

**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: SB 478

INTRODUCER: Senator Hukill

SUBJECT: Trusts

DATE: January 29, 2018

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Stallard</u>	<u>Cibula</u>	<u>JU</u>	<b>Favorable</b>
2.	<u>Billmeier</u>	<u>Knudson</u>	<u>BI</u>	<b>Pre-meeting</b>
3.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 478 amends the Florida Trust Code to ensure that the trust creator's or "settlor's" intent is paramount in trust interpretation, 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 further regulate the electronic provision of important trust documents.

The bill provides that the settlor'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 provides that a beneficiary's actual knowledge that he or she has not received a trust accounting is not sufficient to begin the running of any limitations or laches period. Thus, the bill provides a longer period during which a beneficiary may hold a trustee responsible for a past-due accounting.

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.

Finally, the bill includes several provisions to further regulate a trustee's providing documents to a beneficiary solely by posting them to a website or electronic account. These provisions include a requirement that the authorization signed by the recipient allowing documents to be

electronically delivered specifically indicate whether a trust accounting, trust disclosure statement, or limitation notice will be posted in this way. Also, the bill lengthens the timeframe during which a document provided solely through electronic posting must remain accessible to the recipient at the website or electronic account.

## 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 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.

### Interpretive Principles for 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 interpret the language differently. 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, two statutes require trusts to be “for the benefit of the trust’s beneficiaries.”<sup>2</sup> Members of the Real Property, Probate, and Trust Law Section of the Florida Bar are concerned that courts, influenced by relevant law review articles, might appropriate these statutory provisions as an interpretive principle.<sup>3</sup> Thus, the concern is that the settlor’s-intent principle of trust interpretation might be moderated or even replaced by a benefit-of-the-beneficiaries principle.

### Trust “Decanting”

Under certain circumstances, a trustee may invade the corpus, or principal, of a trust to make distributions to a person. Similarly, under certain circumstances a trustee may instead place trust principal into another trust, which is often called “decanting.” A trustee who has been granted the “absolute power” to invade the principal of a trust in order to give it to one or more persons may instead place the trust principal into a second trust if:<sup>4</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 decant only if the second trust does not contain any

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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> Sections 736.0105(2)(c) and 736.0404, F.S.

<sup>3</sup> Trust Law Committee, Real Property, Probate and Trust Law Section of the Florida Bar, *White Paper: Proposed Revisions to ss. 736.0103, 736.0105 and 736.0404, Florida Statutes* (2017) (on file with the Senate Committee on Judiciary)

<sup>4</sup> Section 736.04117(1)(a), F.S.

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>5</sup>

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

The law requires a trustee to give an accounting for the trust to its beneficiaries.<sup>6</sup> Failure to give an accounting constitutes an actionable breach of trust.<sup>7</sup> Current law, however, is not clear as to when the statute of limitations begins to run on a claim for a failure to account when the beneficiary is aware of the failure. Moreover, some believe that a 2015 appellate court opinion improperly truncated the period of limitations for bringing an action by a beneficiary for a trustee's failure to provide an accounting.<sup>8</sup>

### **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 requirements.<sup>9</sup> These requirements appear to be intended to place recipients on clear notice of what specific documents will be provided electronically, how the recipient will be able to access the documents, and the time period in which the documents will be electronically accessible.

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

### **Protecting Settlor's Intent (Sections 1, 2, and 4)**

Section 1 amends s. 736.0103, F.S., to clarify that the "interests of the beneficiaries of a trust" means the beneficial interests *intended by the settlor* as provided in the terms of the trust. The bill deletes provisions of the Florida Trust Code which require that every trust and trust term be for the "benefit of the trust's beneficiaries." The Real Property, Probate, and Trust Law Section of The Florida Bar has recommended this change to ensure that courts will not look to this language as setting forth an interpretive principle for ambiguous trust terms. Sections 2 and 4 make analogous change to ss. 736.0105 and 736.0404, F.S.

### **Trust "Decanting" (Section 5)**

The bill extensively amends s. 736.04117, F.S., pertaining to the decanting of trusts. Decanting a trust, in very general terms, involves a trustee taking the principal of a trust and putting it into one or more other trusts.

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<sup>5</sup> Section 736.04117(1)(a)3., F.S.

<sup>6</sup> Section 736.0813, F.S.

<sup>7</sup> See s. 735.1001(1)-(2), F.S.

<sup>8</sup> The 2015 Opinion is that in *Corya v. Sanders*, 155 So.3d 1279 (Fla. 4th DCA 2015).

<sup>9</sup> See s. 736.0109(3), F.S.

### ***“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>10</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>11</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>12</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 power holder is a current beneficiary of the first trust;
- Create or modify a power of appointment if the power holder 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 power holder becomes, or would have become if then living, a current beneficiary of the first trust; and
- Extend the term of the second trust beyond the term of the first trust.

The bill allows the class of permissible appointees in favor of which a created or modified power of appointment may be exercised may differ from the class identified in 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 such 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;
- 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.

The bill allows the second trust to extend beyond the term of the first trust. During the extended period, the second trust may give the trustee absolute power to invade the trust and may expand the class of permissible appointees.

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<sup>10</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>11</sup> The power of appointment is the authority to designate recipients of beneficial interests in property.

<sup>12</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.”

### ***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.

### ***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***

Under current law, a trustee who intends to decant must first give notice to the persons specified in statute. 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.

The bill provides that a power to invade principal does not allow a trustee to increase the trustee's compensation or relieve the trustee from liability for breach of trust.

### **Statute of Limitations on Actions Against Trustee (Section 7)**

Trustees are required to give an accounting for the trust to the beneficiaries.<sup>13</sup> Failure to give an account constitutes an actionable breach of trust.<sup>14</sup> In an action for a breach of trust based on the failure to provide an accounting, an issue that may arise is the applicable limitations period for bringing the action. The bill amends s. 736.1008(3), F.S., to state that a beneficiary's actual knowledge that he or she has not received a trust accounting is not sufficient to begin the running of the limitations period, which under current law would be 4 years from the date the beneficiary acquired the actual knowledge in question. Thus, the limitations periods set forth in existing s. 736.1008(6), F.S., which depending upon the circumstances may span several decades, would appear to govern how long a beneficiary has to bring such an action. The change is in response to the *Corya* decision that essentially held that a person's actual knowledge merely that he or she is a beneficiary and that he or she has not received an accounting is sufficient to begin the running of the 4-year limitations period.<sup>15</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 requirements

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<sup>13</sup> Section 736.0813, F.S.

<sup>14</sup> See s. 736.1001(1)-(2), F.S.

<sup>15</sup> Real Property, Probate and Trust Law Section of the Florida Bar, *White Paper: Proposed amendments of ss. 736.08135 and 736.1008, F.S., to clarify the period for which beneficiaries may compel trust accountings* (2017) (on file with the Senate Committee on Judiciary).

under the law.<sup>16</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 of notice.<sup>17</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 sent solely through electronic posting, the sender must comply with the law regarding electronic posting and has the burden of proving compliance if there is a dispute.

The bill modifies the timeframe during which a document provided solely through electronic posting must remain accessible to the recipient at the website or electronic account. Under current law, the period is 4 years from the date on which the document is deemed received. Under the bill, the recipient must be able to access and print or download these documents until the earlier of this date or 4 years after the date on which the recipient's access is terminated.<sup>18</sup>

Finally, 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<sup>19</sup> are tolled for any information "adequately disclosed in a document sent solely by electronic posting." Particularly, this tolling begins on the date the recipient's access was terminated by the sender and continues until 45 days after the sender provides notice of the termination by means other than electronic posting. The limitations periods are further tolled if after the electronic access is terminated, the person entitled to documents makes a request for documents to be provided by means other than electronic means. These provisions appear designed to mitigate the negative effect that the termination of access may have on the recipient's interests.

### **Other Provisions (Sections 6, 8)**

Section 6 amends s. 736.08135, F.S., to provide that the provisions detailing the form and content of a trust accounting does not affect the beginning period from which a trustee is required to render a trust accounting.

Section 8 provides that the changes to ss. 736.1008 and 736.08135, F.S., are remedial and intended to clarify existing law and apply retroactively.

### **Effective Date (Section 9)**

The bill takes effect July 1, 2018.

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<sup>16</sup> See s. 736.0109(3), F.S.

<sup>17</sup> Section 736.0109, F.S.

<sup>18</sup> The termination of access does not invalidate the notice of sending of any document previously posted in accordance with s. 736.0109, F.S.

<sup>19</sup> Section 736.1008(1),(2), 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.

**D. Other Constitutional Issues:**

Section 8 of the bill states:

The changes to ss. 736.08135 and 736.1008, Florida Statutes, made by this act are intended to clarify existing law, are remedial in nature, and apply retroactively to all cases pending or commenced on or after July 1, 2018.

However, the Supreme Court has found that “[j]ust because the Legislature labels something as remedial . . . does not make it so.”<sup>20</sup> Accordingly, legislation that is labeled as remedial or procedural may instead be substantive. Regardless, legislation may not be applied retroactively if it “impairs vested rights, creates new obligations, or imposes new penalties.”<sup>21</sup> Therefore, if a court found that section 6 or 7 of the bill did any of these prohibited things, the court would have to reject any retroactive application of these provisions.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Under the bill, beneficiaries will have more time to file legal actions against trustees. Also, those entitled to receive trust documents electronically will have longer time periods to file legal actions related to those documents. Accordingly, the bill appears to increase the risk, and thus the associated potential costs, taken on by trustees.

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<sup>20</sup> *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 61 (Fla. 1955).

<sup>21</sup> *See id.*

**C. Government Sector Impact:**

The Office of the State Courts Administrator has not provided its analysis of the impact of the bill on judicial workloads.

**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, 736.0404, 736.04117, 736.08135, and 736.1008.

**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.