

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Banking and Insurance Committee

BILL: CS/CS/SB 1958

INTRODUCER: Banking and Insurance Committee; Judiciary Committee and Senator Gelber

SUBJECT: Trust Administration

DATE: March 31, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Maclure	JU	Fav/CS
2.	Woodham	Burgess	BI	Fav/CS
3.				
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill amends the provisions related to the Florida Trust Code (code) The bill makes the following changes to the code; and are designed to clarify the code.

- Amends the definition of “beneficiary” to clarify that a permissible appointee is not a beneficiary unless the power of appointment is irrevocably exercised in favor of the appointee;
- Provides that a person who takes trust property if a power of appointment is not exercised (“takers in default”) may represent and bind permissible appointees;
- Clarifies the term “power of appointment” to not include the power of a trustee to make discretionary distributions of the trust property.
- Requires that a trust settlor creating a trust in Florida designating the law of another state to govern the trust must demonstrate a connection between the trust and that other state;
- Provides that the designated representative for a beneficiary must be specifically nominated. It also provides that the trust instrument may also authorize any person or persons, other than a trustee of the trust, to designate one or more persons to represent and bind a beneficiary and receive any notice, information, accounting, or report;

- Clarifies that, except in cases of willful misconduct on the part of the trustee with the authority to direct or prevent actions of the trustees of which the excluded trustee has actual knowledge, an excluded trustee is not liable as a consequence of the trustee's actions;
- Allows for the delegation of investment functions to a qualified cotrustee even if the settlor reasonably expected the cotrustees to perform certain functions jointly;
- Applies the fiduciary delegation rules of s. 518.112, F.S., to delegation of investment functions of a trustee;
- Clarifies that the distribution date to the beneficiary of a trust refers to the time that the right to possession or enjoyment arises and is not necessarily the time that any benefit of the right is realized.

This bill substantially amends the following sections of the Florida Statutes: 736.0103, 736.0105, 736.0302, 736.0306, 736.0703, 736.0807, and 736.1106.

II. Present Situation:

Qualified Beneficiaries of a Trust and Permissible Appointees

A "beneficiary" under the code is defined as a person who has a present or future beneficial interest in a trust or holds a power of appointment over trust property in a capacity other than as a trustee. A "qualified beneficiary" of a trust is entitled to receive a complete copy of the trust, annual trust accountings, and information concerning the trust, including its assets, liabilities, and the particulars of its administration.¹

A permissible appointee is a class of persons to whom someone has given the power to direct trust assets (usually at someone's death and usually the settlor's descendants).² Under s. 736.0302, F.S., a person cannot represent and bind the interests of permissible appointees in a trust if the holder of the power of appointment is also the sole trustee of the trust.

Information received from the Real Property, Probate, and Trust Law (RPPTL) section of the Florida Bar states it is frequent practice to file a court action to appoint a guardian ad litem to represent the interests of permissible appointees. This practice is often considered contrary to the general interest of the code which generally calls for resolution of issues in a trust to be conducted outside the courts.

Governing Law of a Trust

Section 736.0107, F.S., provides that a trust settlor may designate the law of any state to govern the meaning and effect of the trust terms as long as the trust has a "sufficient nexus," or connection, to the designated jurisdiction. The conditions for sufficient nexus would be such things as ownership by the trust of real property in the designated jurisdiction, the location of the trust settlor's residence or office in the designated jurisdiction, or the location of the residence or office of the trustee or any beneficiary in the designated jurisdiction. Present law sets out these criteria but does not require them as a provision for the trust.

¹ Section 736.0103(14), F.S., and Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper: Proposed Revisions to Florida Trust Code Chapter 736, Florida Statutes* (2009) (on file with the Senate Committee on Judiciary).

² Conversations with Brian Fecovski and Barry Spivey of the Real Property, Probate, and Trust Law Section of the Florida Bar (March 14, 2009).

Exceptions to Provisions of a Trust

Section 736.0105, F.S., provides that the terms of the trust prevail over any provisions of the trust code except for a certain enumerated list provided in this section, including for example:

- the requirements for creating a trust;
- the duty of the trustee to act in good faith;
- the requirement that a trust and its terms be for the benefit of the trust's beneficiaries and not be contrary to public policy;
- the periods of limitation for commencing a judicial proceeding;
- the power of the court to take action and exercise jurisdiction when necessary; and
- other statutorily mandated provisions.

Designated Representative

Section 736.0306(1), F.S., provides that “[i]f authorized in the trust instrument, one or more persons may be designated to represent and bind a beneficiary and receive any notice, information, accounting, or report.” The RPPTL section reports this provision has been interpreted by several leading estate and trust practitioners to grant a trustee the power to select “designated representatives.” When there is a designated representative for a beneficiary, the trustee furnishes trust accountings and other information to the representative and not to the beneficiary. The RPPTL section believes that the statute was not intended to allow a trustee to designate a representative for a beneficiary to whom the trustee does not wish to account directly.

Cotrustees

Section 736.0703(9), F.S., was amended in 2008 to permit a trust settlor who is designating more than one trustee to provide that one cotrustee can direct the actions of another cotrustee with respect to specific areas of trust administration. The trustee who is required to follow the direction of another trustee is called the “excluded trustee.” According to the RPPTL section, the excluded trustee is substantially exonerated from liability for following the directions of the trustee(s) having authority to direct.

Delegation by Trustee

Section 736.0807, F.S., allows a trustee to delegate duties and powers so long as the trustee uses reasonable care, skill, and caution in selecting the agent, establishing the scope of the delegation, and periodically reviewing the actions of the agent.

Antilapse and Survivorship with Respect to Future Interests

Section 736.1106, F.S., defines “beneficiary” for purposes of this particular section as the beneficiary of a future interest. “Distribution date” with the respect of future interests is defined as the time when the future interest is to take effect in possession or enjoyment. This date is not required to be at the beginning or end of a calendar day, but can occur at a time during the course of a day. The Florida Bankers Association (FBA) states that this language has been interpreted to mean that a beneficiary of a trust who is entitled to a distribution forfeits the entitlement if the beneficiary dies prior to “actual receipt” of the distribution. The FBA states that this result may

shift the distribution from the spouse or heirs of the deceased beneficiary to others and increase pressure on trustees to administer distributions quickly rather than thoughtfully.³

III. Effect of Proposed Changes:

Qualified Beneficiaries of a Trust and Permissible Appointees

The bill amends the definition of “beneficiary” in s. 736.0103, F.S., by clarifying that a permissible appointee is not a beneficiary unless the power of appointment is “irrevocably exercised” in his or her favor. According to bill proponents,⁴ whether or not this appointee would be a “qualified beneficiary” is determined by the criteria set forth in s. 736.0103(14), F.S. The intent of this change is to fill a gap in the law where representation of the potential interests of permissible appointees under a power of appointment is concerned. This is of particular concern in the common circumstance where a sole trustee holds the power of appointment.

Takers in Default

The changes to s. 736.0302(2), F.S., provide a person who takes trust property, if a power of appointment is not exercised (“takers in default”), may represent and bind permissible appointees.

Scope of the Power of Appointment

The bill amends s. 736.0302(4), F.S. to define the term “power of an appointment” to exclude a trustee’s discretionary power to distribute trust property.

Exceptions to Provisions of a Trust/Governing Jurisdiction of a Trust

The bill amends s. 736.0105(2)(f), F.S., to require a trust settlor in Florida who designates the law of another state to govern the meaning and effect of the trust terms to demonstrate the connection between the trust and designated state.

Designated Representative

The bill amends s. 736.0306(1), F.S., to provide that the designated representative must be specifically nominated. It also provides that the trust instrument may also authorize any person or persons, other than a trustee of the trust, to designate one or more persons to represent and bind a beneficiary and receive any notice, information, accounting, or report. The RPPTL section states that this change will clarify that a trust settlor could provide for selection of a designated representative for one or more beneficiaries by anyone other than a trustee of the trust.

Cotrustees

The bill amends s. 736.0703(5), F.S., to allow for the delegation of investment functions to a qualified cotrustee even if the settlor reasonably expected the cotrustees to perform certain functions jointly.

The bill amends s. 736.0703(9), F.S., to clarify that except in cases of willful misconduct on the part of the trustee with the authority to direct or prevent actions of the trustees of which the excluded trustee has actual knowledge, an excluded trustee is not liable as a consequence of the

³ Florida Bankers Association, *White Paper: Florida Trust Code Survivorship with Respect to Future Interests* (January 6, 2009) (on file with the Senate Committee on Judiciary).

⁴ the Real Property, Probate, and Trust Law (RPPTL) Section of the Florida Bar.

trustee's actions. The RPPTL section states that this proposed change is necessary to achieve the legislative intent of the 2008 changes.

Delegation by Trustee

The bill amends s. 736.0807, F.S., to apply the fiduciary delegation rules of s. 518.112, F.S., to delegation of investment functions of a trustee.

Antilapse and Survivorship with Respect to Future Interests

The bill amends s. 736.1106(1)(b), F.S., to clarify that the distribution date to the beneficiary of a trust refers to the time that the right to possession or enjoyment arises and is not necessarily the time that any benefit of the right is realized.

Effective Date

The bill provides an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Banking and Insurance on April 1, 2009

corrects an incorrect statutory cross-reference.

CS by Judiciary on March 18, 2009:

The committee substitute:

- Makes technical changes to the bill’s revised definition of “beneficiary.”
- Amends the duties of a cotrustee to allow for the delegation of investment functions to a qualified cotrustee even if the settlor reasonably expected the cotrustees to perform certain functions jointly.
- Applies the fiduciary delegation rules of s. 518.112, F.S., to delegation of investment functions of a trustee.
- Deletes the changes to s. 736.0813, F.S., which defined the term “complete copy of the trust instrument” (as a complete copy of the original trust instrument including all restatements of and amendments to the original trust instrument, whether or not any such restatements or amendments contained current terms of the trust).
- Clarifies that the distribution date to the beneficiary of a trust refers to the time that the right to possession or enjoyment arises and is not necessarily the time that any benefit of the right is realized.

- B. **Amendments:**

None.