and reinvestment of principal and income of the trust.

Finally, the bill provides a new subsection (5) that reads: “By accepting an appointment to serve as a trust advisor of a trust that is subject to the laws of this state, the trust advisor submits to the jurisdiction of the courts of this state even if investment advisory agreements or other related agreements provide otherwise, and the trust advisor may be made a party to any action or proceeding if issues relate to a decision or action of the trust advisor.”

### **Specific Powers of a Trustee**

Section 736.0816, F.S., provides a detailed listing of powers that a trustee automatically has in the absence of a contrary provision in the trust instrument. Among these powers, the trustee may collect trust property, acquire or sell property, acquire an undivided interest in a trust asset, exchange, partition, or otherwise change the character of trust property, deposit trust money, borrow money, continue a business enterprise, exercise stock rights, maintain real property, enter into a lease for any purpose as lessor or lessee, grant an option involving disposition of trust property, insure the property of the trust, abandon or decline to administer property of no value or of insufficient value, pay or contest any claim, pay taxes, allocate items of income or expense, exercise elections with respect to taxes, select a mode of payment under any employee benefit or retirement plan, make loans, employ persons, pay an amount distributable to a beneficiary, make distributions, prosecute or defend an action, sign and deliver contracts and other instruments, and exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to the property.

This section specifically provides that a trustee may:

Acquire an undivided interest in a trust asset, including, but not limited to, a money market mutual fund, mutual fund, or common trust fund, in which asset the trustee holds an undivided interest in any trust capacity, including any money market or other mutual fund from which the trustee or any affiliate or associate of the trustee is entitled to receive reasonable compensation for providing necessary services as an investment adviser, portfolio manager, or servicing agent. A trustee or affiliate or associate of the trustee may receive compensation for such services in addition to fees received for administering the trust provided such compensation is fully disclosed in writing to all qualified beneficiaries.<sup>41</sup>

The bill amends this subsection to provide that the term “mutual fund” includes “an open-end or closed-end management investment company or investment trust registered under the Investment Company Act of 1940,<sup>42</sup> 15 U.S.C. ss. 80a-1 et seq., as amended.”

Forbes defines a closed-end fund as an “investment company that sells shares like any other corporation and usually does not redeem its shares. A publicly traded fund sold on stock exchanges or over the counter that may trade above or below its net asset value.”<sup>43</sup>

Forbes defines open-end fund as a “[m]utual fund that continually creates new shares on demand. Mutual fund shareholders buy the funds at net asset value and may redeem them at any time at the prevailing market prices.”<sup>44</sup>

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<sup>41</sup> Section 736.0816(3), F.S.

<sup>42</sup> “Created in 1940 through an act of Congress, this piece of legislation clearly defines the responsibilities and limitations placed upon fund companies that offer investment products to the public. Enforced and regulated by the Securities and Exchange Commission, this act clearly sets out the limits regarding filings, service charges, financial disclosure and fiduciary duties. It is the document that keeps investment companies in check.” <http://www.investopedia.com/> (last visited on March 1, 2007).

<sup>43</sup> <http://www.forbes.com/>

<sup>44</sup> <http://www.forbes.com/>



## Limitations on Actions Against Trustees

Section 736.1008, F.S., specifies limitation periods for claims by a beneficiary against a trustee for breach of trust. With respect to matters adequately disclosed on a trust accounting, the applicable limitations period depends on whether the trustee has sent the beneficiary a limitation notice that relates to that accounting. The shortest limitations period provided is six months. This period applies to actions on matters the trustee has adequately disclosed on a trust accounting or other trust disclosure document when the trustee has provided the beneficiary with a related limitation notice.<sup>45</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>46</sup>

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. Section 736.1008(1)(a), F.S., provides that the claims are barred as provided in chapter 95, F.S. Normally, this will result in a four-year limitations with the period beginning on the date of receipt of the adequate disclosure.<sup>47</sup> An exception applies to matters involving actual or constructive fraud by the trustee. In those cases, the discovery rule of s. 95.031(2)(a), F.S., applies. Subject to an overall requirement that the action be commenced within 12 years, the discovery rule provides that the limitations period does not begin until the later of the time the facts giving rise to the action are discovered or the time the facts should have been discovered by an exercise of due diligence.

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

- The trustee has issued its final accounting for the trust; and
- The trustee has given written notice to the beneficiary of the availability of trust records for examination and that claims based on matters not adequately disclosed in that accounting may be barred unless the action is commenced within the applicable limitations period provided in chapter 95, F.S.<sup>48</sup>

In this context, in the absence of fraud that 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>49</sup>

For matters that have not been disclosed on a trust accounting where either the trustee has not issued a final accounting or, having done so, the trustee has not given the required notice described above, s. 736.1008(3), F.S., provides that the applicable limitations period is determined under chapter 95, F.S. That is, the normal limitations period will be the four-year period described in s. 95.11(3), F.S. 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.

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 was scheduled to become effective on January 1, 2008, in order to

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<sup>45</sup> Section 736.1008(2), F.S.

<sup>46</sup> Section 736.1008(4)(c), F.S.

<sup>47</sup> See s. 95.11(3), F.S. See also s. 736.1008(1)(a), F.S.

<sup>48</sup> See s. 736.1008(1)(b), F.S.

<sup>49</sup> *Id.*

coincide with the calendar year used for such accountings. However, the existing provisions<sup>50</sup> that provide similar limitations are scheduled to repeal July 1, 2007.<sup>51</sup>

The bill amends s. 736.1008, F.S., to provide that 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, the applicable limitations period as provided under chapter 95, F.S., would begin to accrue in a few more circumstances than under the current statute. The additional circumstances are when the beneficiary has actual knowledge of the facts upon which the claim for breach of trust against a trustee is based or actual knowledge of the trustee's resignation or termination of the trust.

The bill provides that, notwithstanding the provisions in the existing statute, all claims by a beneficiary against a trustee are barred ten years after the date of the act or omission of the trustee complained of. The ten-year period is tolled when the beneficiary entitled to sue is a minor "during any period of time in which a parent, guardian, or guardian ad litem does not exist, has an interest adverse to that of the minor, or is adjudicated to be incapacitated to sue."

The bill provides that the "failure of the trustee to take corrective action shall not be construed as a separate act or omission and shall not be construed to extend any period of limitations otherwise established by law, including, but not limited to, the limitations established by this section."

Finally, 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.

### **Exculpation of Trustee**

The powers and duties of a trustee are governed pursuant to part VIII of ch. 736, F.S., and are discussed in detail above. Section 736.0802, F.S., provides a duty of loyalty to certain parties upon the trustee. A trustee may be liable for damage or loss resulting from the breach of trust owed by the trustee.<sup>52</sup> The Florida Trust Code contains a provision that restricts the enforceability of a term in a trust that attempts to relieve a trustee of liability for a breach of trust.<sup>53</sup> The restrictions are mandatory and may not be relaxed in the trust instrument.<sup>54</sup> Under this statute, 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>55</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 grantor.<sup>56</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 grantor.<sup>57</sup> This provision is part of the new Trust Code and will take effect July 1, 2007.

The bill adds a qualification to the existing prohibition to provide that an exculpatory term within a trust agreement is not considered drafted by the trustee for the purposes of subsection (2), and therefore not invalid as an abuse of a fiduciary or confidential relationship between the trustee and grantor, if the trustee provides exculpatory language to the person drafting the trust instrument and the trustee requests or requires such language to be contained in the trust instrument.

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<sup>50</sup> Section 737.307, F.S.

<sup>51</sup> Section 48, ch. 2006-217, L.O.F.

<sup>52</sup> Part X of ch. 736, F.S.

<sup>53</sup> Section 736.1011, F.S.

<sup>54</sup> Section 736.0105(2)(u), F.S.

<sup>55</sup> Section 736.1011(1)(a), F.S.

<sup>56</sup> Section 736.1011(1)(b), F.S.

<sup>57</sup> Section 736.1011(2), F.S.

## **Conforming Changes**

Section 660.46, F.S., relating to the substitution of fiduciaries is amended to conform cross-references necessitated by the amendments to s. 736.1008, F.S., elsewhere in the bill.

### **C. SECTION DIRECTORY:**

Section 1 amends s. 660.417, F.S., relating to investment of fiduciary funds in investment instruments.

Section 2 amends s. 660.46, F.S., relating to substitution of fiduciaries.

Section 3 amends s. 736.0802, F.S., relating to the duty of loyalty of trustees.

Section 4 amends s. 736.0808, F.S., relating to the power to direct a trustee.

Section 5 amends s. 736.0816, F.S., relating to specific powers of a trustee.

Section 6 amends s. 736.1008, F.S., relating to limitations on proceedings against trustees.

Section 7 amends s. 736.1011, F.S., relating to exculpation of a trustee.

Section 8 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:

###### **Access to Courts**

Section 21, Art. I, of the State Constitution provides that the “courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.” This provision generally preserves a person’s right to litigate in court. The Florida Supreme Court has provided that, where a right of access to the courts for redress for a particular injury has been provided by statutory or common law predating the 1968 Florida Constitution, the Legislature may not abolish a cause of action without providing a reasonable alternative, unless an overpowering public necessity for the abolishment is shown and there is no alternative method for meeting that public necessity.<sup>58</sup>

This bill limits liability for trustees in certain situations and creates a 10-year statute of repose for such suits. A statute of repose permanently lays a cause of action to rest and operates to jurisdictionally bar what might have been a cause of action from ever arising. The Florida Supreme Court has upheld statutes of repose that rest upon over-riding public purposes.<sup>59</sup>

If the bill eliminates or significantly impairs a cause of action that is found to have predated the 1968 State Constitution, the Legislature may not be able to limit such actions without providing a reasonable alternative, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.<sup>60</sup> The Florida Supreme Court has held that the Legislature has the “final word” on declarations of public policy and those declarations are presumed correct.<sup>61</sup> This bill does not include any statement of public necessity.

#### B. RULE-MAKING AUTHORITY:

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

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill amends s. 736.0808, F.S., to provide for the ability of the grantor to appoint trust advisors with limited duties and to protect the trustee from liability by virtue of the exercise by the trust advisor of its powers. The bill introduces a new term to the Florida Statutes, “trust advisor,” but does not define this term. The term refers to the person given power by the grantor, other than the trustee, to manage assets, direct distributions, modify, or terminate a trust.

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<sup>58</sup> *Kluger v. White*, 281 So.2d 1 (Fla. 1973); the court invalidated a statute requiring a minimum of \$550 in property damages arising from an automobile accident before bringing an action; *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987); the court ruled that a section of the Tort Reform and Insurance Act, which placed an absolute \$450,000 cap on damages that a tort victim could recover for noneconomic losses, violated victim's constitutional right to access to courts.

<sup>59</sup> *Kush v. Lloyd*, 616 So.2d 415 (Fla. 1992) (upheld a 4-year statute of repose on medical malpractice actions; however, Justices Barkett and Kogan point out in their dissents that a statute of repose that bars a cause of action before the cause of action existed would violate the access to courts provision of the Florida Constitution. *Id.* at 425, Barkett, C. J. dissenting in relevant part.); *Carr v. Broward County*, 541 So.2d 92 (Fla. 1989) (upholding a 7-year statute of repose on medical malpractice actions when the Legislature clearly stated a public necessity for statutory reform.)

<sup>60</sup> *Kluger v. White*, 281 So.2d 1 (Fla. 1973).

<sup>61</sup> *University of Miami v. Echarte*, 618 So.2d 189 (Fla. 1993).

D. STATEMENT OF THE SPONSOR

No statement submitted.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**