

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 965 Trust Administration
SPONSOR(S): Civil Justice & Courts Policy Committee; Grady; Hukill
TIED BILLS: None IDEN./SIM. BILLS: SB 1958

Table with 4 columns: REFERENCE, ACTION, ANALYST, STAFF DIRECTOR. Row 1: Civil Justice & Courts Policy Committee, 9 Y, 0 N, As CS, Bond, De La Paz. Row 2: Criminal & Civil Justice Policy Council, 12 Y, 0 N, Bond, Havlicak. Rows 3-5 are empty.

SUMMARY ANALYSIS

This bill amends trust law to:

- Provide that a permissible appointee under a power of appointment is not a "beneficiary" of a trust until the power of appointment is irrevocably exercised in favor of the appointee and provides that persons who take trust property if a power of appointment is not exercised ("takers in default") may represent and bind permissible appointees.
Provide 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.
Provide that a trustee may not be empowered to select a "designated representative" for a beneficiary to whom the trustee may account and furnish other required information instead of furnishing such information directly to the beneficiary.
Correct a misnomer created by insertion of the term "directed trustee" as a person different from the statutory term "excluded trustee," when they are in fact one and the same thereby nullifying the unintended blanket exoneration of the excluded trustee from liability for complying with the directions of a cotrustee having authority to direct or prevent actions of other cotrustees.
Provide that the distribution date for purposes of antilapse is the date that the property interest arises, not the date that the property is actually distributed to a beneficiary.

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

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

A trust can be created either by express grant in a trust agreement or a will, or may be created by operation of law when required because of the status of the beneficiary. A trust is managed by a person known as a trustee, and is managed for the benefit of one or more persons known as beneficiaries. Chapter 736, F.S., governs trust law.

#### Permissible Appointees

Under s. 736.0302, F.S., there is no person who can represent and bind the interests of permissible appointees if the holder of the power of appointment is also the sole trustee of the trust. "Qualified beneficiaries" of a trust, as defined in s. 736.0103(14), F.S., are 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 among other rights. To be considered a qualified beneficiary, a person must first be a "beneficiary" as defined in s. 736.0103(4), F.S. A person who is a "permissible appointee" under a power of appointment is not a "beneficiary" within the definition in s. 736.0103(4), F.S., because the permissible appointee does not have a present or future beneficial interest in the trust, either vested or contingent.

This bill amends the definition of beneficiary in s. 736.0103(4), F.S., to provide that takers in default under a power of appointment (who are qualified beneficiaries) can represent and bind permissible appointees under a power of appointment. This covers the representation gap that occurs when the holder of the power of appointment is also the sole trustee of the trust. In addition, the change in the definition of "beneficiary" in s. 736.0103(4), F.S., will make it clear that a permissible appointee is not a beneficiary unless the power of appointment is irrevocably exercised in favor of the appointee. In that event, whether the appointee is or is not a qualified beneficiary requires the application of the definition of that term in s. 736.0103(14), F.S.

This bill also amends s. 736.0302, F.S., to add a new subsection (2) to that section to fill an apparent gap in the 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. Under current law, it is sometimes necessary to file a court action to appoint a guardian ad litem to represent the interests of permissible appointees, contrary to the general theme of the Florida Trust Code which is to allow resolution of issues concerning trusts by the persons having an interest in the trust without court proceedings. The change in the definition of the term "power of appointment" as used in s. 736.0302, F.S., provides that a non-discretionary power to distribute trust property is not considered a power of appointment.

### Law applied to 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. Things that can lead to a sufficient nexus include 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.

In general, the trust code is a fallback, that is, the provisions of the trust code only apply where the specific terms of a trust do not apply or are not in conflict. Section 736.0105, F.S., however, lists provisions of the trust code that are mandatory, that is, that cannot be altered or amended by the terms of a trust. Section 736.0107, F.S., is not one of the trust code provisions listed as “mandatory” in s. 736.0105, F.S. Therefore, the terms of a trust created in Florida could provide that s. 736.0107, F.S., does not apply to the trust, and by doing so the trust settlor could then provide that the law of any other state be designated as the law governing the Florida trust.

This bill amends s. 736.0105(2)(f), F.S., to provide that the provisions of s. 736.0107, F.S., are mandatory and therefore 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.

### Designated representatives

There are occasions where the administration of a trust is served by the appointment of a designated representative. A designated representative is a person who represents a beneficiary and is the person that the trustee accounts to and furnishes information to in lieu of the beneficiary. Under current law, a trust instrument may grant a trustee the power to name a designated representative. Under that scenario, a trustee can name a designated beneficiary whose interest sides with the trustee rather than one who would act in the best interest of the beneficiary, in order to avoid having to directly report to the beneficiary.

This bill amends s. 736.0306, F.S., to provide that, where a trust instrument allows the appointment of a designated representative, someone other than a trustee of the trust must be the person appointing the designated representative.

### Directed and excluded trustees

Section 736.0703(9), F.S., was amended in 2008 to allow 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 required to follow the direction of another trustee is called the “excluded trustee.” The excluded trustee is substantially exonerated from liability for following the directions of the trustee(s) having authority to direct. An exception to full exoneration of the excluded trustee was added to the statute in the case of willful misconduct by the directed trustee of which the excluded trustee has actual knowledge. However, the trustee being directed is the “excluded trustee,” whereas the apparent intent was to prohibit exoneration of the excluded trustee who follows directions notwithstanding actual knowledge of willful misconduct by the cotrustee giving direction.

Section 518.112, F.S., provides for delegation of investment functions by a fiduciary. It requires a fiduciary to exercise reasonable care, judgment and caution in selection and oversight over the person to whom investment functions are delegated. Subsection (3)(b) also requires, as applied to a trust, that the fiduciary give written notice to beneficiaries of the delegation within 30 days unless notice is waived. Subsection (4) provides that a fiduciary that properly designates investment functions is not liable for actions or omissions of the investment agent.

This bill amends ss. 736.0703 and 736.0807, F.S., to provide that trustees and cotrustees may delegate investment functions to another, including to a cotrustee, pursuant to and in compliance with s. 518.112, F.S.

Antilapse and the definition of distribution date

Section 736.1106, F.S., creates an antilapse provision in the trust law. Trusts often create contingent interests, that is, an interest in property that is realized in the future rather than today. The date that a property interest changes from contingent (in the future) to realized (that is, can be used, cashed, or sold today) is the "distribution date." The reason for an antilapse provision is that it is common for a trust settlor to create a contingent interest in a person who dies before the person is eligible to receive the property. Without antilapse, there can either be confusion as to who is to receive the property or an unintended beneficiary may receive the property. The general antilapse rule is that the beneficiaries of the deceased intended beneficiary of the future interest receive the gift that the intended recipient would have taken.

This bill amends the definition of "distribution date" in s. 736.1106(1)(b), F.S., to provide that the distribution date is the date that the right to possession or enjoyment of the property to be distributed arises, and is not the date that the right to possession or enjoyment was actually realized.

**B. SECTION DIRECTORY:**

Section 1 amends s. 736.0103, F.S., relating to definitions applicable to the Florida Trust Code.

Section 2 amends s. 736.0105, F.S., relating to default and mandatory rules applicable to trusts.

Section 3 amends s. 736.0302, F.S., relating to representation by holder of a power of appointment.

Section 4 amends s. 736.0306, F.S., relating to a designated representative of a trust.

Section 5 amends s. 736.0703, F.S., relating to cotrustees of a trust.

Section 6 amends s. 736.0807, F.S., relating to delegation of duties by a trustee.

Section 7 amends s. 736.1106, F.S., relating to antilapse.

Section 8 provides an effective date of July 1, 2009.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

On March 17, 2009, the Civil Justice & Courts Policy Committee adopted 4 amendments to this bill. The amendments:

- Require that delegation of investment functions must be according to the requirements of s. 581.112, F.S.
- Define distribution date in the antilapse statute applicable to a trust.
- Remove provisions relating to providing copies of the trust instrument to a beneficiary.
- Provide that the "permissible appointee" amendment to the term "beneficiary" applies to the entire definition.

The bill was then reported favorably with a committee substitute.