

**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.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 826

INTRODUCER: Senator Joyner

SUBJECT: Trusts

DATE: March 10, 2014

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Cibula	JU	<b>Pre-meeting</b>
2.			BI	
3.			RC	

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**I. Summary:**

SB 826 allows a trust that authorizes one cotrustee to direct the actions of another cotrustee without creating liability in an excluded cotrustee. The directing cotrustee remains liable to the trust beneficiaries with respect to the exercise of his or her power as if the cotrustee did not exist. Accordingly, under the bill, a trust instrument may provide that an excluded trustee is not liable for willful misconduct by trustee having the power to direct or prevent actions by the excluded trustee even if the excluded trustee has actual knowledge of the misconduct. Under current law, if an excluded trustee knows of willful misconduct by the trustee having the power to direct or prevent actions of other trustees, the excluded trustee may be liable for the misconduct.

**II. Present Situation:**

“A trust is 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.”<sup>1</sup> A trust involves three interest holders<sup>2</sup>: the settlor or grantor who establishes the trust;<sup>3</sup> the trustee who holds legal title to the property held in the benefit of the beneficiary;<sup>4</sup> and lastly, the beneficiary who has an equitable interest in property held subject to the trust.<sup>5</sup>

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<sup>1</sup> 55A FLA. JUR.2D *Trusts* § 1. See also, s. 731.201(38), F.S., “trust” means an express trust, private or charitable, with additions to it, wherever and however created. It also includes a trust created or determined by a judgment or decree under which the trust is to be administered in the manner of an express trust.

<sup>2</sup> 55A FLA. JUR.2D *Trusts* § 1.

<sup>3</sup> A “settlor” is one “who makes a settlement of the property; esp.[ecially], one who sets up a trust.” BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>4</sup> A “trustee” is “one who stands in a fiduciary or confidential relation to another; esp.[ecially], one who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary.” BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>5</sup> A “beneficiary” is a person for whose benefit property is held in trust. BLACK’S LAW DICTIONARY (9th ed. 2009).

A trustee has a fiduciary duty to the beneficiary for proper administration of trust assets and is liable for any breach of that duty.<sup>6</sup> Cotrustees are generally jointly and severably liable to the beneficiary for any breach of trust, without special trust terms changing their duties or liabilities.<sup>7</sup> Clauses in a trust exonerating a trustee from liability are called exculpatory terms.<sup>8</sup> Exculpatory terms in a trust document providing for the release of a trustee who breaches his or her fiduciary duties may be unenforceable.<sup>9</sup>

Frequently, a trust will contain assets for which one of multiple trustees wishes to have no responsibility. In such case, the settlor may designate the trustee as the “excluded trustee” required to follow the direction of the directing trustee who is given sole authority to give direction over the subject trust property at issue.<sup>10</sup> Cotrustees are governed by the trust document and s. 736.0703(9), F.S. Section 736.0703(9), F.S., provides that:

If the terms of a trust instrument provide for the appointment of more than one trustee but confer upon one or more of the trustees, to the exclusion of the others, the power to direct or prevent specified actions of the trustees, the excluded trustees shall act in accordance with the exercise of the power. *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, individually or as a fiduciary, for any consequence that results from compliance with the exercise of the power, regardless of the information available to the excluded trustees.* The excluded trustees are relieved of any obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of the power. The trustee or trustees 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 (emphasis added).

There have been complaints that the directed trust statute, s 736.0703(9), F.S., does not provide sufficient level of protection to excluded trustees.<sup>11</sup> The excluded trustee to protect itself from potential liability still has to oversee, monitor, and intervene in the actions of a directed cotrustee to avoid liability. As a result, trustees have been reluctant to accept appointments where the trustees are subject to the directions of another trustee (the directing trustee).<sup>12</sup>

Section 736.0703(9), F.S. provides that the excluded trustee is protected from liability when following the instructions of the directing trustee unless the excluded trustee has “actual knowledge of willful misconduct” on the part of the directing trustee.

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<sup>6</sup> See s. 736.1011, F.S.

<sup>7</sup> 55A FLA. JUR.2D *Trusts* § 155.

<sup>8</sup> See ss. 736.1011, and 736.0105(2)(u), F.S.

<sup>9</sup> Section 736.1011, F.S.

<sup>10</sup> 12 FLA. PRAC., ESTATE Planning § 17:50.

<sup>11</sup> Communication between committee staff of the Senate Judiciary Committee and the Trust Law Committee of the Real Property, Probate, and Trust Law Section of The Florida Bar.

<sup>12</sup> *Id.*

**III. Effect of Proposed Changes:**

The bill amends s. 736.0703(9), F.S., to allow a trust document to exonerate an excluded trustee for misconduct by a trustee having the power to direct or prevent actions by the excluded trustee. The bill removes any duty for the excluded cotrustee to make any inquiry. The excluded cotrustee is exonerated under the new provision even if he or she has actual knowledge of willful misconduct by the directing trustee. The bill implies that the excluded cotrustee is exonerated from liability for following the direction of the included cotrustee, even if the excluded trustee knows of willful misconduct by the included trustee. The changes to the directed trust statute allow a settlor to exonerate an excluded trustee beyond what is currently in the law.

The bill also amends s. 736.1011, F.S., to make the exculpation of a cotrustee under the directed trust statute parallel to the revised s. 736.0703(9), F.S. Therefore, a provision in a trust that fully exonerates the excluded cotrustee prevails over the actual knowledge exception contained in the statute and is an enforceable provision under the Trust Code.

The bill takes effect on July 1 2014.

**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:**

Under the bill, a trust instrument may provide that an excluded trustee is not liable for willful misconduct by the included trustee even if the excluded trustee has actual knowledge of the misconduct. As a result of the liability protections, additional institutions and individuals may be more willing to serve as an excluded trustee.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 736.0703 and 736.1011.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.