

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 Committee on Judiciary

BILL: CS/SB 1554

INTRODUCER: Judiciary Committee and Senator Young

SUBJECT: Trusts

DATE: March 23, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	Fav/CS
2.			BI	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 1554 amends the Florida Trust Code to protect the trust creator’s intent as paramount in trust interpretation, expressly permit co-trustees to be compensated in a manner that is aggregately more than would be permissible for each individually, and to expand certain trustees’ ability to place the principal of the “first trust” into one or more second trusts in order to protect and maximize the beneficiaries’ interests.

Additionally, the bill addresses current case law which some believe to have misconstrued the timeframes in which a beneficiary may bring an action against a trustee that fails deliver a trust accounting.

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. And 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."¹

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 even 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 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*" ² Also, the statute governing trust purposes requires that a trust and its terms be "for the benefit of its beneficiaries."³

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.⁴ 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.⁵ Thus, one could say that a trustee is entitled to compensation that is reasonable under the circumstances, regardless of the terms of the trust.

Sometimes, however, trusts are administered by co-trustees. And the Florida Statutes are not perfectly 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

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

² Section 736.0105, F.S. Emphasis added.

³ Section 736.040, F.S.

⁴ Section 736.0708(1), F.S.

⁵ Section 736.0708(2), F.S.

into another trust; this is often called “decanting.”⁶ If a trust grants a trustee the “absolute power”⁷ 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:⁸

- 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.⁹

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.¹⁰ These purposes include, but are not limited to, the relief of poverty; the advancement of the arts, sciences, education, or religion; and the promotion of health, governmental, or municipal purposes.¹¹ 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.¹² 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.¹³

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.¹⁴

⁶ 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.

⁷ This term is not defined in the Florida Statutes.

⁸ Section 736.04117(1)(a), F.S.

⁹ Section 736.04117(1)(a)3., F.S.

¹⁰ Section 736.0103(5), F.S.

¹¹ Section 736.0405(1), F.S.

¹² 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

¹³ Section 736.1206(2), F.S.

¹⁴ See ss. 736.1208(5) and 736.1209, F.S.

Statute of Limitations on Actions Against Trustee

The law requires a trustee to give accounting for the trust to the beneficiaries.¹⁵ Failure to give an accounting constitutes an actionable breach of trust.¹⁶ Current law is not perfectly 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.¹⁷

III. Effect of Proposed Changes:

Protecting Settlers' Intent

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.

Aggregate Co-Trustee Compensation May Exceed Maximum Solo Trustee Compensation

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 thus is not as clear as it could be about co-trustee compensation. Particularly, after reading this statute, one could reasonably ask whether co-trustees may be compensated in an aggregate amount that would be impermissibly high for a sole trustee. 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 instead of the State Attorney

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.

¹⁵ Section 736.0813, F.S.

¹⁶ See ss. 735.1001(1)-(2), F.S.

¹⁷ See s. 736.0109(3), F.S.

Trust “Decanting”

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.

“Absolute Power” Not Necessary to Decant

Under current law this may only be done by one who is expressly given “absolute power” in the first trust. Under the bill, this grant of authority is sufficient, but not always necessary. The bill creates a new type of trustee, called an “authorized trustee,” who may invade trust assets under the conditions set forth in the bill.

General Authority of Authorized Trustee to Decant

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; and
- The term of the second trust may extend beyond the term of the first trust.

Authority of Authorized Trustee to Decant to Special Needs Trust

Even if an authorized trustee does not have absolute authority or does not have general authority to decant, the authorized trustee may be able to decant trust principal to a special needs trust. A special needs trust, very generally, is a one into which money can be placed for the benefit of a disabled person, permitting the person to maintain welfare eligibility, which might be lost if he or she were to hold the money outright.

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.

Statute of Limitations on Actions Against Trustee

The law requires a trustee to give accounting for the trust to the beneficiaries.¹⁸ Failure to give an account constitutes an actionable breach of trust.¹⁹ One of the remedies that a court may award on this action is to force the trustee to give an account.²⁰ Current law is not perfectly clear 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.²¹ Some take issue with the reasoning of this case.

¹⁸ Section 736.0813, F.S.

¹⁹ See Section 736.1001(1)-(2), F.S.

²⁰ *Id.*

²¹ See *Corya v. Sanders*, 155 So. 3d 1279 (Fla. 4th DCA 2009)

To clarify the matter 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.²²

Providing Documents and Notices Electronically

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.²³ 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.²⁴

Under the bill, the recipient must be able to access and print or download these documents until the earlier of:

- The date on which the recipient's access is terminated;²⁵ or
- Four years after the date on which the document is deemed received.

Also, if any recipient's access to the electronic account or website is terminated by the sender less than 4 years after the date the document was deemed received, the specified limitations periods in the trust limitations statute²⁶ that are still open are tolled as set forth in the bill.

Effective Date

The bill takes effect July 1, 2017.

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.

²² See s. 736.1008(6), F.S.

²³ See s. 736.0109(3), F.S.

²⁴ Section 736.0109, F.S.

²⁵ The termination of access does not invalidate the notice of sending of any document previously posted in accordance with s. 736.0109, F.S.

²⁶ Section 736.1008(1),(2), F.S.

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:

The Trust Code requires the sending of several documents and notices. And these documents may be sent to a recipient by posting them to an electronic account or website accessible by the recipient. The committee substitute authorizes a recipient who has received a document in this manner, but who has been given notice that their electronic access was terminated, to 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. The bill does not clarify from what date the prior 4 years is to be calculated. Moreover, the sub-sub-subparagraph in question—new s. 736.0109(3)(g)3.a.(I), F.S.—and the one following it do not seem compatible. The Legislature may wish to amend the bill to clarify and simplify these provisions.

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 Changes:

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

CS by Judiciary on March 22, 2017:

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

B. Amendments:

None.

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