

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 Judiciary Committee

BILL: CS/SB 1958

INTRODUCER: Judiciary Committee and Senator Gelber

SUBJECT: Trust Administration

DATE: March 19, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Maclure	JU	Fav/CS
2.			BI	
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 is a product of the Real Property, Probate, and Trust Law Section of the Florida Bar to improve and clarify current Florida Law pertaining to the Florida Trust Code. The bill makes the following changes:

- 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 persons who take trust property if a power of appointment is not exercised (“takers in default”) may represent and bind permissible appointees;
- Provides that a trust settlor creating a trust in Florida cannot designate the law of another state to govern the meaning and effect of the trust terms unless there is some demonstrable connection between the trust and the designated state;
- Provides 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;

- 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 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; and
- 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 Florida Trust 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., there is no one who can 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.

The Real Property, Probate, and Trust Law (RPPTL) Section of the Florida Bar states it is a frequent practice to file a court action to appoint a guardian ad litem to represent the interests of permissible appointees, which is contrary to the general theme of the Florida Trust Code to allow resolution of issues concerning trusts by the persons having an interest in the trust without court proceedings.

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).

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. Sufficient nexus can be things such 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.

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 states that this provision has been interpreted by several leading estate and trust practitioners to allow the terms of a trust 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 states 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., to clarify that a permissible appointee is not a beneficiary unless the power of appointment is irrevocably exercised in favor of the appointee. According to the Real Property, Probate, and Trust Law (RPPTL) Section of the Florida Bar, in this case, whether the appointee is or is not a qualified beneficiary requires the application of the definition of “qualified beneficiary” as set forth in s. 736.0103(14), F.S. This will fill a gap in these provisions for representation of the potential interests of permissible appointees under a power of appointment in the common circumstance where a sole trustee holds the power of appointment. The proposed changes further provide, under s. 736.0302, F.S., that persons who take trust property if a power of appointment is not exercised (“takers in default”) may represent and bind permissible appointees.

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

The bill amends s. 736.0105, F.S., to include the requirements of s. 736.0107, F.S., in the mandatory provisions of the trust. This amendment, according to the RPPTL section, will prevent the trust settlor in Florida from designating the law of another state to govern the meaning and effect of the trust terms unless there is some demonstrable connection between the trust and designated state.

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).

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 amendment 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 trustee's actions. The RPPTL section states that this proposed change is necessary if the legislative intent of the 2008 amendment is to be carried out.

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:**

On line 94, the statutory cross-reference to “s. 581.112” should be to “s. 518.112,” relating to delegation of investment functions by a fiduciary.

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 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 bill’s amendment 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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
