

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 Banking and Insurance

BILL: SB 1368

INTRODUCER: Senator Gruters

SUBJECT: Trusts

DATE: February 7, 2022

REVISED: _____

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

I. Summary:

SB 1368 amends trust law to:

- Extend the alternative perpetuities limit on the life of a trust from 360 years to 1,000 years for trusts created on or after the effective date of the bill.
- Allow a trustee to elect a simplified form of periodic accounting, provided that the accounting contains sufficient notice of trust assets, debts, and transactions during the accounting period.
- Simplify service of trust notices furnished by e-mail, including waiver of the current law requirement that the recipient annually agree to electronic notice.
- Expand the scope of representation by a parent to include unborn descendants of an unborn child.
- Extend the allowable life of a noncharitable trust to 1,000 years.
- Extend the authority of a trust to reimburse the grantor for certain tax liabilities to apply to a trust formed under the laws of a foreign jurisdiction if the trust has a principal place of administration in the state.

The bill takes effect July 1, 2022.

II. Present Situation:

Trusts - In General

A trust is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person. A trust arises as a result of a manifestation of an intention to create it. Except as otherwise provided, the Florida Trust Code applies to express trusts, charitable or noncharitable, and trusts created pursuant to a law, judgment, or decree that requires the trust to be administered in the manner of an express trust. The Code does not apply to: constructive or resulting trusts;

conservatorships; custodial arrangements pursuant to the Florida Uniform Transfers to Minors Act; business trusts providing for certificates to be issued to beneficiaries; common trust funds; trusts created by the form of the account or by the deposit agreement at a financial institution; voting trusts; security arrangements; liquidation trusts; trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind; and any arrangement under which a person is nominee or escrowee for another. The Code does not apply to any land trust under statute except to the extent as otherwise provided by statute.¹

The Trust Code provides a comprehensive administrative framework for operation of a trust. However, the express terms of a trust agreement prevail over a conflicting provision in statute, except for provisions that are deemed mandatory.² The following statutory terms of a trust are mandatory:³

- The requirements for creating a trust.
- The duty of the trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.
- The requirement that a trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.
- The periods of limitation for commencing a judicial proceeding.
- The power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.
- The requirements for designation of a principal place of administration of the trust and the requirements for the designation of a jurisdiction the law of which determines the meaning and effect of the terms of a trust.
- The jurisdiction and venue provisions.
- The restrictions on the designation of representative.
- The formalities required for the execution of a trust.
- The power of the court to modify or terminate a trust.
- The ability to modify a trust under the requirements for nonjudicial modification of an irrevocable trust, except as provided in the Code for certain trusts created after December 31, 2000.
- The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust.
- The trustee's duty to pay expenses and obligations of the settlor's estate.
- The trustee's duty to file a notice of trust at the settlor's death.
- The right of a trustee to decline a trusteeship and the right of a trustee to resign a trusteeship.
- The power of the court to require, dispense with, modify, or terminate a bond.
- The power of the court to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high.
- The duty of the trustee to notify qualified beneficiaries of an irrevocable trust of the existence of the trust, of the identity of the trustee, and of their rights to trust accountings.
- The duty of the trustee to provide a complete copy of the trust instrument and to account to qualified beneficiaries.

¹ 55A FLA. JUR. 2D TRUSTS § 1; and s. 736.102, F.S.

² Section 736.0105, F.S.

³ *Id.*

- The duty of the trustee to respond to the request of a qualified beneficiary of an irrevocable trust for relevant information about the assets and liabilities of the trust and the particulars relating to trust administration.
- The effect of an exculpatory term.
- The rights of a person other than a trustee or beneficiary.
- The effect of a penalty clause for contesting a trust.

Furthermore, the common law of trusts and principles of equity supplement the Code except to the extent modified by the Code or another law of Florida.⁴

Allowable Lifetime of a Trust

The maximum allowable life of a trust depends on the type of trust. There is no statutory minimum life of a trust and no limit on creation of a trust term of less than the maximum.

Private Trusts and the Rule Against Perpetuities

The legal life of a private trust was until recently governed solely by the common law Rule Against Perpetuities. The rule originated from an English court decision in 1682. The rule provides that a nonvested (also known as contingent) interest⁵ in property or a power of appointment in a trust is invalid unless it can be said, with absolute certainty, that it will either vest or terminate no later than 21 years after the death of an individual alive at the creation of the trust interest. The primary objective of the rule is to prevent perpetual control and unreasonable restraints upon the alienation of property by invalidating, after a specific time, any future nonvested interest created either by a will, deed, or power of appointment.⁶ The meaning of the Rule can be very difficult to decipher.⁷ At common law, the rule also carried with it some arguably absurd legal fictions such as the fertile-octogenarians⁸ and precocious toddlers,⁹ which, essentially said that a person is considered capable of having a child no matter their age or physical condition. Given these issues, many states have modified or abolished the Rule Against Perpetuities.¹⁰

⁴ FLA. JUR, *supra* note 1.

⁵ Contingent remainders, executory interests, vested remainders subject to open (class gifts), options to purchase (not attached to a leasehold), and rights of first refusal are subject to the Rule Against Perpetuities. Vested interests, reversion, possibilities of reverter, charity to charity dispositions, and rights of entry are not subject to the rule.

⁶ A power of appointment is a power delegated to another to exercise prescribed powers on behalf of the person who delegated the powers.

⁷ *Rule Against Perpetuities*, Legal Information Institute: Cornell Law School, https://www.law.cornell.edu/wex/rule_against_perpetuities#:~:text=A%20common%20law%20property%20rule,the%20creation%20of%20the%20interest (last visited Feb. 5, 2022).

⁸ *Fertile-octogenarian Rule*, Legal Information Institute: Cornell Law School, https://www.law.cornell.edu/wex/fertile-octogenarian_rule#:~:text=The%20fertile%20octogenarian%20rule%20means,their%20age%20or%20physical%20condition (last visited Feb. 5, 2022).

⁹ Robert Lynn, *A Practical Guide to the Rule Against Perpetuities*, 2 DUKE LAW JOURNAL 207 (1964), available at: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1908&context=dlj>.

¹⁰ *Fertile-octogenarian Rule*, *supra* note 8.

In 1988, the Florida Legislature enacted the Florida Uniform Statutory Rule Against Perpetuities¹¹ which essentially codified the common law Rule Against Perpetuities.¹² However, the uniform act also includes a “wait and see” provision that alternatively allows the valid duration of a trust to be 90 years¹³ from the date of the trust’s creation. Under the 1988 law, a property interest or the power of appointment must vest or terminate within a “life in being plus 21 years” or within the 90-year period in order to be valid. The simplicity of the 90-year rule avoids the often difficult interpretations of the common law rule.

There has been a trend among states¹⁴ to eliminate or limit the rule against perpetuities in order to facilitate the establishment of long-term, multi-generational trusts (sometimes referred to as “dynasty trusts”) and to assist individuals in limiting federal estate and generation-skipping transfer taxes.¹⁵ However, Congress has reacted accordingly. Although it is possible to shield a trust from federal estate and generation-skipping transfer taxes, as long as the interests of the trust are valid for an ascertainable period, there are limits on how much can be placed into these trusts, and taxes may be owed upon transfer at some point or upon termination. Overall, the federal tax laws have been interpreted to mean that if a trust has no limit on its existence and the beneficiary exercises power in such a way to extend the trust forever, the exercise by a beneficiary of a power of appointment could potentially and immediately trigger the gift or estate tax.¹⁶ In 2000, Florida avoided this potential tax issue and addressed the desire to allow longer legacy trusts by extending the allowable length of a private trust from 90 years to 360 years for trusts created after December 31, 2000.¹⁷

Charitable and Noncharitable Trusts

A charitable trust is created for the benefit of one or more charitable purposes such as the relief of poverty; the advancement of arts, sciences, education, or religion; or the promotion of health, governmental, or municipal purposes.¹⁸ A charitable trust is not governed by the Rule Against Perpetuities and thus may have an unlimited life.¹⁹

¹¹ Thirty-one states (including Florida) have adopted the National Conference of Commissioners on Uniform State Law’s Uniform Statutory Rule Against Perpetuities. <https://www.uniformlaws.org/committees/community-home?CommunityKey=addf3263-af92-4421-a83c-2ef7bc9a1b94> (last visited Feb. 5, 2022).

¹² Chapter 88-40, Laws of Fla.; s. 689.225, F.S.

¹³ The 90-year period was intended to approximate an average time period that would apply in a 21-years plus a life in being situation. *See* USRAP comments, 8B ULA 342.

¹⁴ *E.g.*, Delaware, Illinois, Kentucky, Ohio, Pennsylvania, Rhode Island, and Virginia. *See* Patrick Hicks, *A Guide to Dynasty Trusts*, Trust and Will, <https://trustandwill.com/learn/dynasty-trust> (last visited Feb. 5, 2022).

¹⁵ The federal generation-skipping transfer tax was designed to diminish the ability to avoid successive transfer taxes. *See* s. 2601 et seq. Internal Revenue Code.

¹⁶ For example, Delaware enacted law that allowed trust beneficiaries to avoid federal estate taxes through a manipulation of the rule against perpetuities and essentially create a trust in perpetual existence. As long as the beneficiaries of each generation took the necessary action to extend the period in the rule against perpetuities and the assets remained inside the trust, the trust would not violate the Rule Against Perpetuities. In response, Congress enacted sections 2041(a)(3) and 2514(d) of the Internal Revenue Code, also known as the “Delaware tax trap,” to address the Delaware law. The “Delaware tax trap” states that if a beneficiary exercises a power that allows vesting of the trust property to be postponed “for a period ascertainable without regard to the date of the creation of the [beneficiary’s] power,” the exercise of the beneficiary’s power triggers a gift tax or estate tax.

¹⁷ Chapter 2000-245, Laws of Fla.; s. 689.225(2)(f), F.S.

¹⁸ Section 736.0405(1), F.S.

¹⁹ Section 689.225(5)(e), F.S.

A noncharitable trust is a trust with a purpose that is not charitable and no individual beneficiaries. Noncharitable trusts are limited to 21 years existence.²⁰

Mandatory Duty to Account to Qualified Beneficiaries

A trustee of an irrevocable trust must provide an accounting to the qualified beneficiaries at least annually and upon termination of the trust or upon a change in trustee.²¹ This duty may not be modified by the trust agreement.²² An accounting must be a reasonably understandable report from the date of the last accounting or, if none, from the date on which the trustee became accountable, and it must adequately disclose:

- All cash and property transactions.
- All significant transactions affecting administration during the accounting period.
- Compensation paid to the trustee and the trustee's agents.
- Gains and losses realized during the accounting period.
- All receipts and disbursements.
- Trust assets on hand at the close of the accounting period, showing the asset acquisition value or carrying value and the estimated current value.
- Known noncontingent liabilities.
- Significant transactions that do not affect the amount for which the trustee is accountable, including name changes in investment holdings, adjustments to carrying value, a change of custodial institutions, and stock splits.
- The allocation of receipts, disbursements, accruals, or allowances between income and principal when the allocation affects the interest of any beneficiary of the trust.²³

A qualified beneficiary may waive the accounting requirement.²⁴

Notices from a Trust by Electronic Means

Numerous provisions in the Trust Code require that a notice or document be given to a person related to a trust. In general, notice “must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document.”²⁵ While still allowing traditional notice by mail or personal delivery, the Trust Code has been modernized to allow notice and delivery by “electronic means” without preference for any specific technology. Where delivery is solely by posting on an electronic account or website, the following requirements must be met:

- The recipient must have signed a written authorization for electronic notice.
- A notice must be provided upon every posting to the online account.
- The recipient must be given an annual notice of his or her legal rights regarding electronic posting, including a notice regarding applicable statutes of limitation.
- The electronic posting must be available for at least 4 years.²⁶

²⁰ Section 736.0409(1), F.S.

²¹ Section 736.0813(1)(d), F.S.

²² Section 736.0105(2)(s), F.S.

²³ Section 736.08135, F.S.

²⁴ Section 736.0813(2), F.S.

²⁵ Section 736.0109(1), F.S.

²⁶ Section 736.0109(3), F.S.

Grantor Trust Reimbursement

If a trust is treated as being owned by a person under the Internal Revenue Code or any similar federal, state, or other tax law, the trustee may, in the trustee's sole discretion, reimburse the person being treated as the owner for any amount of the person's personal federal, state, or other income tax liability which is attributable to the inclusion of the trust's income, capital gains, deductions, or credits in the calculation of the person's taxable income.²⁷ With limited exceptions, this law applies to all trusts.

III. Effect of Proposed Changes:

Rule Against Perpetuities (Section 1)

Applicable to a trust created on or after July 1, 2022, the 360 year limit on private trusts is extended to 1,000 years. The 360 year limit applies to trusts created after December 31, 2000, and through June 30, 2022.

Mandatory Duty to Account to Qualified Beneficiaries (Sections 2 and 6)

The bill creates an exception to the mandatory comprehensive annual accounting requirement allowing a trustee to furnish a beneficiary a summary statement in lieu of the current comprehensive annual accounting. The statement must show:

- The name of the trust, the trustee furnishing the accounting, and the time period covered by the accounting.
- If a final accounting, a plan for distribution of the remaining assets.
- A summary of the other information currently required to be set out in detail, provided that the summary contains sufficient information to put the beneficiary on notice of the trust assets, liabilities, and transactions during the accounting period.

Where a trustee makes this election, the trustee must, upon request of any beneficiary, make available the detailed information that was used in preparation of the summary accounting.

The ability of a trustee to elect simplified accounting created by this bill is not a mandatory requirement of the Trust Code. Accordingly, a grantor can, when creating the terms of the trust, limit or prohibit the trustee from taking this option and thereby compel comprehensive annual accounting.

This change applies to any accounting period beginning on or after January 1, 2021.

Notices from a Trust by Electronic Means (Section 3)

The bill adds e-mail as an optional form of notice from a trust to an interested person. The notice can be in an attachment to the e-mail or a hyperlink in the e-mail. Any necessary user name, password, or authentication must be furnished to or made available to the person receiving notice

²⁷ Section 736.08145(1), F.S.

by e-mail. Service by e-mail is not subject to the requirements for written authorization, an annual notice of legal rights and applicable statutes of limitation, or for 4 years' availability.

Representation of Future Beneficiaries (Section 4)

The bill expands the authority of a parent to represent and bind the parent's minor child and any unborn child to also give parents the authority to represent and bind an unborn child or unborn descendant, but only if a guardian has not been appointed for the child or descendant.

Life of a Noncharitable Trust (Section 5)

The bill provides that a noncharitable trust may exist up to 1,000 years.

Grantor Trust Reimbursement (Section 7)

The bill expands application of the grantor trust reimbursement for income tax liability to add that a trustee of a foreign trust that has a principal place of administration within the state may agree to grantor trust reimbursement.

Effective Date (Section 8)

The bill takes effect July 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The 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. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

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

None.

B. Private Sector Impact:

SB 1368 appears to simplify trust administration and thus could lower the cost of maintaining a trust in the state. In addition, the extending of the allowable life of trusts in Florida may encourage more trusts to be established in the state.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 689.225, 736.0105, 736.0109, 736.0303, 736.0409, 736.08135, and 736.08145.

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.