

By Senator Jones

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1 A bill to be entitled

2 An act relating to fiduciaries; creating s. 90.5021, F.S.;

3 providing a fiduciary lawyer-client privilege for purposes

4 of the Florida Evidence Code; providing that a

5 communication between a lawyer and a client acting as a

6 fiduciary is privileged and protected from disclosure;

7 amending s. 736.0703, F.S.; providing exceptions to duties

8 and liabilities of cotrustees for excluded cotrustees

9 under certain circumstances; providing for liabilities and

10 obligations of included cotrustees; amending s. 736.0802,

11 F.S.; providing an exception for trustee payments of costs

12 and attorney's fees from trust assets except pursuant to

13 court order under certain circumstances; providing

14 requirements for obtaining such a court order; preserving

15 certain court remedies; amending s. 736.1008, F.S.;

16 specifying when a claim accrues against a trustee for

17 breach of trust based on a matter not adequately

18 disclosed; providing for application; specifying periods

19 of repose barring claims by a beneficiary against a

20 trustee; providing for construction; providing for

21 application; providing an effective date.

22

23 Be It Enacted by the Legislature of the State of Florida:

24

25 Section 1. Section 90.5021, Florida Statutes, is created to

26 read:

27 90.5021 Fiduciary lawyer-client privilege.--

28 (1) For the purpose of this section, a client acts as a

29 fiduciary when serving as a personal representative or a trustee

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30 as defined in s. 731.201, an administrator ad litem as described
31 in s. 733.308, a curator as described in s. 733.501, a guardian
32 or guardian ad litem as defined in s. 744.102, a conservator as
33 defined in s. 710.102, or an attorney in fact as described in
34 chapter 709.

35 (2) A communication between a lawyer and a client acting as
36 a fiduciary is privileged and protected from disclosure under s.
37 90.502 to the same extent as if the client were not acting as a
38 fiduciary. In applying s. 90.502 to a communication under this
39 section, only the person or entity acting as a fiduciary is
40 considered a client of the lawyer.

41 Section 2. Subsection (7) of section 736.0703, Florida
42 Statutes, is amended, and subsection (9) is added to that
43 section, to read:

44 736.0703 Cotrustees.--

45 (7) Except as otherwise provided in subsection (9), each
46 cotrustee shall exercise reasonable care to:

47 (a) Prevent a cotrustee from committing a breach of trust.

48 (b) Compel a cotrustee to redress a breach of trust.

49 (9) If the terms of a trust instrument provide for the
50 appointment of more than one trustee but confer upon one or more
51 of the trustees, to the exclusion of the others, the power to
52 direct or prevent specified actions of the trustees, the excluded
53 trustees shall act in accordance with the exercise of the power.
54 An excluded trustee is not liable, individually or as a
55 fiduciary, for any consequence that results from compliance with
56 the exercise of the power, regardless of the information
57 available to the excluded trustees. The excluded trustees are
58 relieved of any obligation to review, inquire, investigate, or

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59 make recommendations or evaluations with respect to the exercise
60 of the power. The trustee or trustees having the power to direct
61 or prevent actions of the trustees shall be liable to the
62 beneficiaries with respect to the exercise of the power as if the
63 excluded trustees were not in office and have the exclusive
64 obligation to account to and defend any action brought by the
65 beneficiaries with respect to the exercise of the power.

66 Section 3. Subsection (10) of section 736.0802, Florida
67 Statutes, is amended to read:

68 736.0802 Duty of loyalty.--

69 (10) Payment of costs or attorney's fees incurred in any
70 trust proceeding from the assets of the trust may be made by the
71 trustee without the approval of any person and without court
72 authorization, unless the court orders otherwise as provided in
73 paragraph (a). ~~except that court authorization shall be required~~
74 ~~if an action has been filed~~

75 (a) If a claim or defense asserted against the trustee
76 based upon a breach of trust is made against the trustee in a
77 trust proceeding, a party must obtain a court order to prohibit
78 the trustee from paying costs or attorney's fees from trust
79 assets. To obtain an order prohibiting payment of costs or
80 attorney's fees from trust assets, a party must make a reasonable
81 showing by evidence in the record or by proffering evidence that
82 provides a reasonable basis for a court to conclude that there
83 has been a breach of trust. The trustee may proffer evidence to
84 rebut the evidence submitted by a party.

85 (b) This subsection does not restrict the remedies a court
86 may employ to remedy a breach of trust, including, but not
87 limited to, ordering appropriate refunds. ~~Court authorization is~~

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88 ~~not required if the action or defense is later withdrawn or~~
89 ~~dismissed by the party that is alleging a breach of trust or~~
90 ~~resolved without a determination by the court that the trustee~~
91 ~~has committed a breach of trust.~~

92 Section 4. Subsection (3) of section 736.1008, Florida
93 Statutes, is amended, present subsection (6) of that section is
94 renumbered as subsection (7), and new subsection (6) is added to
95 that section, to read:

96 736.1008 Limitations on proceedings against trustees.--

97 (3) When a trustee has not issued a final trust accounting
98 or has not given written notice to the beneficiary of the
99 availability of the trust records for examination and that claims
100 with respect to matters not adequately disclosed may be barred, a
101 claim against the trustee for breach of trust based on a matter
102 not adequately disclosed in a trust disclosure document is barred
103 as provided in chapter 95 and accrues when the beneficiary has
104 actual knowledge of:

105 (a) The facts upon which the claim is based if such actual
106 knowledge is established by clear and convincing evidence; or

107 (b) The trustee's repudiation of the trust or adverse
108 possession of trust assets, ~~and is barred as provided in chapter~~
109 ~~95.~~

110
111 Paragraph (a) applies to claims based upon acts or omissions
112 occurring on or after July 1, 2008.

113 (6) (a) Notwithstanding subsections (1), (2), and (3), all
114 claims by a beneficiary against a trustee are barred:

115 1. Upon the later of:

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116 a. Ten years after the date the trust terminates, the
117 trustee resigns, or the fiduciary relationship between the
118 trustee and the beneficiary otherwise ends if the beneficiary had
119 actual knowledge of the existence of the trust during the 10-year
120 period; or

121 b. Twenty years after the date of the act or omission of
122 the trustee which is complained of if the beneficiary had actual
123 knowledge of the existence of the trust during the 20-year period
124 or;

125 2. Forty years after the date the trust terminates, the
126 trustee resigns, or the fiduciary relationship between the
127 trustee and the beneficiary otherwise ends.

128 (b) For purposes of this subsection, the failure of the
129 trustee to take corrective action is not a separate act or
130 omission and does not extend the period of repose established by
131 this subsection.

132 (c) This subsection applies to claims based upon acts or
133 omissions occurring on or after July 1, 2008.

134 Section 5. This act shall take effect July 1, 2008.