

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 Community Affairs

BILL: CS/SB 262

INTRODUCER: Judiciary Committee and Senator Berman

SUBJECT: Trusts

DATE: March 10, 2025

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
2.	<u>Hackett</u>	<u>Fleming</u>	<u>CA</u>	Pre-meeting
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 262 amends the Florida Trust Code. The Code governs the creation of trusts and the authority and responsibilities of trustees to manage property held in trust for the benefit of others. The changes in the bill are intended to clarify existing law while also incorporating language from the Florida Probate Code to treat gifts of trust assets made during a settlor's lifetime in the same manner that gifts are treated when made from a decedent's assets before his or her death.

The bill clarifies existing law relating to trust decanting, which refers to pouring trust assets into a new trust. Trust decanting is often appropriate due to changes in circumstances, administrative ease, or changes in tax laws.

Under the trust decanting provisions of the bill, a trustee is expressly authorized to modify the terms of a first trust to create or fund a second trust as a means of making distributions to beneficiaries. Additionally, the bill expressly states that a trustee who is authorized to invade the principal of a trust to create or fund a second trust is not considered to be the settlor of the second trust. This change ensures that a trustee will not be disqualified from serving as a trustee of a second trust as the result of having created or funded the second trust from the assets of the first trust.

With regard to a former trustee's liability and successor trustees' responsibilities, the bill clarifies that a person in a fiduciary relationship to a beneficiary may not bring an action on behalf of a beneficiary if the beneficiary is barred from bringing the claim or action.

The bill adopts nearly identical provisions contained in the Florida Probate Code to clarify when an “ademption by satisfaction” occurs with assets from a trust. The phrase “ademption by satisfaction” as used in the Florida Probate Code refers to the cancellation of a gift or distribution of an asset because the asset has already been given to the intended recipient. Often, property is missing from a trust at the settlor’s death because the settlor gave the property to someone during the settlor’s lifetime or because the property was distributed to someone from a revocable trust during the settlor’s lifetime. Under the bill, these gifts from a trust will be considered satisfied or adeemed only if a written statement is made, either in the terms of the trust, in a contemporaneous statement that the gift is to be deducted from the devise, or when the recipient acknowledges in writing that the gift has been satisfied.

The definitions of “community property” and “community property trust” are amended by the bill to clarify that transferring homestead property into a community trust is not a change of ownership for the purpose of reassessing the value of homestead property. This clarification will prevent property appraisers from reassessing the value of a home which will likely result in higher property taxes.

The bill takes effect upon becoming a law.

II. Present Situation:

Trusts

Background

In its most basic form, a trust is a legally binding relationship in which a person who owns property gives that property to a second person to hold and manage for the benefit of a third person. The settlor is the person who originally owned the property and creates the trust. The trustee is the person who holds legal title to the trust property and manages it with powers and responsibilities established in the terms of the trust. The beneficiary is the person for whom the property is held and who benefits from the trust.¹

Trusts are generally used for estate and financial planning purposes. They allow people to avoid probate proceedings and reduce certain tax obligations while also protecting assets from creditors and abuse.² When a trust is established pursuant to the terms of someone’s will and takes effect upon his or her death, it is called a testamentary trust. In contrast, when a trust is created during someone’s life, it is called an inter vivos or living trust.³

¹Restatement (Third) of Trusts s. 3 (2003); BLACK’S LAW DICTIONARY (12th ed. 2024); 55A FLA. JUR 2D TRUSTS s. 114 *Trusts, Generally* (2024).

² Alan S. Gassman, Brock Exline, and Peter Farrell, *Designing Trust Systems for Florida Residents: Planning Strategies, Things You Should Know, and Traps for the Unwary*, Florida Bar Journal, vol. 97, No. 4, July/August 2023, <https://www.floridabar.org/the-florida-bar-journal/designing-trust-systems-for-florida-residents-planning-strategies-things-you-should-know-and-traps-for-the-unwary/>.

³ BLACK’S LAW DICTIONARY (12th ed. 2024).

The Florida Trust Code is contained in chapter 736, F.S. It became effective in 2007 and applies to express trusts,⁴ charitable or noncharitable trusts, and trusts created pursuant to a law, judgment, or decree that requires the trust to be administered in the manner of an express trust.⁵

A Trustee’s Power to Invade the Principal in a Trust, Section 736.04117, F.S.

Trust Decanting

In the realm of trust law, “decanting” is a legal term which describes the act of a trustee pouring assets from one trust into another trust. This procedure is deemed to be a useful mechanism that provides a trustee with the opportunity to remedy problems that arise when administering a trust or address changes that occur with time. Decanting might be used to alter a trustee’s power, increase the protection of assets, correct a scrivener’s error, or revise distributions from the trust to encompass special needs provisions.⁶ Decanting is also used to update the terms of a trust or adjust provisions to take advantage of changes in tax laws.

Definition of an Authorized Trustee - Section 736.04117(1)(b), F.S.

An “authorized trustee” has the power to invade the principal of a trust for decanting purposes. An “authorized trustee” is defined in statute to be “a trustee, other than the settlor or a beneficiary, who has the power to invade the principal of a trust.”⁷ Currently, if an authorized trustee executes a trust instrument that creates a second trust or appoints assets to the second trust, he or she might technically meet the elements of the definition of a “settlor” as defined in s. 736.0103(21), F.S. If the trustee is the settlor of the second trust, the trustee could be precluded from being an authorized trustee for the second trust.⁸

Distribution from a First Trust to a Second Trust or Supplemental Needs Trust - s. 736.04117(2)(a), (3), and 4(a), F.S.

Three very similar provisions in s. 736.04117, F.S., address an authorized trustee’s authority to invade the principal of a first trust, either with or without absolute power to invade, and make distributions to a second trust or a supplemental needs trust.⁹ However, none of the three statutes expressly states that the trustee has the authority to *modify* the first trust under the grant of discretion authorized in statute as a means of creating or funding a second trust. If a trustee is expressly granted the authority to structure the decanting as a *modification*, he or she can avoid

⁴ An express trust is a trust created intentionally by a settlor, generally declared in writing, as distinguished from an implied or constructive trust that is “implied” by circumstances and often involves a court’s intervention to correct a wrong. BLACK’S LAW DICTIONARY (12th ed. 2024); Cornell Law School, Legal information Institute, https://www.law.cornell.edu/wex/express_trust.

⁵ Sections 736.0101 and 736.0102, F.S.

⁶ Amy J. Fanzlaw, *New Opportunities to Decant in Florida, Part I: Recent Changes to the Trust Decanting Statute*, Florida Bar Journal, Vol. 93, No. 5, September/October 2019, <https://www.floridabar.org/the-florida-bar-journal/new-opportunities-to-decant-in-florida-part-i-recent-changes-to-the-trust-decanting-statute/>.

⁷ Section 736.04117(1)(b), F.S. The decanting statute was added to the Florida Trust Code in 2007.

⁸ Real Property, Probate, and Trust Law (RPPTL) Section of The Florida Bar, *White Paper on the Revision to Subsections (1)(b), (2)(a), (3), (4)(a), (8)(d), (11) and (12) of 736.04117 of the Florida Statutes* (2024) (on file with the Senate Committee on Judiciary).

⁹ A supplemental needs trust is defined in statute to mean “a trust that the authorized trustee believes would not be considered a resource for purposes of determining whether the beneficiary who has a disability is eligible for government benefits.” Section 736.04117(1)(j), F.S.

doing additional administrative tasks such as retitling the assets and obtaining a new EIN, or employer identification number, from the IRS.

A Trustee’s Requirement to Provide Written Notice Before Invading the Principal of a Trust – s. 736.04117(8)(d), F.S.

Currently, an authorized trustee is required to provide written notice, known as a decanting notice, as to how he or she intends to exercise power to invade the principal of a trust. This notice must be provided to certain enumerated parties 60 days before the effective date of the exercise of that power. Some authorized trustees include on the notice a statement from a statutory form that actions for a breach of trust “may be subject to a 6-month statute of limitations from the receipt of the trust accounting or other written report.”¹⁰ This statement can be confusing to both beneficiaries and trustees because the earliest date that the statute of limitations could begin to run is either when the actual decanting occurs, a time period that is no sooner than the earlier of 60 days after the delivery of the notice or when notice is waived. This confusion could be resolved if language is added to clarify that a notice of a proposed decanting is not a trust disclosure document.

Protection of Successor Trustees – s. 736.08125, F.S.

The Florida Trust Code provides that a successor trustee is not personally liable for the actions taken by a former trustee. Additionally, the successor trustee does not have a duty to initiate an action against any former trustee or file a claim against any former trustee’s estate under certain enumerated circumstances.¹¹ However, s. 736.08125(3), F.S., states that “Nothing in this section affects any liability of the prior trustee or the right of the successor trustee or any beneficiary to pursue an action or claim against the prior trustee.” Some practitioners suggest that the statute does not absolutely prohibit a successor trustee from bringing an action against a former trustee even when all of the beneficiaries are barred from bringing an action. This produces confusion for practitioners and can lead to conflicting applications of the statute. One group believes that a successor trustee is barred when the beneficiaries are barred. Another group interprets the statute to say that a successor trustee is permitted to bring a claim even if the beneficiaries are barred from that action.¹²

Ademption by Satisfaction

The word “adeem” is a verb that means to revoke, cancel, or withdraw an item.¹³ In probate legal terms, “ademption by satisfaction” occurs when specific property granted under the terms of a will is no longer in the testator’s estate when he or she dies because the gift was satisfied during the testator’s life. An example would be that a decedent bequeathed her car to a particular beneficiary in her will. However, the decedent did not own a car when she died, therefore, the gift of the car would be “adeemed.” The result is that the beneficiary would not inherit the car.¹⁴

¹⁰ Section 736.1008(4)(a) and (c), F.S.

¹¹ Section 736.08125(1)(a) – (e), F.S.

¹² Real Property, Probate, and Trust Law (RPPTL) Section of The Florida Bar, *White Paper: Former Trustee Liability* (2024) (on file with the Senate Committee on Judiciary).

¹³ “Adeem.” Merriam-Webster.com Legal Dictionary, Merriam-Webster, <https://www.merriam-webster.com/legal/adeem>.

¹⁴ Law.Com, Services & Resources Legal Dictionary, <https://dictionary.law.com/Default.aspx?selected=2322>; Smith Gambrell Russell Newsletter, *To Adeem or Not to Adeem ... That Is the Question*, Issue 4/Spring 2012,

An “Ademption by Satisfaction” statute is contained in the Florida Probate Code¹⁵ but there is no comparable statute in the Florida Trust Code. The provision in the Probate Code states that property given to someone in the testator’s lifetime is treated as a satisfaction of a devise¹⁶ of the gift to that person, in whole or in part only if:

- The will provides for deduction of the lifetime gift,
- The testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction of the devise, or
- The devisee, or recipient, acknowledges in writing that the gift is in satisfaction.

To summarize the intent of the statute, property that is given to someone during a testator’s life satisfies the intent of the will to make a devise *only if* the testator’s will provides for that or when the testator or recipient acknowledges it to be so in a written statement.

Community Property Trust Act – s. 736.1502, F.S.

The Florida Community Property Trust Act was created in 2021 and is contained within Part XV of ch. 736.¹⁷ The Act permits a married couple to form a joint trust that holds their assets which generally may be used for their benefit while both spouses are living. Perhaps the most important benefit is the savings of substantial income tax when the first spouse dies.¹⁸ Although the state permits the formation of a community property trust, Florida is not a community property state. Florida is among the 41 states that follow the common law which holds that each spouse is recognized as an individual who has separate legal and property rights.¹⁹

Definition of “Community Property”

The term “community property” is defined in s. 736.1502(1), F.S. to mean

[T]he property and the appreciation of and income from the property owned by a qualified trustee of a community property trust during the marriage of the settlor spouses. The property owned by a community property trust pursuant to this part

https://www.sgrlaw.com/newsletter/newsletters/trusts_estates_trends/trustsnestatestrends_spring201/1834-2/#:~:text=Ademption%20is%20a%20legal%20term,adeemed%2C%20and%20the%20gift%20fails.

¹⁵ The Florida Probate Code is contained in chapters 731-735, F.S.

Section 732.609, F.S. For purposes of part satisfaction, property given during the testator’s lifetime is valued at the time the devisee came into possession or enjoyment of the property or at the time of the death of the testator, whichever occurs first.

¹⁶ “Devise” means the act of giving property by a will. (BLACK’S LAW DICTIONARY (12th ed. 2024)).

¹⁷ Ch. 2021-183, ss. 29-40, Laws of Fla.

¹⁸ Joseph M. Percopo, *Understanding the New Florida Community Property Trust, Part I*, The Florida Bar Journal, July/August 2022, <https://www.floridabar.org/the-florida-bar-journal/understanding-the-new-florida-community-property-trust-part-i/>; Joseph M. Percopo, *Understanding the New Florida Community Property Trust, Part II*, The Florida Bar Journal, September/October 2022, <https://www.floridabar.org/the-florida-bar-journal/understanding-the-new-florida-community-property-trust-part-ii/>.

¹⁹ In a community property state, property that is acquired during the course of the marriage is owned equally by the spouses. If the couple divorces, the assets acquired during the marriage are divided equally between the spouses. According to the IRS, there are nine community property states in the country: Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington, and Wisconsin. IRS, Internal Revenue Manual, 25.18.1 *Basic Principles of Community Property Law*, (May 2023) https://www.irs.gov/irm/part25/irm_25-018-001.

and the appreciation of and income from such property *shall be deemed to be* community property for purposes of general law.

The inclusion of the phrase “shall be deemed” has caused concern among some professionals as being inconsistent with other provisions in the Community Property Trust Act. In contrast, s. 736.1505(3), F.S., states that “All property owned by a community property trust *is* community property under the laws of the state during the marriage of the settlor spouses.”

Definition of “Community Property Trust”

“Community property trust” is defined as

[A]n express trust that complies with s. 736.1503 and is *created on or after* July 1, 2021.

The phrase “created on or after” July 1, 2021 has also caused concern among professionals who work in this area.²⁰ Some married couples have already established community property trusts or joint revocable trusts before July 1, 2021, in another state before moving to Florida and becoming residents. In order to qualify their trust as a community property trust in this state, the couples want to amend or restate the terms of their existing trust. By adding the language “amended, restated, or modified” the provision is clarified so that a couple who amends, restates, or modifies their existing trust, if it meets the additional statutory requirements, would meet the requirement of s. 736.1502(2), F.S., because the trust would be created on the date of the amendment, restatement, or modification even though the original community trust was created earlier.

Homestead Property – s. 736.151, F.S.

Homestead property is protected under the State Constitution in three specific ways. The property is:

- Exempt from forced sale by creditors.²¹
- Given an exemption from property taxes.²²
- Protected with certain restrictions should a homestead owner attempt to devise or alienate the property if the owner is survived by a spouse or minor child.²³

The Florida Trust Code currently recognizes that homestead property placed in a community property trust retains its homestead nature and receives the appropriate exemptions. The statute also states that property acquired in the name of the trustee may initially qualify as the settlor spouses’ homestead if that property would qualify as the settlor spouses’ homestead if title was held outside of the trust in one or both of the spouses’ individual names.²⁴

²⁰ Real Property, Probate, and Trust Law (RPPTL) Section of The Florida Bar, *White Paper on Minor Clarifications to the Florida Community Property Trust Act* (2024) (on file with the Senate Committee on Judiciary).

²¹ FLA. CONST. art. X, s. 4(a).

²² FLA. CONST. art. VII, s. 6.

²³ FLA. CONST. art. X, s. 4(c).

²⁴ Section 736.151(1), F.S.

The concern has been raised that a county property appraiser might believe that transferring the homestead property into a community property trust is technically a change of ownership.²⁵ The result is that the property appraiser would reassess the value of the property for property tax purposes and the homeowner would pay higher taxes.

III. Effect of Proposed Changes:

Section 1 – A Trustee’s Power to Invade the Principal in a Trust

Authorized Trustee - s. 736.04117(1)(b), F.S.

This section is revised to clarify that an “authorized trustee” will not be considered a settlor of a second trust even if he or she created the trust instrument that governs the second trust or made a distribution of assets from the first trust to the second trust. In order to determine the settlor’s intent for a second trust or a modification of the first trust, consideration may be given to the intent of a settlor of the first trust, the settlor of the second trust, or the authorized trustee.²⁶

Distribution from a First Trust to a Second Trust or Supplemental Needs Trust - s.736.04117(2)(a), (3), and (4)(a), F.S.

Each of these three provisions is amended with identical language to expressly permit the trustee to modify the terms of a first trust. This will permit the trustee to avoid certain administrative tasks such as retitling assets and obtaining a new EIN or employer identification number from the IRS.

Notice Provision – s. 736.04117(8)(d), F.S.

The revisions to this paragraph clarify that an authorized trustee’s notice to invade the principal of the first trust *is not a trust disclosure document* and does not limit a beneficiary’s right to object to the trustee’s power to invade principal of the trust except as otherwise stated in the statutes. The revision also clarifies that a trust disclosure document pertaining to the distribution does not start a limitations period unless the trust disclosure document is provided after the effective date of the exercise of the trustee’s power to invade the principal.

Application – s. 736.04117(12), F.S.

Newly created s. 736.04117(12), F.S., is added to the decanting provisions to state that the decanting statute applies to all trusts that are governed by Florida law or any trusts that have a principal place of administration within the state. This clarifies which state’s laws govern when a trust originated in another state but is now operational in this state.

²⁵ Real Property, Probate, and Trust Law (RPPTL) Section of The Florida Bar, *White Paper on Minor Clarifications to the Florida Community Property Trust Act* (2024) (on file with the Senate Committee on Judiciary).

²⁶ The language governing intent is drawn from the Uniform Law Commission’s *Uniform Trust Decanting Act*, Section 25 (2015).

**Section 2 – Protection of Successor Trustees – s. 736.08125(3), F.S. and
Section 3 – Claims Against Former Trustees - s. 736.10085, F.S.**

The bill resolves the confusion surrounding a former trustee’s liability and when an action may be brought against him or her. This is accomplished by creating a new s. 736.10085, F.S., and cross-referencing it in the existing s. 736.08125(3), F.S., which defines the bases for a former trustee’s liability.

If a beneficiary is barred from bringing certain claims or actions against a former trustee, a fiduciary acting on the beneficiary’s behalf is also barred. Fiduciaries do not have an independent right to bring a claim or action against a former trustee if the beneficiary is barred from bringing the claim or action.

Section 4 – Ademption by Satisfaction in a Revocable Trust – s. 736.10085, F.S.

The bill creates an “ademption by satisfaction” provision in the Trust Code that is very similar to, and modeled after, the provision contained in the Probate Code. The newly created statute governs property that is devised to or from a revocable trust²⁷ that a settlor gave to someone during the settlor’s lifetime or property that is distributed to someone from a revocable trust during the settlor’s lifetime.

These gifts made during a settlor’s lifetime are treated as a satisfaction of a devise to the person, in whole or in part, upon the settlor’s death if any of these circumstances apply:

- The terms of the trust instrument provide for the deduction of the lifetime gift or distribution.
- The settlor or the trustee declares in a contemporaneous writing that the gift or distribution is to be deducted from the devise or is in satisfaction of the devise.
- The devisee acknowledges in writing that the gift or distribution is in satisfaction of the devise.

When a part satisfaction occurs, the property distributed or given during the settlor’s lifetime is to be valued at the time the devisee came into possession or enjoyment of the property or at the time of the death of the settlor, whichever occurs first.

This new “Ademption by Satisfaction” statute applies to revocable trusts that become irrevocable on or after July 1, 2025.

Section 5 – Community Property Trust Act – s. 736.1502, F.S.

Definition of “Community Property”

The term “community property” is amended in s. 736.1502(1), F.S., to delete the phrase “shall be deemed” to clarify that any asset that is held in a community property trust is community property.

²⁷ A “revocable trust” means a trust that is revocable by the settlor without the consent of the trustee or a person holding an adverse interest. Section 736.0103(20), F.S.

Definition of “Community Property Trust”

The definition of “community property trust” is amended and the phrase “amended, restated, or modified” is added.

By adding the language “amended, restated, or modified” the provision is clarified so that a couple who amends, restates, or modifies their existing trust, if it meets the additional statutory requirements, would meet the requirement of s. 736.1502(2), F.S., because the trust would be *created* on the date of the amendment, restatement, or modification even though the original community trust was created earlier.

Section 6 – Homestead Property – s. 736.151(3), F.S.

The addition of this new subsection to the homestead property statute clarifies that transferring homestead property into a community property trust is *not* a change of ownership for the purpose of reassessing the value of the homestead property. As such, the property appraiser may not reassess the value of the home. It should be treated as a qualified transfer between spouses, which is permitted in existing s. 193.155(3)(a)2., F.S.²⁸

Section 7 – Retroactive Applicability of the Amendments

The bill provides that amendments made to s. 736.04117, F.S., a trustee’s power to invade the principal in a trust, s. 736.1502, F.S., the Community Property Trust Act, involving the definitions of community property and community property trust, as well as s. 736.151, F.S., the transfer of homestead property are remedial. The amendments apply to all trusts that are created before, on, or after the effective date of the bill.

These amendments are designed to be remedial in nature, not substantive changes to existing law, and will take effect when the bill becomes a law.

Section 8 – Effective Date

The bill takes effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

²⁸ Section 193.155(3)(a)2., F.S. states that when a “Legal or equitable title is changed or transferred between husband and wife, including a change or transfer to a surviving spouse ...” it is not a change of ownership for purposes of homestead assessments.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:Retroactivity

Three provisions in this bill apply retroactively: s.736.04117, F.S., relating to a trustee's power to invade the principal in a trust, s. 736.1502(2), F.S., relating to community property trusts, and s. 736.151, F.S., relating to homestead property.

State statutes are presumed to apply prospectively and not retroactively. In essence, statutes generally apply to actions that occur on or after the effective date of an act, not before the legislation becomes effective. In general, laws that are remedial or procedural may be applied retroactively. However, substantive laws may not be applied retroactively even if the Legislature intends that they apply retroactively, if the "laws impair vested rights, create new obligations, or impose new penalties."²⁹ The changes to the Trust Code appear to be clarifying provisions and remedial in nature such that their retroactive application should not be unconstitutional.

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

None.

B. Private Sector Impact:

The provisions in the bill are designed to bring clarity to settlors, trustees, and beneficiaries. As such, this could result in a financial savings to those people because they will not have to pay fees for legal research to resolve ambiguous language that currently exists in the statutes.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

²⁹ *Patronis v. United Insurance Company of America*, 299 So 3d. 1152, 1156 (Fla. 1st DCA 2020) (quoting *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995).

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 736.04117, 736.08125, 736.1502, and 736.151.

This bill creates the following sections of the Florida Statutes: 736.10085, 736.1110.

This bill creates one undesignated section of Florida Law.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

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

CS by Judiciary on February 18, 2025:

The committee substitute makes technical changes to the underlying bill by:

- Removing the retroactive application language of amendments made to s. 736.04117, F.S., and including that language in the retroactive application of other statutes in Section 7 and stating that the changes are remedial.
- Deleting as unnecessary Section 8, the directive to the Division of Law Revision to make technical changes to the bill to provide a chapter number and effective date.

B. Amendments:

None.