

**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 Banking and Insurance

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BILL: CS/CS/SB 1554

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

SUBJECT: Trusts

DATE: April 18, 2017

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

|    | ANALYST          | STAFF DIRECTOR | REFERENCE | ACTION        |
|----|------------------|----------------|-----------|---------------|
| 1. | <u>Stallard</u>  | <u>Cibula</u>  | <u>JU</u> | <b>Fav/CS</b> |
| 2. | <u>Billmeier</u> | <u>Knudson</u> | <u>BI</u> | <b>Fav/CS</b> |
| 3. | _____            | _____          | <u>RC</u> | _____         |

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/CS/SB 1554 amends the Florida Trust Code (Code) to protect the trust creator's intent as paramount in trust interpretation. Historically, a trust was administered with the primary intent of accomplishing the intent of the settlor. Recent changes to trust law may be interpreted to require the administration of a trust for the benefit of the beneficiaries instead. This bill deletes language related to benefiting the beneficiaries and thus makes the intent of the settlor the primary intent of trust administration.

The bill changes portions of the Code related to the trustee and their duties, liabilities, and powers to provide which provisions of the Code govern a trustee's duty to provide an accounting to the beneficiaries and extend the period for beneficiaries to file actions alleging a breach of trust.

Additionally, the bill limits the application of the portion of the Code relating to posting documents electronically, revises procedural requirements for such postings, and provides consequences for failing to maintain receipts of electronic postings.

The bill also expands the state's decanting statute. Decanting is a trustee's power to cure or avoid issues with a trust by distributing trust property from one trust to a second trust, as opposed to distributing property directly to a beneficiary. The bill:

- Expands a trustee's ability to decant trust principal under the terms of the trust;
- Provides support for disabled beneficiaries; and

- Imposes greater notice requirements when a trustee exercises the ability to decant trust principal.

The bill modifies portions of the Code related to notices for charitable trusts. The bill requires that notice be sent to only one entity, the Attorney General, rather than to a state attorney in some instances and the Attorney General in others. The bill specifies the method by which the Attorney General is to receive notice and gives the Attorney General standing in actions related to charitable trusts.

## II. Present Situation:

### Trusts in General

A trust is a legal instrument, into which a “settlor” places property in the care of a “trustee,” who administers the property according to the terms of the trust and for the benefit of one or more “beneficiaries.” For example, a father might place \$100,000 in trust for the benefit of his children, the proceeds to be used only for their education, and appoint the father’s certified financial planner as the trustee.

### Guiding Interpretive Principles of Trusts

A trust, like any other legal document, may be ambiguous at one or more points. Ambiguous trust language can lead to lawsuits where two persons with an interest in the trust would like the language interpreted in different ways. In resolving the meaning of ambiguous trust language in these cases, it is a settled matter of this state’s case law that “the polestar of trust interpretation is the settlors’ intent.”<sup>1</sup>

However, some argue that this guiding principal should be significantly tempered by, or even replaced by, the “benefit of the beneficiaries” standard. Were this standard to replace the settlors’ intent standard in interpreting a trust, a court would ask how a given ambiguous term could be interpreted to benefit the beneficiaries, rather than how it could be interpreted to effectuate the settlor’s intent.

There is some concern that an unambiguous trust term that a court determines is not in the best interest of the beneficiaries could effectively be undone by a court. This concern is bolstered by some of the language in this state’s trust statute.

For instance, s. 736.0105, F.S., sets forth default and mandatory rules for trusts. The mandatory rules include a requirement that a “trust and its terms be *for the benefit of the trust’s beneficiaries*, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.”<sup>2</sup> The statute governing trust purposes requires that a trust and its terms be “for the benefit of its beneficiaries.”<sup>3</sup>

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<sup>1</sup> E.g., *L’Argent v. Barnett Bank, N.A.*, 730 So.2d 395, 397 (Fla.2d DCA 1999).

<sup>2</sup> Section 736.0105, F.S. Emphasis added.

<sup>3</sup> Section 736.0404, F.S.

## Trustee Compensation

A trustee is entitled to compensation for his or her efforts, either as specified in the trust or in an amount that is reasonable under the circumstances.<sup>4</sup> However, even when the trust specifies the trustee's compensation, a court may adjust it up or down if the trustee's duties are substantially different than contemplated at the trust's creation or if the specified compensation is unreasonably low or high.<sup>5</sup> Thus, one could say that a trustee is entitled to compensation that is reasonable under the circumstances, regardless of the terms of the trust.

Trusts are sometimes administered by co-trustees. The law is not clear as to whether these co-trustees may be compensated, in the aggregate, in an amount that would be impermissibly high for a sole trustee.

## Trust "Decanting"

Under certain circumstances, a trustee may invade the corpus, or principal, of a trust to make distributions to a person. Under certain circumstances, a trustee may instead place trust principal into another trust; this is often called "decanting."<sup>6</sup> If a trust grants a trustee the "absolute power"<sup>7</sup> to invade the principal of a trust (the "first trust") in order to give it to one or more persons, the trustee may instead take the trust principal and put it into another trust (the "second trust"), if:<sup>8</sup>

- The beneficiaries of the second trust are only those of the first trust; and
- The second trust does not reduce any fixed income, annuity, or unitrust interest in the assets of the first trust.

Additionally, if any contributions to the first trust qualified for a specified deduction for certain federal tax purposes, the trustee may only decant if the second trust does not contain any provision that, if contained in the first trust, would have prevented it from qualifying for the reduction, or would have decreased the size of the deduction.<sup>9</sup>

Several of the key aspects of the current decanting statute that are modified by the bill are discussed in more detail in the Effect of Proposed Changes section of this analysis.

## Charitable Trusts

A charitable trust is a trust, or portion of a trust, created for a charitable purpose.<sup>10</sup> These purposes include, but are not limited to, the relief of poverty; the advancement of the arts,

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<sup>4</sup> Section 736.0708(1), F.S.

<sup>5</sup> Section 736.0708(2), F.S.

<sup>6</sup> Decanting is a word commonly used in relation to wine to describe the act of pouring wine from its bottle into another container before service.

<sup>7</sup> Section 736.04117(1)(b), F.S., provides that an "absolute power" to "invade principal shall include a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support, whether or not the term "absolute" is used. A power to invade principal for purposes such as best interests, welfare, comfort, or happiness shall constitute an absolute power not limited to specific or ascertainable purposes."

<sup>8</sup> Section 736.04117(1)(a), F.S.

<sup>9</sup> Section 736.04117(1)(a)3., F.S.

<sup>10</sup> Section 736.0103(5), F.S.

sciences, education, or religion; and the promotion of health, governmental, or municipal purposes.<sup>11</sup> As such, charitable trusts are said to be for the benefit of the community or the public, instead of for the benefit of one or more individuals.

One of the unique characteristics of a charitable trust is the way in which it involves the local state attorney's office.<sup>12</sup> For instance, regarding private foundation trusts, the trustee may amend the trust instrument to permit him or her to make certain mandatory distributions only with the consent of a state attorney.<sup>13</sup> Another way that the state attorney may be involved in charitable trust administration is through the process of a trustee's release of the trustee's power to select charitable donees. One way that this release may be accomplished is by specifying a charitable organization as the sole beneficiary of a trust. In order to accomplish this, the trustee must file with the state attorney proof of the consent of the organization to this arrangement.<sup>14</sup>

### **Statute of Limitations on Actions Against a Trustee**

The law requires a trustee to give accounting for the trust to the beneficiaries.<sup>15</sup> Failure to give an accounting constitutes an actionable breach of trust.<sup>16</sup> Current law is not clear as to when the statute of limitations begins to run on a claim for a failure to account.

### **Providing Documents and Notices Electronically**

The Florida Trust Code requires trustees and others to provide each other several documents. For example, trustees must provide trust accounting documents to beneficiaries. One permissible method of sending these documents is by posting them to a secure electronic account or website. This method of sending, posting, and sharing of documents is subject to special regulation under the law.<sup>17</sup>

## **III. Effect of Proposed Changes:**

### **Protecting Settlers' Intent (Sections 1, 2, 5)**

The bill removes three provisions of the Florida Trust Code that require that every trust and trust term be for the "benefit of the trust's beneficiaries." This is intended to ensure that this state's statutes are consistent with settled case law that provides that the settlor's intent is paramount in interpreting ambiguous trust terms. It is also intended to ensure that a settlor's express, unambiguous desires as set forth in a trust instrument are not undone by a court that determines that these terms do not (optimally) benefit the trust's beneficiaries.

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<sup>11</sup> Section 736.0405(1), F.S.

<sup>12</sup> By *local* state attorney's office, it is meant the state attorney's office for the judicial circuit of the principal place of administration of the trust.

<sup>13</sup> Section 736.1206(2), F.S.

<sup>14</sup> See ss. 736.1208(5) and 736.1209, F.S.

<sup>15</sup> Section 736.0813, F.S.

<sup>16</sup> See ss. 735.1001(1)-(2), F.S.

<sup>17</sup> See s. 736.0109(3), F.S.

### **Compensation for Multiple Trustees (Section 7)**

The Florida Statutes currently entitle a trustee to compensation that is reasonable under the circumstances. However, the compensation statute is written in the singular (“a trustee”), and is unclear regarding co-trustee compensation. The bill clarifies that each co-trustee is entitled to compensation that is reasonable under the circumstances, even if the aggregated amount would be too much to pay a sole trustee.

### **Charitable Trusts Involve the Attorney General (Sections 4, 11, 12, 13, 14, 15, 16)**

Under current law, the state attorney’s office in the judicial circuit where a charitable trust is administered is involved in the administration of the trust. Under the bill, the state Attorney General’s Office fulfills the responsibilities currently fulfilled by the state attorneys’ offices. The bill provides that the Attorney General has standing to assert the rights of a qualified beneficiary of a charitable trust in judicial proceedings.

### **Trust “Decanting” (Section 6)**

The bill extensively amends s. 736.04117, F.S., pertaining to the decanting of trusts. Decanting a trust, very generally, involves a trustee taking the principal of a trust and putting it into one or more other trusts. A trustee might wish to make distributions from one trust to another trust in order to avoid the expense involved modifying a trust.

#### ***“Absolute Power” Not Necessary to Decant***

Under current law, decanting may only be done by one who is expressly given “absolute power” to make principal distributions from the first trust. The bill creates a new type of trustee, called an “authorized trustee,”<sup>18</sup> who may invade trust assets under the conditions set forth in the bill. The bill allows an authorized trustee with absolute power to invade the trust’s principal to appoint<sup>19</sup> all or part of the principal of the trust to a second trust if the beneficiaries of the second trust include only beneficiaries of the first trust and the second trust does not reduce any vested interest.<sup>20</sup> The second trust may:

- Retain a power of appointment granted in the first trust;
- Omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;
- Create or modify a power of appointment if the powerholder is a current beneficiary of the first trust;
- Create or modify a power of appointment if the powerholder is a beneficiary of the first trust who is not a current beneficiary, but the exercise of the power of appointment may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary of the first trust; and

<sup>18</sup> The bill defines “authorized trustee” as a trustee, other than the settlor or a beneficiary, who has the power to invade the principal of a trust.”

<sup>19</sup> The power of appointment is the authority to designate recipients of beneficial interests in property.

<sup>20</sup> “Vested interest” is “a current unconditional right to receive a mandatory distribution of income, a specified dollar amount, or a percentage of value of a trust, or a current unconditional right to withdraw income, a specified dollar amount, or a percentage of value of a trust, which right is not subject to the occurrence of a specified event, the passage of a specified time, or the exercise of discretion.”

- Extend the term of the second trust beyond the term of the first trust.

An authorized trustee who has non-absolute power under the first trust to distribute trust principal to a beneficiary may instead distribute that principal to one or more second trusts. However, if an authorized trustee exercises this power:

- The second trusts, in the aggregate, must grant each beneficiary of the first trust substantially similar interests as they had under the first trust;
- The term of the second trust may extend beyond the term of the first trust;
- If the first trust grants a power of appointment to a beneficiary of the first trust, the second trust shall grant such power of appointment in the second trust to such beneficiary, and the class of permissible appointees shall be the same as in the first trust; and
- If the first trust does not grant a power of appointment to a beneficiary of the first trust, then the second trust may not grant a power of appointment in the second trust to such beneficiary.

#### ***Authority of Authorized Trustee to Decant to Supplemental Needs Trust***

An authorized trustee without absolute authority or general authority to decant may be able to decant trust principal to a supplemental needs trust.<sup>21</sup> The supplemental needs trust must only benefit the beneficiary of the first trust and the authorized trustee must determine that the supplemental needs trust furthers the purposes of the first trust.

#### ***Prohibited Distributions***

The bill prohibits distributions from a trust that would prevent a contribution to a trust from qualifying for various federal tax deductions and exclusions.

#### ***Notice of Decanting***

As under current law, a trustee who intends to decant must first give notice to the persons specified in statute. However, under the bill, this notice must include a copy of the trust document for any second trust into which the principal from the first trust is to be placed.

#### **Actions against a Trustee (Sections 8, 9, 10)**

The law requires a trustee to give accounting for the trust to the beneficiaries.<sup>22</sup> Failure to give an account constitutes an actionable breach of trust.<sup>23</sup> One of the remedies that a court may award on this action is to force the trustee to give an account.<sup>24</sup> Current law is unclear as to when the statute of limitations begins to run on a claim for a failure to account. A recent case found that an action for a trustee's failure to account was subject to the general limitations statute, and could not be brought for a failure occurring more than 4 years before the date the action was filed.<sup>25</sup>

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<sup>21</sup> A supplemental needs trust is a trust that the authorized trustee believes would not be considered a resource for purposes of determining whether the beneficiary who has a disability is eligible for governmental benefits.

<sup>22</sup> Section 736.0813, F.S.

<sup>23</sup> See s. 736.1001(1)-(2), F.S.

<sup>24</sup> *Id.*

<sup>25</sup> See *Corya v. Sanders*, 155 So.3d 1279 (Fla.4th DCA 2009).

The bill expressly states that a failure to account, and even the beneficiary's knowledge of the failure, does not cause a 4-year clock to run on the beneficiary's time to file suit. Additionally, the bill expressly states that the action is not subject to the general limitations statute. As a result, the limitation on bringing this action appears to be 10, 20, or 40 years, depending on the circumstances of a given case.<sup>26</sup>

### **Providing Documents and Notices Electronically (Section 3)**

The Florida Trust Code requires trustees and others to provide each other various documents. For example, trustees must provide trust accounting documents to beneficiaries. One permissible method of sending these documents is by posting them to a secure electronic account or website. This method of sending, posting, and sharing of documents is subject to special regulation under the law.<sup>27</sup> The bill amends the requirements as to documents that are provided to recipients *solely* through electronic posting and deemed sent for the purposes of the statute regulating methods of notice and waiver.<sup>28</sup> The bill provides that before documents can be posted on an electronic account, the recipient must sign an authorization solely for the purpose of allowing electronic posting. The authorization must specifically indicate whether a trust accounting, trust disclosure document, or limitation notice may be posted electronically and must generally indicate the other types of documents that will be posted.

The bill provides that if a document is provided solely through electronic posting, the recipient must be able to access the document until the earlier of 4 years after the date the document is deemed received by the recipient or the date the recipient's access to the electronic account is terminated.

If access to the electronic account is terminated sooner than 4 years after the document is deemed received, any applicable limitations period is tolled from the date access to the electronic account is terminated until 45 days after the sender provides one of the following:

- Notice of such termination and notification to the recipient that he or she may request that any documents sent during the prior 4 years solely through electronic posting be provided to him or her by other means at no cost; or
- Notice of such termination and notification to the recipient that his or her access to the electronic account or website has been restored.

This notice must be provided by a means other than electronic posting.

### **Effective Date**

The bill takes effect July 1, 2017.

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<sup>26</sup> See s. 736.1008(6), F.S.

<sup>27</sup> See s. 736.0109(3), F.S.

<sup>28</sup> Section 736.0109, F.S.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

**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. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 736.0103, 736.0105, 736.0109, 736.0110, 736.0404, 736.04117, 736.0708, 736.08135, 736.1008, 736.1201, 736.1205, 736.1206, 736.1207, 736.1208, and 736.1209.



**IX. Additional Information:**

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

**CS/CS by Banking and Insurance on April 17, 2017:**

The CS clarifies when limitations periods begin to run or are tolled for documents sent to recipients solely through electronic posting.

**CS by Judiciary on March 22, 2017:**

The CS includes several technical wording changes that were made to the underlying bill.

- B. **Amendments:**

None.