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 Rules

BILL: CS/CS/CS/SB 206

INTRODUCER: Rules Committee; Banking and Insurance Committee; Judiciary Committee; and Senators Passidomo and Brandes

SUBJECT: Electronic Wills

DATE: April 26, 2017 REVISED:

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

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/CS/SB 206 creates the Florida Electronic Wills Act, which expressly permits the use of electronic wills, and makes several changes to the Florida Trust Code.

The Electronic Wills Act regulates how electronic wills may be executed, stored, and admitted to probate. Under current law, electronic wills are not expressly allowed or clearly prohibited.

As described in the bill, an electronic will is a will that exists in an electronic record and, like a traditional will, disposes of a person's property after death. The use of an electronic record, electronic signatures of the testator, the role of witnesses or a notary public, and a designated qualified custodian are key features of the Act.

Under the Act, an electronic will may be stored by a qualified custodian, which must be capable of storing an electronic will, and must store electronic records of electronic wills, including documents related to the execution of a given electronic will.

In addition to wills executed in this state, the bill grants the courts of this state jurisdiction over electronic wills that are executed, by nonresidents, according to the Act or according to the laws of the nonresident's state. These non-residents need not have any substantial connection to this state. Moreover, the bill makes it much easier to execute an electronic will, traditional will, or living will that is, as a matter of law, "deemed" executed in Florida.

Venue for probating an electronic will is proper anywhere current law permits for probating wills. Non-residents have additional venue options, including the county in which the "qualified custodian" of an electronic will is located. During probate proceedings, the bill expressly permits the admission to probate of the electronic will or its "true and correct copy."

Under current law, traditional wills and living wills generally must be signed by the principal[1] to the instrument and by witnesses. The bill allows these individuals to fulfill their duties while in different locations using video conferencing. These individuals may sign with an electronic signature, and they are deemed to be in the presence of each other if they are in communication with each other through a live video conference that meets a long list of requirements designed to protect the integrity of the execution of the instrument.

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

II. Present Situation:

Overview

Wills and trusts are related but distinct instruments for estate planning. And what the bill does to the law of wills is largely distinct from what it does to the law of trusts. Accordingly, this section of the analysis will discuss the relevant portions of the Florida Probate Code—pertaining to wills—then discuss the relevant portions of the Florida Trust Code, instead of combining the two areas.

Part One — Wills

A will is a legal document that a person (a "testator") may use to determine who gets his or her property when he or she dies. As set forth in the Florida Probate Code, codified as chs. 731-735, F.S., the legal definition of a will is:

> an instrument, including a codicil, executed by a person in the manner prescribed by this code, which disposes of the person's property on or after his or her death and includes an instrument which merely appoints a personal representative or revokes or revises another will.[2]

Wills do not dispose of all of a testator's property, but only his or her "estate," i.e., those assets that are subject to probate administration.[3] Probate is "a court-supervised process for identifying

[1] Principal here refers, in the case of a will, to a testator.
[2] Section 731.201(40), F.S.
[3] *See*, s. 731.201(14), F.S.

and gathering the assets of a deceased person (decedent), paying the decedent's debts, and distributing the decedent's assets to his or her beneficiaries."[4] Other assets are disposed of outside of probate.[5]

Without a will, a decedent's estate will be distributed pursuant to the intestacy statutes, which devise a decedent's estate according to what might be described as default rules. With a will, however, a testator may, as a general matter, devise his or her estate to whomever he or she likes. Also, with a will, a testator may designate a person known as a personal representative to carry out the terms of the will. Otherwise, a court will choose the personal representative.

Execution of a Will

A will must be "in writing" and signed at its end by either the testator or by someone else for the testator. If someone else signs for the testator, the person must do so in the testator's presence and at the testator's direction.[6] At least two persons must witness the testator sign the will or must witness the testator's acknowledgement that he or she previously signed the will or that another person subscribed the testator's name to the will.[7] These witnesses must sign the will in the presence of each other and the testator.[8] For wills executed in other states, the requirements may be different.[9] The consequence of failing to strictly comply with these requirements is that the will is not valid.[10] A codicil (amendment) to a will must be executed in the same manner as a will.[11]

Though s. 732.502(1), F.S., specifies that a will must be "in writing" and that certain persons must "sign" or attach their "signature," these terms are not defined in the statutes. Moreover, there is no explicit statement in the Florida Probate Code that an electronic will is invalid, that an electronic signature is invalid, or that a will must be executed on paper.

Some have asserted that an electronically-signed will is not valid in Florida, but s. 668.004, F.S., states that, "[u]nless otherwise provided by law, an electronic signature may be used to sign a writing and shall have the same force and effect as a written signature."[12] An electronic signature, as defined in s. 668.003(4), F.S., is:

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[4] The Florida Bar, *Probate in Florida*, http://www.floridabar.org/tfb/tfbconsum.nsf/48e76203493b82ad852567090070c9b9/92f75229484644c985256b2f006c5a7a?OpenDocument#Untitled%20Section (last accessed April 11, 2017).
[5] For example, the terms of a decedent's bank account may include a beneficiary clause, giving the account to whomever the decedent names.
[6] Section 732.502(1)(a), F.S.
[7] Section 732.502(1)(b), F.S.
[8] Section 732.502(1)(c), F.S.
[9] *See*, s. 732.502(2), F.S. A will executed in another state is valid in Florida if the will is executed in accordance with the laws of this state, the laws of the state in which it was executed, or both. This does not apply to nuncupative wills (oral wills) or holographic wills (wills written in the hand of the testator, but not properly executed as set forth in s. 732.502(1), F.S.), which are not valid in Florida regardless of whether they were executed according to the laws of the state in which they were executed.
[10] *Allen v. Dalk*, 826 So.2d 245, 247 (Fla. 2002).
[11] Section 732.502(5), F.S.
[12] The Uniform Electronic Transaction Act is set forth in s. 668.50, F.S. It includes a statement that the "section" does not govern, among other things, a transaction that is governed by a law governing the creation and execution of wills.

> any letters, characters, or symbols, manifested by electronic or similar means, executed or adopted by a party with an intent to authenticate a writing. A writing is electronically signed if an electronic signature is logically associated with such writing.

Storing a Will

The Florida Probate Code does not specify how a will must be stored.

Probate and Proving a Will

To acquire a court order distributing the testator's estate assets in line with the terms of a will, the will must be probated.[13] The venue for a probate proceeding is set forth in s. 731.101(1), F.S., which states:

> (1) The venue for probate of wills and granting letters shall be:
> (a) In the county in this state where the decedent was domiciled.
> (b) If the decedent had no domicile in this state, then in any county where the decedent's property is located.
> (c) If the decedent had no domicile in this state and possessed no property in this state, then in the county where any debtor of the decedent resides.

For a will to be admitted to probate in Florida, it must be "proved."[14] No statute describes what it means for a will to be proved or what it is about the will or purported will that is being proved. However, it is apparent that proving a will means proving that the will is what it purports to be, i.e., the last will and testament of the testator and that it was validly executed.

Proving a Will

A will may be proved by having one of the attesting witnesses swear or affirm an oath regarding the will before a circuit judge or any of the other persons set forth in s. 733.201(2), F.S. If it appears to the court that no attesting witness can be found, that no attesting witness still has capacity, or that the testimony of an attesting witness cannot be obtained within a reasonable time, the court must resort to another method of proving a will. The other method is through an oath of the personal representative nominated by the will or a different person who has no interest in the estate under the will. This oath must include a statement that "the person believes the writing exhibited to be the last will and testament of the decedent."[15]

Section 668.004, F.S., which provides broad permission to electronically sign a document, is of course a different section. But even if it were not, or even if it did not exist, s. 668.50, F.S., would not appear to *prohibit* electronically signing a will.

[13] *See* s. 733.103(1), F.S.

[14] Section 733.201(1), F.S.

[15] Section 733.201(3), F.S.

Making a Will Self-Proved

A will may be made self-proved. A self-proved will may be admitted to probate without further proof, such as the testimony mentioned above.[16] For a will to be self-proved in this state, the testator must acknowledge the will before an officer authorized to administer oaths (e.g., a notary public). The attesting witnesses must make affidavits before the officer. Lastly, the officer must evidence the acknowledgement and affidavits by a certificate attached to or following the will.[17]

Even after a will is proved and admitted to probate, it may be contested.[18] There are several grounds, such as fraud and undue influence, on which a self-proved will might be contested.

Custodian's Duty to File with Court

The custodian of a will must deposit the will with the court within 10 days after receiving information of the testator's death.[19] If the custodian fails to do so without just or reasonable cause, he or she is be subject to liability:

> Upon petition and notice, the custodian of any will may be compelled to produce and deposit the will. All costs, damages, and a reasonable attorney's fee shall be adjudged to the petitioner against the delinquent custodian if the court finds that the custodian had no just or reasonable cause for failing to deposit the will.[20]

Living Wills

Many aging persons also choose to execute a living will. A living will, despite its name, is fundamentally different than a will. A living will is a document setting forth a person's desires regarding "providing, withholding, or withdrawal of life-prolonging procedures in the event that such person has a terminal condition, has an end-stage condition, or is in a persistent vegetative state."[21] A living will must be executed as follows, which differs from the requirement for executing a will:

> A living will must be signed by the principal in the presence of two subscribing witnesses, one of whom is neither a spouse nor a blood relative of the principal. If the principal is physically unable to sign the living will, one of the witnesses must subscribe the principal's signature in the principal's presence and at the principal's direction.[22]

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[16] Section 733.201(1), F.S.

[17] The officer's certificate must be substantially in the form set forth at s. 732.503, F.S. The form requires that the witnesses state that they witnessed the testator *sign* the will. However, the statutory requirements for executing a will do not require witnesses to witness the testator sign the will. Section 732.502, F.S., provides that the witnesses may either witness the testator sign, or witness the testator acknowledge his or her prior signature.

[18] *See, Powell v. Eberhardt (in Re Estate of Hartman)*, 836 So.2d 1038, 1039 (Fla.2d DCA 2002).

[19] Section 732.901(1), F.S.

[20] Section 732.901(2), F.S.

[21] Section 765.302(1), F.S.

[22] Section 765.302(1), F.S.

Other States' Treatment of Electronic Wills

It appears that Nevada is the only state that, by statute, expressly permits the use of electronic wills.[23] This statute has been in effect since 2001.

Although Virginia's statutes do not expressly permit the use of electronic wills, Virginia allows documents to be notarized through live video and audio technology.[24] In Tennessee, a court held that a testator validly signed his will when he typed his name in cursive font.[25] In Ohio, a court admitted a will to probate that was written and signed with a stylus on an electronic tablet.[26]

Part Two – Trusts

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."[27]

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 *un*ambiguous 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* . . . ."[28] Also, the statute governing trust purposes requires that a trust and its terms be "for the benefit of its beneficiaries."[29]

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[23] See Nev. Rev. Stat. s. 133.085.
[24] Va. Code Ann. S. 47.1.
[25] *Taylor v. Holt,* 134 S.W.3d 830, 833 (Tenn. Ct. App. 2003).
[26] *In re Estate of Javier Castro, Deceased*, 2013-ES-00140 (Ct. Comm. Pl. Lorain Cnty., Probate Div., Ohio, June 19, 2013) (James T. Walther, Judge)
[27] *E.g.*, *L'Argent v. Barnett Bank, N.A.*, 730 So. 2d 395, 397 (Fla. 2d DCA 1999).
[28] Section 736.0105, F.S. Emphasis added.
[29] Section 736.040, 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.[30] 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.[31] 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 into another trust; this is often called "decanting."[32] If a trust grants a trustee the "absolute power"[33] 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:[34]

- 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.[35]

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.[36] 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

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[30] Section 736.0708(1), F.S.
[31] Section 736.0708(2), F.S.
[32] 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.
[33] This term is not defined in the Florida Statutes.
[34] Section 736.04117(1)(a), F.S.
[35] Section 736.04117(1)(a)3., F.S.
[36] Section 736.0103(5), F.S.

purposes.[37] 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.[38] 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.[39]

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.[40]

Statute of Limitations on Actions Against Trustee

The law requires a trustee to give accounting for the trust to the beneficiaries.[41] Failure to give an accounting constitutes an actionable breach of trust.[42] 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.[43]

III. Effect of Proposed Changes:

Overview

The changes made by the bill to the law of wills are largely distinct from the changes made to the law of trusts. Accordingly, the first section of the analysis will discuss the effect of the Florida Electronic Wills Act, which is created by the bill, and the second section will then discuss the changes the bill makes to the existing Florida Trust Code.

[37] Section 736.0405(1), F.S.
[38] 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
[39] Section 736.1206(2), F.S.
[40] *See* ss. 736.1208(5) and 736.1209, F.S.
[41] Section 736.0813, F.S.
[42] *See* ss. 735.1001(1)-(2), F.S.
[43] *See* s. 736.0109(3), F.S.

Part One of the Bill — The Florida Electronic Wills Act

This bill creates the Florida Electronic Wills Act, which regulates and expressly permits the use of "electronic wills." The bill also revises several aspects of current law relating to the execution of wills and living wills.

The Act defines an electronic will as:

> an instrument, including a codicil, executed in accordance with s. 732.523 by a person in the manner prescribed by this act, which disposes of the person's property on or after his or her death and includes an instrument that merely appoints a personal representative or revokes or revises another will or electronic will.[44]

This definition is very similar to the definition of a traditional will, which is set forth in the Florida Probate Code.[45]

The bill makes it explicit that a testator may sign and store his or her will electronically. However, the bill does not prohibit traditional means of signing, witnessing, and storing wills.

Current law arguably already permits several of the key aspects of the bill, such as electronically signing and electronically storing a will. Other aspects of the bill clearly are not permitted under current law. For example, the bill allows a testator having no domicile, no property, and no debtor in this state to make a Florida will and probate the will in a Florida circuit court.

Executing an Electronic Will

In order for an electronic will to be valid under the bill, it must meet all of the following requirements:

- Exist in an electronic record[46] that is unique and identifiable;
- Be electronically signed[47] by the testator in the presence of at least two attesting witnesses; and
- Be electronically signed by the attesting witnesses in the presence of the testator and in the presence of each other.

Presence via Video Conference

The Florida Probate Code does not specify the sense in which the persons executing a will must be in each other's "presence." In contrast, the bill provides that an individual is deemed to be in the presence of or appearing before another individual if the individuals are either in the same physical location or in different physical locations while being able to communicate with each other by means of live video conference.

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[44] Section 732.522(3), F.S.
[45] See s. 731.201(4), F.S., for a definition of will.
[46] An "electronic record" is a "record created, generated, sent, communicated, received, or stored by electronic means."
[47] An "electronic signature" is an "electronic mark visibly manifested in a record as a signature and executed or adopted by a person with the intent to sign the record."

However, video-conference-presence is valid only if meets a lengthy and detailed list of requirements designed to ensure the integrity of the execution of the will.[48] These requirements include that the:

- Testator or principal not be in an "end-stage condition" or be a "vulnerable adult";
- Signal transmission be live, in real time, and secure;
- Persons communicating simultaneously see speak to one another with reasonable clarity;
- Persons communicating establish the identity of the testator or principal, and must demonstrate awareness of the events taking place;
- Persons communicating include an attorney licensed to practice in this state or a notary public;
- Testator or principal provide answers to a list of questions designed to establish, among other things, their competency and their voluntary participation; and
- Electronic records include a time-stamped copy of the recording.

These provisions apply for purposes of the Electronic Wills Act, the execution and filing of a document with the court as provided in the Electronic Wills Act or the Florida Probate Rules, or the execution of a living will. The bill provides that any of these documents may be signed by electronic signature.

Documents Deemed to be Executed in Florida

The bill includes a provision, in s. 732.525(3), F.S., which specifies when an electronically signed document is "deemed" to be executed in this state.[49] An electronically signed document is deemed to be executed in this state if all of the following requirements are met:

- The person creating the document states that he or she intends to execute and understands that he or she is executing the document in, and according to, the laws of this state.[50]
- The person creating the document, the attesting witnesses, or the notary public signing the document are physically in Florida when the document is executed.[51]
- In the case of an electronic will, it designates a qualified custodian who is:
  - Domiciled in, and a resident of, this state; or
  - Organized or incorporated in this state.[52]

[48] Section 732.525(1)(b), F.S.
[49] The purpose of deeming a document to be executed in this state is not clear. One might suppose that the purpose is to allow residents of any state, irrespective of whether they have any real connection to Florida, to create an electronic will that could be probated in Florida. However, that purpose seems to be fulfilled in new s. 732.526, F.S., which provides that an electronic will may be probated in this state regardless of whether it is executed here. Perhaps the intent of the provision is instead to allow a person who has no real connection to this state to execute a valid Florida electronic will that is admissible to probate in his or her home state upon death. For example, assume a man is a resident of Mississippi and has no real or personal property in Florida and wishes to have an electronic will. But Mississippi law does not expressly permit Mississippi residents to create an electronic will under the laws of that state. However, perhaps Mississippi law recognizes a will executed out-of-state as valid as long as the will was executed according to the law of the state in which it was executed. As a result, this man could create an electronic will "deemed to be executed in Florida" pursuant to s. 732.525(3), F.S., and the electronic will would be valid in, and could be admitted to probate in, Mississippi. This process could allow a qualified custodian in Florida to make electronic wills available to a person in any state.
[50] Section 732.525(3)(a), F.S.
[51] Section 732.525(3)(b), F.S.
[52] Section 732.525(3)(c), F.S.

Qualified Custodians

Definition and Essential Duties

Under the bill, one of the requirements of a *self-proved* will is that is be held at all times by a qualified custodian, which is a person who meets all of the following requirements:

- Is not an heir or devisee of the testator.
- Is domiciled in and a resident of Florida or is incorporated or organized in Florida.
- Consistently employs a system for ensuring the safekeeping of electronic records and stores electronic records containing electronic wills under the system.
- Furnishes for any court hearing involving an electronic will that is currently or was previously stored by the qualified custodian any information requested by the court pertaining to the qualified custodian's policies and procedures.[53]

The qualified custodian of an electronic must provide access to or information concerning the electronic will, or the electronic will and the electronic record containing the electronic will, only to the testator and such other persons as directed by the written instructions of the testator, or anyone as directed by a court with jurisdiction over the matter.

The qualified custodian of the electronic record of an electronic will may elect to destroy the record at any time after the earlier of 5th anniversary of the admission of the will to probate or 20 years after the death of the testator.

Qualified Custodian's Passing Office or Being Removed from Office

A qualified custodian who at any time controls the electronic record of an electronic will may elect to cease serving in this capacity by delivering the electronic will or the electronic record containing the electronic will to the testator, if then living, or by filing the will with the court in accordance with s. 732.901, F.S.

If the outgoing qualified custodian intends to designate a successor qualified custodian, the qualified custodian may cease serving by providing written notice to the testator of the name, address, and qualifications of the proposed successor qualified custodian. The testator must provide written consent before the electronic record, including the electronic will, is delivered to a successor qualified custodian. The outgoing qualified custodian must also deliver the electronic record containing the electronic will to the successor qualified custodian. Finally, the outgoing qualified custodian must deliver to the successor qualified custodian an affidavit of the outgoing qualified custodian stating that:

- The outgoing qualified custodian is eligible to act as a qualified custodian in this state;
- The outgoing qualified custodian is the qualified custodian designated by the testator in the electronic will or appointed to act in such capacity;
- The electronic will has been in the control of one or more qualified custodians since the time the electronic record was created, and identifying such qualified custodians; and
- To the best of the qualified custodian's knowledge, the electronic will has not been altered since the time it was created.

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[53] Sections 732.522(4) and 732.527(1), F.S.

In addition to voluntarily stepping down, as discussed above, a qualified custodian may also be forced out by the testator. Upon the written request of the testator, a qualified custodian who controls the electronic record of the testator's electronic will must cease serving in such capacity and must deliver to a successor qualified custodian that designated in writing by the testator the electronic will and an affidavit stating that:

- The outgoing qualified custodian is eligible to act as a qualified custodian in this state;
- The outgoing qualified custodian is the qualified custodian designated by the testator in the electronic will or appointed to act in such capacity;
- The electronic will has been in the control of one or more qualified custodians since the time the electronic record was created, and identifying such qualified custodians; and
- To the best of the qualified custodian's knowledge, the electronic will has not been altered since the time it was created.

The bill's aims to protect consumers who choose to employ the services of qualified custodians. Specifically, the bill expressly states that each qualified custodian:

- Must provide a paper copy of an electronic will and the electronic record, including the electronic will, to the testator immediately upon request. For the first such request in any 365-day period, the testator may not be charged a fee for being provided with these documents;
- Is liable for any damages caused by the negligent loss or destruction of the electronic record, including the electronic will, while it is in the possession of the qualified custodian;
- May not limit liability for these damages;
- May not terminate or suspend access to the electronic will by the testator; and
- Must at all times keep information provided by the testator confidential and may not disclose such information to any third party.

Finally, when a qualified custodian receives information that a testator is dead, the qualified custodian must deposit the electronic will with the court pursuant to s. 732.901, F.S.

Probate of a Will or an Electronic Will

Venue

The bill provides that venue for probate of an electronic will may be anywhere that venue would be proper for a traditional will. The bill provides additional venue options for the probate of electronic will *of a non-resident*. Venue for probate of a non-resident's electronic will is also proper in the county in which the qualified custodian or attorney for the petitioner or personal representative has his or her domicile or registered office.[54]

Currently, venue for probate of a will must be in:

- The county in this state where the decedent was domiciled.
- Any county where the decedent's property is located, if the decedent was not domiciled in this state.

[54] Section 732.526, F.S.

- The county where any debtor of the decedent resides, if the decedent was not domiciled in this state and had no property in this state.[55]

Jurisdiction

In addition to the right of Florida residents to probate a will executed in this state, which Florida residents already enjoy, the bill expressly grants the right to admit an electronic will of a *non-resident* to original probate in this state. However, this right only exists if the will is not a holographic or nuncupative[56] will and was "executed or deemed executed in another state in accordance with the laws of that state or of" Florida.[57] Florida courts are expressly granted jurisdiction over these electronic wills.[58]

In contrast, the existing Florida Probate Code does not appear to contain a similar provision broadly granting Florida courts with jurisdiction over validly executed wills of non-residents who do not have any property, creditors, or debtors in Florida. Moreover, the venue provision of current law discussed just above does not provide a venue option to probate the will of non-residents having no connection to this state. Together, the lack of a provision clearly granting jurisdiction, and the lack of a venue option, seem to indicate that the courts of this state currently have no jurisdiction to probate the will of a nonresident decedent with no domicile, no property, and no debtor in this state

What May Be Admitted to Probate

The bill permits the admission to probate of an electronic will[59] or a "true and correct copy" of an electronic will.[60] Apparently, in either case the will would still need to be proved by appropriate testimony at the time of admission or by making the will self-proved at some prior point. The same is required of traditional wills under current law.

Proving a Will

An electronic will that is not self-proved may be admitted to probate on the oath of the two attesting witnesses to the electronic will. These oaths must be sworn or affirmed before a circuit judge or the other persons set forth in the bill.[61] In contrast, only one attesting witness's oath is required to prove a traditional will. Under the bill, if it appears to the court that the two attesting witnesses cannot be found, have lost capacity, or cannot testify within a reasonable time, two "disinterested" witnesses must swear or affirm an oath as to the list of statements set forth in the bill.[62] However, the personal representative's swearing or affirming an oath is sufficient to prove a traditional will when the attesting witnesses are not available.

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[55] Section 731.101(1), F.S.
[56] Holographic wills are those written in the hand of the testator, but not properly executed as set forth in s. 732.502(1), F.S., and nuncupative wills are oral (unwritten) wills.
[57] Section 732.526, F.S.
[58] Section 732.526, F.S. The way the bill is worded, it is unclear whether this jurisdiction applies to the type of electronic will in question even before such will is offered for and admitted to probate.
[59] Section 732.526, F.S.
[60] Section 733.201(5), F.S.
[61] Section 733.201(4), F.S.
[62] Section 733.201(4)(a)-(f), F.S.

Making an Electronic Will Self-Proved

Under current law, a will may be made self-proved. A self-proved will may be admitted to probate without further proof that it is what it purports to be or that it was executed properly.

The bill provides that an attested electronic will is self-proved, pursuant to new s. 732.524, F.S., if all of the following requirements are met:

- The will is executed in conformity with the Florida Electronic Wills Act.
- The acknowledgement of the electronic will by the testator and the affidavits of the witnesses are made in accordance with s. 732.503, F.S.
- The same acknowledgement and affidavits are made a part of, or are attached to or logically associated with, the electronic record.
- The electronic will either:
  - Is deposited with the clerk before the death of the testator in accordance with s. 732.901, F.S., with a certification the meets the requirements in the bill; or
  - Designates a qualified custodian who executes a certification that meets the requirements set forth in the bill.

Prospective Effect of the Bill as it Relates to Electronic Wills

The bill expressly states that it applies to electronic wills executed on or after July 1, 2017. The bill does not, however, state that it applies (only) to those traditional wills, powers of attorney, or living wills created on or after July 1, 2017.

Part Two of the Bill — Changes to the Florida Trust Code

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."

Protecting Settlors' 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.

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.[63] Failure to give an account constitutes an actionable breach of trust.[64] One of the remedies that a court may award

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[63] Section 736.0813, F.S.
[64] *See* Section 736.1001(1)-(2), F.S.

on this action is to force the trustee to give an account.[65] 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.[66] Some take issue with the reasoning of this case.

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.[67]

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.[68] 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.[69]

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;[70] 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 statute[71] 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:

None.

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[65] *Id.*
[66] *See Corya v. Sanders*, 155 So. 3d 1279 (Fla. 4th DCA 2009)
[67] *See* s. 736.1008(6), F.S.
[68] *See* s. 736.0109(3), F.S.
[69] Section 736.0109, F.S.
[70] The termination of access does not invalidate the notice of sending of any document previously posted in accordance with s. 736.0109, F.S.
[71] Section 736.1008(1),(2), F.S.

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:

The bill may facilitate the creation and storage of wills using an Internet-based service. The associated costs are unknown. Further, if an electronic will can be easily created, many people who do not have a will may decide to execute one. However, some may use the services of an Internet-based service instead of, or in addition to, the services of an attorney.

C. Government Sector Impact:

The bill apparently allows non-Floridians with no property, no creditors, and no debtors in the state to execute a valid Florida electronic will. Florida courts are given jurisdiction over these electronic wills. The extent to which the bill will result in an increase in probate cases and associated costs to the judicial branch is unknown.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 731.201, 732.506, 732.521, 733.201, 736.0103, 736.0105, 736.0109, 736.0110, 736.0403, 736.0404, 736.04117, 736.0708, 736.08135, 736.1008, 736.1201, 736.1205, 736.1206, 736.1207, 736.1208, and 736.1209.

This bill creates the following sections of the Florida Statutes: 732.521, 732.522, 732.523, 732.524, 732.525, 732.526, and 732.527.

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/CS by Rules on April 25, 2017:
The committee substitute inserts the substance of SB 1554, relating to trusts, into this bill. Specifically, these provisions modify 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;
- 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; and
- Address current case law that some believe to have misconstrued the timeframes in which a beneficiary may bring an action against a trustee who fails deliver a trust accounting.

In addition to the changes made by the insertion of the substance of SB 1554 into this bill, the committee substitute removes language that would have permitted persons executing a durable power of attorney to be in each other's "presence" by videoconferencing technology. Also, as to wills and other documents that are executed by persons who are in each other's presence via videoconferencing, the committee substitute generally permits a person who is presented with one of these documents to presume that the document was executed according to the provisions governing execution of documents via videoconference if:

- The document contains a notary public's statement or certification that the document was executed in compliance with the section of law governing the method and place of execution; and
- The person presented with the document has no notice that this compliance is contested.

CS/CS by Banking and Insurance on April 17, 2017:
The committee substitute revises requirements for the execution of electronic wills, creates requirements for video conferencing, creates additional duties of qualified custodians, and provides that some revocable trusts can be executed with the same formalities as electronic wills.

CS by Judiciary on January 23, 2017:
The committee substitute includes several changes that appear to be designed to increase the integrity of the execution of electronic wills and other documents that are signed electronically. One such change requires the testator or the attesting witnesses to be "in the same room" as the testator when the testator signs an electronic will. In the underlying bill, none of these people need to be in the same room.

Another change requires the signature of two attesting witnesses and a notary public on an electronic will. In the underlying bill, only the notary public or the two witnesses need to sign. Relating to traditional wills, livings wills, and powers of attorney, the committee

substitute still provides that the persons signing these documents are, as a matter of law, in each other's "presence" if they can communicate via live video and audio conference. However, the committee substitute requires these signing ceremonies to be memorialized by a video recording kept in the documents' electronic record.

The committee substitute makes it easier to execute a will, electronic will, living will, or power of attorney that is deemed to be executed in Florida. This is achieved by no longer requiring that such documents state that they are governed by the laws of this state.

In many ways, the committee substitute adds consumer protections to the relationship between a testator and his or her qualified custodian. For example, the committee substitute expressly states that a qualified custodian will be liable for the negligent loss or destruction of the electronic record. Also, a qualified custodian must allow the testator access to his or her electronic will at all times. Moreover, a qualified custodian must ensure the confidentiality of all information given to the custodian by the testator. However, under the committee substitute, a qualified custodian is no longer required to store several items, including identification of the testator and witnesses, in the electronic record of an electronic will.

The committee substitute does away with the concept of a "certified paper original," a defined term that was fairly pervasive in the underlying bill. Nonetheless, the committee substitute permits admission of "true and correct" paper copies of electronic wills to probate. Moreover, the committee substitute provides that the copy constitutes an original of the electronic will.

B. Amendments:

None.