HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 435 Trust Administration

SPONSOR(S): Hukill

TIED BILLS: **IDEN./SIM. BILLS:** SB 2164

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Constitution & Civil Law	7 Y, 0 N	Thomas	Birtman
2) Safety & Security Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

The Trust Code is the portion of the Florida Statutes that pertains to the administration of trusts.

The bill provides that when a grantor appoints trustees for particular purposes, the trustees excluded from those purposes are not liable for any consequence that results from compliance with the exercise of those purposes, regardless of the information available to the excluded trustees. The trustees having the power for a particular purpose shall be liable to the beneficiaries with respect to the exercise of that purpose.

The bill permits a trustee to use trust assets, without prior court approval, to pay costs or attorney's fees in any trust proceeding, including to defend against an allegation of breach of trust. However, when a claim or defense is made against the trustee based upon a breach of trust, if the party making the allegation shows a reasonable basis for the court to conclude that a breach of trust has in fact occurred, the court may enter an order prohibiting the trustee from using trust assets to pay costs or attorney's fees, and may order a refund.

The bill revises time limitations for the bringing of legal claims by a beneficiary against a trustee for breach of trust. The bill provides that all claims by a beneficiary against a trustee are barred upon the later of:

- Ten years from the date that the trust terminates, the trustee resigns or the fiduciary relationship between the trustee and the beneficiary otherwise ends; or
- Twenty years after the date of the act or omission of the trustee that is complained of.

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

The bill takes effect on July 1, 2008.

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 the portion of the Florida Statutes that pertains to the administration of trusts. Florida's body of statutory law specific to trusts is found in ch. 736, 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.

Florida's Trust Code is modeled on the Uniform Trust Code of 2000. 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 Colombia. 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 or the new Florida Trust Code adopted in 2006.[1]

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.[2]

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."[3] The term "trustee" as used in a technical or legal sense means the person

[1] Chapter 2006-217, L.O.F.
[2] 55A Fla. Jur. 2d Trusts s. 1.
[3] Section 731.201(19), F.S.

who takes and holds the legal title to trust property for the benefit of another.[4] "Trustee" includes "an original, additional, surviving, or successor trustee, whether or not appointed or confirmed by court."[5]

Cotrustees

A trust may comprise a variety of liquid and non-liquid assets. A trustee may be a natural person or may be a financial institution. A trustee may be selected for their expertise in fiduciary administration, family governance or management of a diversified portfolio of securities. The expertise of the trustee may be limited, however, when it comes to managing unique assets such as a family business, real estate or large blocks of stock that cannot be easily diversified. Management of these types of assets may require a different skill set.

Clients sometimes wish to appoint a particular trustee for a trust but also want to have a cotrustee, adviser, or committee (not the trustee) control certain trust decisions. For example, if a grantor funds a trust with stock in the family company, he or she might want to continue to make decisions regarding the purchase, sale, and voting of such stock. Similarly, a family that has a long-standing relationship with a successful money manager might want that manager (not the trustee) to make investment decisions for trust assets. In addition, a client might want someone other than the trustee to decide when to make income or principal distributions to beneficiaries. In these situations, the client wants to minimize the trustee's involvement in such decisions.

Even if a trust directs the trustee to make investments or distributions on the direction of someone else and relieves it from liability for following such directions, the trustee might have considerable monitoring or other responsibilities and may be subject to potential liability. Under present Florida law, the trustee still has the responsibility to oversee, monitor and intervene to avoid a serious breach of trust by the advisor. Florida law provides that when a grantor of a trust confers "on a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power *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* (emphasis added)."[6]

The bill amends s. 736.0703, F.S., to provide that when the grantor appoints trustees for particular purposes:

- an excluded trustee[7] must act in accordance with the exercise of the power given to the included trustee;

- an excluded trustee is not liable, individually or as a fiduciary, for any consequence that results from compliance with the exercise of the power given to the included trustee, regardless of the information available to the excluded trustee;

[4] 90 C.J.S. Trusts s. 2.
[5] Section 731.201(38), F.S.
[6] Section 736.0808(2), F.S.
[7] The "excluded trustee" is the trustee not assigned the specific power or purpose at issue.

- an excluded trustee is relieved from any obligation to review, inquire, investigate or make recommendations or evaluations with respect to the exercise of the power by the included trustee, regardless of any information available to the excluded trustee and regardless of any actual knowledge by the excluded trustee; and

- a trustee having the power to direct or prevent actions of the trustees shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office, and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power.

Duty of Loyalty

A trustee has a duty to administer the trust solely in the interests of the beneficiaries.[8] In the absence of a contrary provision in the trust instrument, a court order,[9] or a specific statutory exception, 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.[10] A trustee may not usurp an opportunity properly belonging to the trust.[11] 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.[12]

To be contrasted with the transactions described above are those entered into between the trustee and persons who have close business[13] or personal ties[14] to the trustee. Such transactions are only presumed to be affected by a conflict between the personal and fiduciary interests of the trustee.[15] Accordingly, the transactions are not voidable per se; they are voidable only if the presumption is not rebutted.

The 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;[16]

- 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;[17]

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[8] See generally, s. 736.0802(1), F.S.
[9] 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.
[10] Section 736.0802(2), F.S.
[11] Section 736.0802(4), F.S.
[12] Section 736.0802(6), F.S.
[13] 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.
[14] 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.
[15] Section 736.0802(3), F.S.
[16] Section 736.0802(7)(a) and (b), F.S.
[17] Section 736.0802(7)(c), F.S.

- A deposit of trust money in a regulated financial-service institution operated by the trustee;[18]
- An advance by the trustee of money for the protection of the trust;[19] or
- The employment of persons, including attorneys, accountants, investment advisers, or agents, even if they are the trustee or are associated with the trustee, to advise or assist the trustee in the performance of its administrative duties or the employment of agents to perform any act of administration, whether or not discretionary.[20]

The Trust Code empowers a trustee to pay costs or attorney fees incurred in any trust proceeding from trust assets without the approval of any person or a court, except prior court approval is required if an action has been filed, or defense asserted, against the trustee based upon a breach of trust.[21] Prior court approval is not required "if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a breach of trust."[22] The courts have held that when the personal interests of a trustee conflict with his or her position as trustee in the defense of an action, the trustee must obtain court approval before using trust funds to pay attorney's fees from trust assets.[23]

The bill amends s. 736.0802(10), F.S., to remove the requirement on a trustee to seek prior court approval to pay costs or attorney's fees to defend against an allegation of breach of trust. The bill will permit the trustee to use trust assets, without prior court approval, to pay costs or attorney's fees in any trust proceeding, including to defend against an allegation of breach of trust. However, when a claim or defense is made against the trustee based upon a breach of trust, if the party making the allegation shows a reasonable basis for the court to conclude that a breach of trust has in fact occurred, the bill provides that the court may enter an order prohibiting the trustee from using trust assets to pay costs or attorney's fees. The party making the allegation of breach of trust may do so by evidence in the record or by proffering evidence to the court that a breach of trust has occurred. The trustee may proffer evidence that rebuts the allegation. The new language provides that it does not restrict the remedies a court may employ to remedy a breach of trust, including ordering appropriate refunds.

Limitations on Proceedings Against Trustees

The Trust Code specifies time limitations on bringing claims by a beneficiary against a trustee for breach of trust.[24] With respect to matters adequately disclosed on a trust accounting, the applicable limitation period depends on whether the trustee has sent the beneficiary a limitation notice that relates to that accounting. The shortest limitation period provided is six months. This period applies to actions on matters the trustee has adequately disclosed in a trust accounting or other trust disclosure document when the trustee has provided the beneficiary with a related limitation notice.[25] A limitation notice is a written statement informing the beneficiary that an action against the trustee for actions

[18] Section 736.0802(7)(d), F.S.
[19] Section 736.0802(7)(e), F.S.
[20] Section 736.0802(8), F.S.
[21] Section 736.0802(10) F.S.
[22] *Ibid.*
[23] *Shriner v. Dyer,* 462 So.2d 1122 (Fla. 4th DCA 1984); *Brigham v. Brigham*, 934 So.2d 544 (Fla. 3d DCA 2006); and *J.P. Morgan Trust Co. v. Siegel,* 965 So.2d 1193 (Fla. 4th DCA 2007).
[24] Section 736.1008, F.S.
[25] Section 736.1008(2), F.S.

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.[26]

A significantly longer limitation period applies to claims involving matters adequately disclosed on a trust accounting when no related limitation notice is sent to the beneficiary. The Trust Code provides that the claims are barred as provided in chapter 95, F.S.[27] Typically, this will result in a four-year limitation with the period beginning on the date of receipt of the adequate disclosure.[28] An exception applies to matters involving actual or constructive fraud by the trustee. In those cases, the action must be commenced within 12 years, however the limitation 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.[29]

The bill provides that when "a trustee has not issued a final trust accounting or has not given written notice to the beneficiary of the availability of the trust records for examination and that claims with respect to matters not adequately disclosed may be barred, a claim against the trustee for breach of trust based on a matter not adequately disclosed in a trust disclosure document accrues when the beneficiary has actual knowledge of the facts upon which the claim is based and the trustee's repudiation of the trust, or adverse possession of trust assets, and is barred as provided in chapter 95." [The change to current law is underlined in the preceding sentence.]

The bill further provides that notwithstanding the present limitations in law as discussed above, all claims by a beneficiary against a trustee are barred upon the later of:

- Ten years from the date that the trust terminates, the trustee resigns or the fiduciary relationship between the trustee and the beneficiary otherwise ends; or

- Twenty years after the date of the act or omission of the trustee that is complained of.

Finally, 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 the period of limitation.

Effective Date

The bill takes effect July 1, 2008.

C. SECTION DIRECTORY:

Section 1: Amends s. 736.0703, F.S., relating to cotrustees.

Section 2: Amends s. 736.0802, F.S., relating to the duty of loyalty by trustees.

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[26] Section 736.1008(4)(c), F.S.
[27] Section 736.1008(1)(a), F.S.
[28] See s. 95.11(3), F.S.
[29] Section 95.031(2)(a), F.S.

Section 3: Amends s. 736.1008, F.S., relating to limitations on proceedings against trustees.

Section 4: Provides that the bill becomes effective on July 1, 2008.

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 raises 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 submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 5, 2008, the Committee on Constitution & Civil Law recommended a strike-all amendment that picks up the Senate version of the bill. The amendment provides:

Section 1: The amendment creates a new section of law to provide that communications between a fiduciary, who administers fiduciary property, and a lawyer are privileged (identical to the existing attorney/client privilege). The new privilege applies to a fiduciary when serving as:

- a personal representative (Probate) or a trustee (Trust Code) as defined in s. 731.201,
- an administrator ad litem (Probate) as described in s. 733.308,
- a curator (Probate) as described in s. 733.501,
- a guardian or guardian ad litem (Guardianship) as defined in s. 744.102,
- a conservator (Transfer of Property to Minors) as defined in s. 710.102, or
- an attorney in fact (Powers of Attorney) as described in chapter 709.

Section 2 and Section 3: - These two sections of the amendment are identical in substance to section 1 and section 2 of the bill as filed – with some slight change in wording made by Senate Bill Drafting.

Section 4: Revises time limitations for the bringing of legal claims by a beneficiary against a trustee for breach of trust.

The first change made by the amendment, made in subsection (3), provides that when a trustee has not issued a final trust accounting or has not given written notice to the beneficiary of the availability of the trust records for examination and that claims with respect to matters not adequately disclosed may be barred, a claim against the trustee for breach of trust based on a matter not adequately disclosed in a trust disclosure document is barred as provided in ch. 95, F.S., and accrues when the beneficiary has actual knowledge of:

1. The facts upon which the claim is based, provided that such actual knowledge is established by clear and convincing evidence; or

2. The trustee's repudiation of the trust or adverse possession of trust assets.

The next changes made by the amendment, made in subsection (6), provide that notwithstanding the limitations provided elsewhere in the section, all claims by a beneficiary against a trustee for breach of trust are barred:

1. Upon the later of:

   a. Ten years after the date the trust terminates, the trustee resigns, or the fiduciary relationship between the trustee and the beneficiary otherwise ends, provided that the beneficiary had actual knowledge of the existence of the trust during the ten-year period; or

   b. Twenty years after the date of the act or omission of the trustee that is complained of, provided that the beneficiary had actual knowledge of the existence of the trust during the twenty-year period; or

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

For the purposed of the changes made by the amendment to subsection (6), failure of the trustee to take corrective action is not a separate act or omission and does not extend the period of repose established in the subsection.

The provisions of this section of the amendment, made to both subsection (3) and subsection (6), will apply only to claims based upon acts or omissions occurring on or after July 1, 2008.

The amendment does not have a fiscal impact on state or local governments.