

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: SB 478

INTRODUCER: Senator Hukill

SUBJECT: Trusts

DATE: January 9, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	Pre-meeting
2.			BI	
3.			RC	

I. Summary:

SB 478 amends the Florida Trust Code to incorporate recommendations of the Real Property, Probate, and Trust Law Section of the Florida Bar.¹ These changes 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, further regulate the electronic provision of important trust documents, and counter what some regard as problematic case law.

By statute, a trust must be created “for the benefit of the trust’s beneficiaries.” The bill deletes this language from the law. The Section is concerned that this core requirement of trusts might be misused by courts as a principle for interpreting trusts, thus rivaling or replacing the “settlor’s-intent” principle. Under common law, the settlor’s intent is the “polestar” of trust interpretation.

Additionally, the bill counters a district court of appeal case which some believe to have misanalysed the question of whether a beneficiary’s actual knowledge that he or she is a beneficiary and has not received a trust accounting is sufficient to trigger a 4-year limitations period for bring an action for the trustee’s failure to provide an accounting. The bill makes it clear 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.

¹ The Section produced a series of white papers in which it advocates for the changes set forth in the bill. The Section actually provided these white papers to the Committee on Judiciary relative to SB 1554 (2017), which is very similar to SB 478 (2018).

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. And 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.”²

However, two statutes require trusts to be “for the benefit of the trust's beneficiaries.”³ These statutory provisions are not set forth as interpretive principles, but as basic requirements for trusts. Nonetheless, 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.⁴ 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.”⁵ 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:⁶

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

³ Sections 736.0105(2)(c) and 736.0404, F.S.

⁴ Trust Law Committee, Real Property, Probate and Trust Law Section of the Florida Bar, *White Paper: Proposed Revisions to §§736.0103, 736.0105 and 736.0404, Florida Statutes* (2017) (on file with the Senate Committee on Judiciary)

⁵ “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.

⁶ Section 736.04117(1)(a), F.S.

- 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 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.⁷

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

Statute of Limitations on Actions Against a Trustee

The law requires a trustee to give an accounting for the trust to its beneficiaries.⁸ Failure to give an accounting constitutes an actionable breach of trust.⁹ Current law, however, is not perfectly 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.¹⁰

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.¹¹ 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

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.

The Florida Supreme Court in interpreting the effect of statutory changes has said that "[w]hen the legislature amends a statute by omitting words, we presume it intends the statute to have a

⁷ Section 736.04117(1)(a)3., F.S.

⁸ Section 736.0813, F.S.

⁹ See s. 735.1001(1)-(2), F.S.

¹⁰ The 2015 Opinion is that in *Corya v. Sanders*, 155 So.3d 1279 (Fla. 4th DCA 2015)

¹¹ See s. 736.0109(3), F.S.

different meaning than that accorded it before the amendment.”¹² But the Court also acknowledges that “[t]he mere change of language does not necessarily indicate an intent to change the law for the intent may be to clarify what was doubtful and to safeguard against misapprehension as to existing law.”¹³ Whether the courts will interpret the deletion of the requirement that trusts be for the benefit of beneficiaries as a substantive or clarifying change is unknown. There are three remaining core requirements for a trust’s purpose set forth in the Florida Statutes. A trust must have a purpose that is “lawful, not contrary to public policy, and possible to achieve.”¹⁴

Trust “Decanting”

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.

“Absolute Power” Not Necessary to Decant

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

General Authority of Authorized Trustee to Decant

An authorized trustee who has nonabsolute 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

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.

¹² *Capella v. City of Gainesville*, 377 So. 2d 658, 660 (Fla. 1979) (citing *Carlisle v. Game and Fresh Water Fish Commission*, 354 So. 2d 362 (Fla. 1977); *Arnold v. Shumpert*, 217 So. 2d 116 (Fla. 1968)).

¹³ *State ex re. Szabo Food Services, Inc. of North Carolina v. Dickinson*, 286 So. 2d 529 (Fla. 1973) (citing *Helvering v. New York Trust Co.*, 292 U.S. 455 (1934)).

¹⁴ Sections 736.0105(2)(c) and 736.0404, F.S.

Statute of Limitations on Actions Against Trustee

Current law requires a trustee to give an accounting for the trust to the beneficiaries.¹⁵ Failure to give an account constitutes an actionable breach of trust.¹⁶ 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 Real Property, Probate, and Trust Law Section asserts in its white paper that this change is needed to counter a 2015 district court of appeal 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.¹⁷ The white paper does not clearly articulate that the court's legal analysis erred in such a way that caused it to reach a result that was clearly wrong as a matter of law. Instead, the white paper asserts that the decision was in conflict with what the paper describes as better-reasoned decisions of other district courts of appeal, and that the decision made for bad public policy.

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 requirements under the law.¹⁸ 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.¹⁹

One new requirement is that the authorization that must be signed by the recipient to allow the sender to electronically send these documents must specifically indicate whether a trust accounting, trust disclosure statement, or limitation notice will be posted in this manner. The authorization must also "generally enumerate" the other types of documents that may be posted in this manner.

Also, 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

¹⁵ Section 736.0813, F.S.

¹⁶ See s. 736.1001(1)-(2), F.S.

¹⁷ Real Property, Probate and Trust Law Section of the Florida Bar, *White Paper: Proposed amendments of §§ 736.08135 and 736.1008 to clarify the period for which beneficiaries may compel trust accountings* (2017) (on file with the Senate Committee on Judiciary)

¹⁸ See s. 736.0109(3), F.S.

¹⁹ Section 736.0109, F.S.

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.²⁰

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 statute²¹ 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.

Effective Date

The bill takes effect July 1, 2018.

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.

²⁰ The termination of access does not invalidate the notice of sending of any document previously posted in accordance with s. 736.0109, F.S.

²¹ Section 736.1008(1),(2), F.S.

However, the Supreme Court has found that “[j]ust because the Legislature labels something as remedial . . . does not make it so.”²² 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.”²³ Therefore, if a court found that sections 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.

C. Government Sector Impact:

By increasing various limitations periods for filing trust litigation, the bill may result in increased workloads for the judicial branch. The Office of the State Courts Administrator, however, 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.

²² *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1955).

²³ *See id.*

B. Amendments:

None.

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