

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 405 Trusts

SPONSOR(S): Judiciary Committee; Civil Justice Subcommittee; Peters

TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 826

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N, As CS	Ward	Bond
2) Judiciary Committee	18 Y, 0 N, As CS	Ward	Havlicak

SUMMARY ANALYSIS

Florida law governs the creation and administration of trusts. Florida trust documents may contain broad parameters for trust administration while the Trust Code provides default provisions for where the trust document is silent. The Trust Code also makes certain trust terms unenforceable.

Current Florida law provides for one cotrustee (called the "included trustee") to direct the actions of another cotrustee (called the "excluded trustee"). However, both cotrustees remain liable for the willful misconduct of the included cotrustee where the excluded cotrustee has actual knowledge of wrongdoing.

The bill allows creation of a trust that allows one cotrustee to direct the actions of another cotrustee without creating liability in the excluded cotrustee. The included cotrustee remains liable to the beneficiaries with respect to the exercise of the power as if the excluded cotrustee were not in office. The included cotrustee has the exclusive obligation to account to a beneficiary and to defend any action brought by a beneficiary with respect to the exercise of the power.

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

The bill has an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Florida Trust Code

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. . ." ¹

A trust must have three interest holders - a settlor (also called a "grantor"), a trustee, and a beneficiary. The settlor is the party creating the trust. The trustee holds legal title to the property held in trust for the benefit of the beneficiary.² The beneficiary has an equitable interest in property subject to trust, enjoying the benefit of the administration of the trust by a trustee.³

The Trust Code⁴ is the portion of the Florida Statutes that pertains to the drafting and administration of trusts. The Trust Code provides default rules for trust drafting and administration. The terms of a trust document prevail over any provision of the Trust Code, with exceptions and mandatory rules as set out in the statute.⁵ One exception relates to a trust term relieving a trustee of liability for breach of trust.⁶ Clauses in a trust exonerating a trustee from liability are called "exculpatory terms."⁷

Exculpatory Terms

A trustee has a fiduciary duty to the beneficiary for proper administration of trust assets and is liable for any breach of that duty.⁸ Cotrustees are generally jointly and severally liable to the beneficiary for any breach of trust, without special trust terms changing their duties and liabilities.⁹ As a result, exculpatory terms in a trust document providing for the release of a trustee who breaches his fiduciary duty are strictly construed.¹⁰ They may also be unenforceable.¹¹ At the same time, settlors may require documents tailored to specific needs and the trustees may require special latitude to accomplish the settlor's purposes.

The expertise of a single trustee may be limited in respect to managing unique assets such as a family business, certain real estate or large blocks of stock that cannot be easily diversified. Management of such peculiar assets may require a unique skill or personal knowledge. For example, if a settlor funds a trust with stock in a closely-held corporation, he or she might want to continue to make decisions regarding the purchase, sale, and voting of such stock. Similarly, a family having a long-standing relationship with a successful money manager might want him or her to continue to make trust investment decisions without appointing him or her as a sole

¹ 55A Fla.Jur.2d Trusts s.1; s. 731.201(38), F.S.

² 55A Fla.Jur.2d Trusts s.1.

³ *Id.*

⁴ Florida's Trust Code, ch. 736, F.S., 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 24 states and the District of Columbia. In Florida, the Ad Hoc Trust Code Revision 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 of the new Florida Trust Code adopted in 2006. See ch. 2006-217, L.O.F.

⁵ Section 736.0105(2), F.S.

⁶ Section 736.0105(2)(u), F.S.

⁷ Sections 736.1011 and 736.0105(2)(u), F.S.

⁸ Sections 736.1001 and 736.1002, F.S.

⁹ 55A Fla. Jur.2d Trusts s.155.

¹⁰ 55A Fla. Jur.2d Trusts s.154.

¹¹ Section 736.1011, F.S.

trustee. A settlor might want someone other than the trustee to decide when to make income or principal distributions to beneficiaries. In these situations, the settlor wants to minimize a single trustee's involvement in decisions, and yet, without exculpatory trust terms, the trustee remains responsible to the beneficiaries for proper management of the trust assets. As a result, settlors seek to appoint a cotrustee for general administration while certain trust decisions are reserved to another cotrustee with particular expertise.

Cotrustees

Cotrustees are governed by the trust document and s. 736.0703(9), F.S. The statute provides that when the settlor appoints a cotrustee for particular purposes:

- An excluded trustee¹² must act in accordance with the exercise of the power given to the included trustee;¹³
- 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, except in cases of willful misconduct on the part of the directed trustee of which the excluded trustee has actual knowledge;
- 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; and
- A trustee having the power to direct or prevent actions of the trustees is 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.

Florida settlors sometimes have the option to establish trusts in other jurisdictions where the law clearly permits the bifurcation of functions among cotrustees and is more flexible on the issue of exoneration of the excluded trustee.¹⁴ Likewise, excluded cotrustees express concern as to whether they have oversight or some other responsibility to ensure that the included cotrustee's direction is not an act of willful misconduct. Corporate trustees who have multiple employees deal with concerns about imputed knowledge. Excluded cotrustees with some residual responsibility are hesitant to make inquiry into family matters where such inquiries are viewed as unwelcome and unwarranted intrusions.

Effect of Proposed Changes

The bill amends s. 736.0703(9), F.S., to allow drafting of a trust document that fully exonerates an excluded cotrustee. The bill enhances the previously existing exoneration of an excluded cotrustee by fully removing any duty of inquiry. The excluded cotrustee is exonerated under the new provision even if he or she has actual knowledge of willful misconduct by the included cotrustee, and regardless of the information available to the excluded cotrustee. The bill provides that the excluded cotrustee is exonerated from liability for following the direction of the included cotrustee, except in cases of its own willful misconduct.

B. SECTION DIRECTORY:

Section 1 amends s. 736.0703, F.S., relating to cotrustees.

Section 2 provides an effective date of July 1, 2014.

¹² The "excluded trustee" is the trustee not assigned the specific power or purpose at issue.

¹³ The "included trustee" is the trustee assigned the specific power or purpose at issue.

¹⁴ Cf. "The law of the jurisdiction designated in the terms of the trust, provided there is a sufficient nexus to the designated jurisdiction at the time of the creation of the trust. . ." s. 736.0107, F.S.

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:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The 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:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 5, 2014, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment provides clarification that the excluded trustee has no separate liability under s. 736.0808(2), F.S., which subjects the excluded trustee to liability if "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."

On March 13, 2014, the Judiciary Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment removes a change to s. 736.1011, F.S., which made the exculpation of a cotrustee parallel to the revised statute, provides that only willful misconduct of the excluded trustee incurs liability for any consequence that results from compliance with a directive of the included trustee, and makes other technical and grammatical changes.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.