

# FLORIDA HOUSE OF REPRESENTATIVES BILL ANALYSIS

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**BILL #:** [CS/HB 385](#)

**TITLE:** Trusts

**SPONSOR(S):** Oliver

**COMPANION BILL:** [CS/SB 262](#) (Berman)

**LINKED BILLS:** None

**RELATED BILLS:** None

## Committee References

[Civil Justice & Claims](#)

18 Y, 0 N, As CS

[Insurance & Banking](#)

[Judiciary](#)

## SUMMARY

### Effect of the Bill:

HB 385 modifies various provisions in the Florida Trust Code, including provisions relating to trust decanting, which refers to the process of transferring, or “decanting,” trust assets from one trust to a new, second trust. Specifically, the bill clarifies that an authorized trustee decanting trust assets from an original trust into a new, second trust is not the settlor of the second trust; specifies whose intent may be considered when determining settlor intent with respect to a second trust; provides an option to expressly structure a decanting as a modification of the original trust; and clarifies that a decanting notice is not a trust disclosure document that would trigger a specified limitations period for bringing breach of fiduciary duty claims against the trustee. The bill also:

- Expressly prohibits a successor trustee from bringing a claim against a former trustee if the beneficiary is barred from personally bringing such a claim.
- Incorporates the concept of ademption by satisfaction, already found in the Florida Probate Code, into the Trust Code in the context of a revocable trust that later becomes irrevocable upon the settlor’s death.
- Modifies the definition of “community property,” clarifies the definition of “community property trust,” and specifies how a transfer of homestead property into such a trust is to be treated for property tax assessment purposes.

### Fiscal or Economic Impact:

The bill may have an indeterminate economic impact on the private sector.

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## ANALYSIS

### EFFECT OF THE BILL:

#### [Trust Decanting](#)

##### *Authorized Trustee*

The bill amends the definition of “authorized trustee” in [s. 736.04117, F.S.](#), to clarify that, for the purposes of that section, an authorized trustee will not be considered the settlor of a second trust, even if the authorized trustee created the trust instrument governing the second trust or decanted assets from the first trust to the second trust. Practically speaking, this will ensure that the authorized trustee of the first trust can also be the authorized trustee of the second trust, as, under Florida law, an authorized trustee generally may not also be the settlor. (Section [1](#))

The bill further amends this section to clarify that, in determining settlor intent with respect to a second trust or a first trust modification, the intent of the first trust’s settlor, the second trust’s settlor, or the authorized trustee may be considered. This clarification is meant to conform this section to the intent of the [Uniform Trust Decanting Act](#), from which this provision originated. (Section [1](#))

##### *Decanting Power*

**STORAGE NAME:** h0385a.CIV

**DATE:** 3/5/2025

The bill amends [s. 736.04117\(2\), \(3\), and \(4\), F.S.](#), to provide an additional method by which an authorized trustee may exercise its power (whether [absolute](#) or [limited](#)) to distribute trust principal to or for the benefit of one or more beneficiaries. Specifically, in addition to exercising this power by a traditional decanting, as authorized under current law, the bill would also allow an authorized trustee to exercise this power by expressly structuring a decanting as a modification of the first trust's terms. Practically speaking, expressly structuring a decanting as a modification may eliminate the need to retitle assets, simplify tax consequences (such as by possibly eliminating the need to obtain a new [Employer Identification Number](#) or redo [Subchapter S elections](#)), and may also avoid a [termination](#) in the context of a [supplemental needs trust](#) under Social Security Administration rules (thereby preserving the eligibility of a beneficiary with a disability to certain government benefits). (Section [1](#))

### *Decanting Notice*

The bill amends [s. 36.04117\(8\)\(d\), F.S.](#), to provide that the authorized trustee's decanting notice is not a [trust disclosure document](#) as defined in [s. 736.1008\(4\), F.S.](#) The bill also provides that, with respect to the authorized trustee's power to invade principal, a trust disclosure document will not commence the six-month [limitations period](#) in which a beneficiary may bring a [breach of trust](#) action against the authorized trustee unless such document is given to the beneficiaries after the effective date of the authorized trustee's exercise of such power. Practically speaking, these changes provide clarity for beneficiaries as to when the limitations period for breach of trust related to a decanting begins to run. (Section [1](#))

### *Application*

The bill creates [s. 736.04117\(12\), F.S.](#), to clarify that [s. 736.04117, F.S.](#), applies to all [trusts governed by Florida law](#) or that have a [principal place of administration](#) in Florida. (Section [1](#))

### [Claims Against Former Trustees](#)

The bill creates [s. 736.10085, F.S.](#), to limit claims which may be brought against former trustees. Specifically, the bill provides that an action or claim by a successor trustee or other person acting on behalf of the trust against a former trustee is barred to the same extent that the action or claim would be barred if brought by the beneficiary whose interests the successor trustee or other person acting on behalf of the trust represents. (Section [3](#)) The bill also amends [s. 736.08125, F.S.](#), to make a conforming change related to this limitation. (Section [2](#))

### [Ademption by Satisfaction](#)

The bill creates [s. 736.1110, F.S.](#), to contemplate ademption by satisfaction with respect to property that is devised to or from a revocable trust, mirroring this provision to similar language in the Florida Probate Code (governing ademption by satisfaction where property is devised by a will). Specifically, the bill provides that property devised to or from a revocable trust which a settlor gave to someone during the settlor's lifetime is to be treated as a satisfaction of a devise to that person upon the settlor's death if any of the following circumstances apply:

- The trust instrument provides 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 thereof; or
- The devisee acknowledges in writing that the gift or distribution is in satisfaction of the devise. (Section [4](#))

Further, the bill specifies that:

- For purposes of partial satisfaction, property distributed or given during the settlor's lifetime will be valued at the time the devisee came into possession or enjoyment of the property or at the time of the settlor's death, whichever occurs first.
- These changes apply to revocable trusts that become irrevocable (due to the settlor's death) on or after July 1, 2025. (Section [4](#))

### [Community Property Trusts](#)

The bill creates s. 736.151, F.S., to clarify that a transfer of [homestead property](#) by one or both of the settlor spouses to a community property trust will not be treated as a [change of ownership](#) for purposes of reassessing the property. Instead, the bill provides that such a transfer qualifies as a transfer of legal or equitable title between spouses as described in [s. 193.155\(3\)\(a\)2, F.S.](#) Practically speaking, this will ensure that the property appraiser's future assessments of the home's value for property tax purposes remain tied to the original assessment done the first year the home received the homestead exemption after purchase by one or both of the settlor spouses; this will likely keep the property taxes assessed on the home lower than they would be if the property's value was reassessed after the transfer to the trust. (Section [6](#))

The bill also modifies the definition of "community property" in [s. 736.1502, F.S.](#), to provide that the property owned by a community property trust and the appreciation of income from such property "are" community property for purposes of general law, rather than "deemed to be" as provided in current law. Further, the bill modifies the definition of "community property trust" in [s. 736.1502, F.S.](#), which Florida law originally tied to the trust's creation date, to clarify that an express trust that complies with [s. 736.1503, F.S.](#), and that is created, amended, restated, or modified on or after July 1, 2021, remains a community property trust. Practically speaking, this clarification expressly accounts for the reality that a married couple who moves to Florida may already have created a community property trust before their move, which trust they may want to amend or restate so that the trust qualifies as a Florida community property trust governable under the Florida Trust Code. (Section [5](#))

### Miscellaneous Provisions

The bill:

- Provides that the amendments made by the bill to ss. [736.04117](#), [736.151](#) and [736.1502, F.S.](#), are remedial and apply to all trusts created before, on, or after the bill's effective date. (Section [7](#))
- Provides an effective date of upon becoming a law. (Section [8](#))

### **FISCAL OR ECONOMIC IMPACT:**

PRIVATE SECTOR:

The bill may have an indeterminate impact on the private sector. To the extent the bill reduces trust and homestead property tax implications, or preserves existing community property trusts, the bill may have a positive economic impact on the private sector.

## **RELEVANT INFORMATION**

### **SUBJECT OVERVIEW:**

#### Trust Overview

Generally speaking, a trust is a relationship in which one party (the "settlor")<sup>1</sup> gives another party (the "trustee")<sup>2</sup> the right to hold title to the settlor's assets for a third party's benefit (the "beneficiary").<sup>3</sup> A trust may be created and take effect during a settlor's lifetime ("a living trust") or may be created by a will or other disposition and take effect when the settlor dies ("testamentary trust").<sup>4</sup> A trust may also be revocable (so that the terms may be changed at any time before the settlor's death) or irrevocable (so that the terms cannot be modified after the trust's creation absent a court order upon the consent of the beneficiaries or where the trust's purposes have become frustrated or illegal).<sup>5</sup>

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<sup>1</sup> "Settlor" means a person, including a testator, who creates or contributes property to a trust. S. [736.0103\(18\), F.S.](#)

<sup>2</sup> A settlor can designate a trustee, and successor trustees, in the trust document itself; however, where there is no designated trustee, or if the designated trustee is unable or unwilling to accept the trusteeship, the qualified beneficiaries may select a trustee by unanimous agreement, or else a court may appoint a trustee. S. [736.0704, F.S.](#)

<sup>3</sup> A "beneficiary" may have a present or future beneficial interest in a trust, which interest may be vested or contingent. S. [736.0103\(4\), F.S.](#)

<sup>4</sup> See "inter vivos trust" and "testamentary trust," Black's Law Dictionary (11th ed. 2019); [s. 736.0401, F.S.](#)

<sup>5</sup> Greg Depersio, Investopedia (Apr. 30, 2023), *Revocable Trust v. Irrevocable Trust: What's the Difference*, <https://www.investopedia.com/ask/answers/071615/what-difference-between-revocable-trust-and-living-trust.asp> (last visited Mar. 5, 2025).

## General Trust Provisions

Most trusts are generally governed by the Florida Trust Code, codified in [chapter 736, F.S.](#) However, additional provisions of Florida law may apply if the trust has special attributes, and, importantly, the terms of the trust govern over Trust Code provisions unless the Trust Code provides otherwise.<sup>6</sup>

### *Trusts Governed by Florida Law*

A trust is generally governed by the law of the jurisdiction designated in the trust's terms, provided there is a sufficient nexus to the designated jurisdiction at the time of the trust's creation or during the trust's administration; a sufficient nexus may include, but is not limited to, the location of real property held by the trust or the residence or location of an office of the settlor, a trustee, or any beneficiary.<sup>7</sup> However, where there is no controlling designation in the trust's terms, a trust is governed by the law of the jurisdiction where the settlor resides at the time of the trust's creation.<sup>8</sup>

Under Florida law, a trust is created only if certain conditions are met. Specifically, to create a trust:

- The settlor must have capacity to create a trust;<sup>9</sup>
- The settlor must indicate an intent to create a trust;
- The trust must have a definite beneficiary,<sup>10</sup> or else be a charitable trust,<sup>11</sup> a trust for the care of an animal,<sup>12</sup> or a trust for a non-charitable purpose;<sup>13</sup>
- The trustee must have duties to perform;<sup>14</sup> and
- The same person cannot be the sole trustee and sole beneficiary.<sup>15</sup>

Further, a trust may be created only to the extent that its purposes are lawful, not contrary to public policy, and possible to achieve.<sup>16</sup>

### *Principal Place of Administration*

A trust's principal place of administration may be designated in the trust instrument or, where no such designation is validly made, determined by operation of law. For a designation of the principal place of administration to be valid, there must be a sufficient connection with the designated jurisdiction, which connection may be established when:

- A trustee's principal place of business or residence is located in the designated jurisdiction; or
- All or part of the administration occurs in the designated jurisdiction.<sup>17</sup>

Where the trust instrument lacks a valid designation:

- The principal place of administration is:

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<sup>6</sup> Ss. [736.0102](#) and [736.0105, F.S.](#)

<sup>7</sup> S. [736.0107, F.S.](#)

<sup>8</sup> *Id.*

<sup>9</sup> The capacity required to create, amend, revoke, or add property to a trust, or to direct the actions of the trustee, is generally the same as that required to make a will. In other words, the settlor must be at least 18 years of age and of sound mind, meaning that he or she understands the nature and extent of the property placed in trust, the identities of the beneficiaries, and the effect of the disposition. Ss. [732.501](#) and [736.0601, F.S.](#)

<sup>10</sup> A beneficiary is "definite" if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities. S. [736.0402\(2\), F.S.](#)

<sup>11</sup> A "charitable trust" is a trust created for charitable purposes, which may include poverty relief; the advancement of the arts, science, education, or religion; or the promotion of health, governmental, or municipal purposes. S. [736.0405, F.S.](#)

<sup>12</sup> A trust may be created for the care of an animal alive during the settlor's lifetime. Such a trust terminates on the animal's death or, if the trust was created to provide for the care of more than one qualifying animal, on the death of the last surviving animal. S. [736.0408, F.S.](#)

<sup>13</sup> A trust may be created for a non-charitable purpose without a definite or definitely ascertainable beneficiary. Such a trust may not be enforced for more than 1,000 years. S. [736.0409, F.S.](#)

<sup>14</sup> Trustees must generally comply with the duties set out in the trust instrument. The Florida Trust Code also confers a number of duties on trustees, intended to ensure that trustees put the beneficiaries' interests before their own interests and act fairly and in good faith to preserve and protect the trust's assets for the beneficiaries' benefit. S. [736.0801, F.S.](#)

<sup>15</sup> S. [736.0402\(1\), F.S.](#)

<sup>16</sup> S. [736.0404, F.S.](#)

<sup>17</sup> S. [736.0108\(1\), F.S.](#)

- The trustee's usual place of business where the trust's records are kept; or
- If the trustee has no place of business, the trustee's residence.<sup>18</sup>
- In the case of co-trustees, the principal place of administration is:
  - The usual place of business of the corporate trustee, if there is only one such trustee;
  - The usual place of business or residence of the individual trustee who is a professional fiduciary, if there is only one such person and no corporate trustee; or
  - The usual place of business or residence of any of the co-trustees as agreed on by the co-trustees.<sup>19</sup>

## [Trustee Duties and Disclosure Document](#)

The Trust Code imposes several affirmative duties upon a trustee. These include a duty:

- To administer the trust in good faith, in accordance with its terms and purposes and the beneficiaries' interests, and with the Trust Code;<sup>20</sup>
- To control and protect trust property;<sup>21</sup>
- To keep clear, distinct, and accurate records;<sup>22</sup> and
- To keep the trust's qualified beneficiaries reasonably informed of the trust and its administration, sometimes accomplished through a trust accounting.<sup>23</sup>

Where a trustee violates a duty owed to a beneficiary, the trustee commits a **breach of trust**.<sup>24</sup> To remedy a breach of trust, a court may, among other things:

- Compel the trustee to perform the trustee's duties;
- Enjoin the trustee from committing a breach of trust;
- Compel the trustee to pay money or restore property;
- Suspend or remove the trustee;
- Reduce or deny compensation owed to the trustee; or
- Void a trustee's act.<sup>25</sup>

However, a court typically cannot remedy a breach of trust unless a beneficiary brings a breach of trust action against the trustee within a specified time period after learning about the breach, which may occur when the beneficiary receives a trust disclosure document; such a document is a trust accounting or any other written report from the trustee or a trust director to the beneficiaries, the purpose of which is to adequately disclose a matter to the trust's beneficiaries to allow them to know or reasonably ascertain whether they have any kind of claim against the trustee for breach of trust related to the matter<sup>26</sup> More specifically, under the statutory **limitations period**, a beneficiary is barred from bringing a breach of trust action against a trustee with respect to a matter that was adequately disclosed in a trust disclosure document unless the action is brought within six months after receipt of such document or a limitation notice<sup>27</sup> applicable to that document,<sup>28</sup> whichever is received later.<sup>29</sup>

<sup>18</sup> S. [736.0108\(2\), F.S.](#)

<sup>19</sup> *Id.*

<sup>20</sup> S. [736.0801, F.S.](#)

<sup>21</sup> S. [736.0809, F.S.](#)

<sup>22</sup> S. [736.0810, F.S.](#)

<sup>23</sup> A trust accounting must be a reasonably understandable report covering the time from the date of the last accounting or, if none, from the date on which the trustee became accountable, that adequately discloses specified information relating to trust assets and financials. S. [736.0813, F.S.](#)

<sup>24</sup> S. [736.1001, F.S.](#)

<sup>25</sup> *Id.*

<sup>26</sup> S. [736.1008\(4\)\(c\), F.S.](#)

<sup>27</sup> A limitation notice is a written notice from the trustee or a trust director that a beneficiary's breach of trust action based on a matter adequately disclosed in a trust disclosure document may be barred if it is not brought within six months after receipt of the trust disclosure document or the limitation notice. S. [736.1008\(4\)\(a\), F.S.](#)

<sup>28</sup> A limitation notice applies to a trust disclosure document when the notice is: contained as a part of the trust disclosure document or as part of another trust disclosure document received within one year before the receipt of the latter trust disclosure document; accompanied concurrently by the trust disclosure document or by another trust disclosure document that was received within one year of the latter trust disclosure document; delivered separately within ten days after delivery of the trust disclosure document or another trust disclosure document that was received within one year before receipt of the latter trust disclosure document; or received more than ten days after the delivery of the trust disclosure document, but only if the limitation notice references the trust disclosure document and meets other conditions. S. [736.10089\(5\), F.S.](#)

<sup>29</sup> S. [736.1008\(4\)\(c\), F.S.](#)

## [Trust Decanting](#)

Florida law allows a trust to authorize a trustee (who is not a settlor or a beneficiary) to invade a trust's principal and shift it from one trust ("first trust") to another trust ("second trust") in certain circumstances.<sup>30</sup> This process, often called "decanting," provides unique opportunities to remedy problems in trust administration or address changes in circumstances or law; more specifically, it can be useful to achieve certain tax objectives, change trust situs, expand or limit trust powers, provide better asset protection, correct drafting errors, and more.<sup>31</sup>

Florida law has recognized a trustee's common law authority to decant since 1940, and the Legislature codified this authority into the Florida Trust Code in 2007, as [s. 736.04117, F.S.](#)<sup>32</sup> The legislature then amended this provision in 2018 to better align Florida's decanting laws to those of other states and the 2015 [Uniform Trust Decanting Act](#),<sup>33</sup> the result of this modification is a broader opportunity to decant Florida trusts and affect changes in trust administration.

### [Authorized Trustee](#)

Under Florida law, an "authorized trustee" is any trustee, other than the settlor or a beneficiary, authorized by a trust instrument to decant trust principal from one trust to a second trust.<sup>34</sup> Sometimes, however, an authorized trustee exercising his or her decanting power may execute the trust instrument that creates the second trust or place assets into the second trust (typically roles of the settlor); in such instances, confusion may arise as to whether the authorized trustee is the settlor of the second trust and, therefore, whether, he or she may be the authorized trustee of the second trust.

### [Decanting Power](#)

Section [736.04117\(2\), F.S.](#), generally provides that an authorized trustee given [absolute power](#)<sup>35</sup> under the trust's terms to distribute trust principal to or for the benefit of one or more beneficiaries may exercise such power by decanting, subject to certain limitations. Specifically, the authorized trustee may, as to the second trust:

- Eliminate beneficiaries, if no vested interest is thereby reduced, but may not add new beneficiaries;
- Omit most, but not all, powers of appointment granted in the first trust, modify existing powers of appointment, and create new powers of appointment; and
- Extend the trust's term past the first trust's term, if doing so does not violate the rule against perpetuities.

Such decanting is permissible whether the second trust was created under the same trust instrument as the first trust or a different trust instrument, including a trust instrument created for the purpose of exercising the power granted by this section.

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<sup>30</sup> S. [736.04117\(1\)\(b\), F.S.](#)

<sup>31</sup> Amy J. Fanzlaw, *New Opportunities to Decant in Florida: Part I: Recent Changes to the Trust Decanting Statute*, 93 Fla. Bar Journal 31 (Sept./Oct. 2019), <https://www.floridabar.org/the-florida-bar-journal/new-opportunities-to-decant-in-florida-part-i-recent-changes-to-the-trust-decanting-statute/> ("Think of the process of decanting wine: Wine is poured from a bottle to a decanter to allow it to breathe and mature. While the wine decanter or vessel changes, the wine itself – the trust corpus – remains the same, conforming and molding itself according to the parameters of the new decanter. This is the same for trust decanting.") (last visited Mar. 5, 2025).

<sup>32</sup> *Phipps v. Palm Beach Trust Co.*, 196 So. 299 (Fla. 1940); *Id.*

<sup>33</sup> The Uniform Trust Decanting Act, produced by the Uniform Law Commission in 2015, is designed to standardize trust decanting laws amongst the several states and jurisdictions of the United States; its purpose is to allow a trust to adopt to unforeseen circumstances while still effectuating the settlor's original intent. 18 states have enacted the Act in its original form; one state has adopted a substantially similar version of the Act; and one state has introduced the Act for consideration in the 2025 legislative session. Florida's decanting statute predates the Act. Uniform Law Commission, *Uniform Trust Decanting Act*, <https://www.uniformlaws.org/committees/community-home?communitykey=5b248bac-9251-47fb-bad8-57a23f3df540> (last visited Mar. 5, 2025).

<sup>34</sup> S. [736.04117\(1\)\(b\), F.S.](#)

<sup>35</sup> "Absolute power" means a power to invade trust principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support, regardless of whether the term "absolute" is used. A power to invade principal for purposes such as best interests, welfare, comfort, or happiness constitutes an absolute power not limited to specific or ascertainable purposes. S. [736.04117\(1\)\(a\), F.S.](#)

Similarly, [s. 736.04117\(3\), F.S.](#), generally allows an authorized trustee given [limited powers](#) to distribute trust principal to decant, albeit in a more limited manner. Specifically, an authorized trustee with limited power may not, as to the second trust, eliminate any beneficiaries; instead each beneficiary of the first trust must have a “substantially similar”<sup>36</sup> interest in the second trust during the first trust’s term. However, the second trust’s term may still extend beyond the first trust’s term, and the second trust’s instrument may, with respect to any property subject to the extended time period, conceivably change the potential beneficiaries of the second trust by:

- Including language giving the authorized trustee the absolute power to invade the second trust’s principal during the extended time period; or
- Creating powers of appointment in those individuals who were beneficiaries under the first trust and expanding the class of permitted appointees of any powers of appointment existing in the first trust.

Finally, [s. 736.04117\(4\), F.S.](#), generally allows an authorized trustee with power (whether absolute or limited) under the first trust to distribute trust principal to or for the benefit of a beneficiary with a disability<sup>37</sup> to exercise such power by decanting to a [supplemental needs trust](#),<sup>38</sup> subject to certain limitations. Specifically:

- The supplemental needs trust must benefit the beneficiary with the disability;
- The beneficiaries of the second trust may include only beneficiaries of the first trust, and must grant each beneficiary of the first trust, other than the disabled beneficiary, beneficial interests in the second trust which are substantially similar to their respective interests under the first trust; and
- The authorized trustee must determine that such decanting will further the first trust’s purposes.

However, trust decanting, as currently contemplated in Florida law, may have tax consequences (including the need to obtain a new [Employer Identification Number](#)<sup>39</sup> or to redo [Subchapter S elections](#)<sup>40</sup>) and may require the retitling of certain assets to the second trust; further, the decanting may be treated as a [termination](#) for the purposes of a supplemental needs trust under Social Security Administration rules, which would impact the eligibility of a beneficiary with a disability for certain government benefits. To try to avoid these issues, an authorized trustee could consider structuring the decanting as a modification of the first trust, but such a structuring is not expressly authorized under current Florida law.

### *Decanting Notice*

Section [736.04117\(8\), F.S.](#), generally requires the authorized trustee to provide written notification of the manner in which he or she intends to exercise his or her power to invade principal to all of the following parties at least 60 days before the effective date of the authorized trustee’s exercise of such power:

- All qualified beneficiaries of the first trust.
- To the settlor of the first trust, if the settlor is not treated as the owner of first trust for tax purposes;
- All trustees of the first trust; and
- Any person who has the power to remove or replace the authorized trustee of the first trust.<sup>41</sup>

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<sup>36</sup> “Substantially similar” means no material change in a beneficiary’s beneficial interest or in the power to make distributions and that the power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to the power under the first trust to make a distribution directly to the beneficiary. S. [736.04117\(1\)\(i\), F.S.](#)

<sup>37</sup> “Beneficiary with a disability” means a beneficiary of the first trust who the authorized trustee believes may qualify for government benefits based on disability, regardless of whether the beneficiary currently receives those benefits or has been adjudicated incapacitated. S. [736.04117\(1\)\(c\), F.S.](#)

<sup>38</sup> “Supplemental needs trust” means 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. “Government benefits,” in turn, means financial aid or services from any state, federal, or other public agency. S. [736.04117\(1\)\(e\) and \(j\), F.S.](#)

<sup>39</sup> An “Employer Identification Number” is a federal tax ID number for businesses, tax-exempt organizations, and other entities. Internal Revenue Service, *Employer Identification Number*, <https://www.irs.gov/businesses/employer-identification-number> (last visited Mar. 5, 2025).

<sup>40</sup> A “Subchapter S election” is an election by a corporation to pass corporate income, losses, deductions, and credits through to its shareholders for federal tax purposes. Shareholders of so-called “S Corporations” report the flow-through of income and losses on their personal tax returns and are assessed taxes thereon at their individual income tax rates, allowing the corporation to avoid double taxation on the corporate income. Internal Revenue Service, *S Corporations*, <https://www.irs.gov/businesses/small-businesses-self-employed/s-corporations> (last visited Mar. 5, 2025).

<sup>41</sup> If all those required to be noticed waive the notice period as provided by law, the authorized trustee’s power to invade principal must be exercised immediately.

The authorized trustee's obligation to provide such a notice is satisfied when he or she provides to the required parties copies of the proposed instrument exercising the power, the trust instrument of the first trust, and the proposed trust instrument of the second trust. Further, such notice does not limit any beneficiary's right to object to the exercise of the authorized trustee's power to invade principal except as otherwise provided in the Florida Trust Code. However, confusion exists as to whether the decanting notice is a trust disclosure document that would trigger the six-month limitations period for breach of trust claims related to matters disclosed in the notice.

### [Claims Against Former Trustees](#)

Section [736.08125, F.S.](#), generally protects a successor trustee from being held personally liable for certain actions taken by a former trustee in certain situations. Specifically, this section provides that a successor trustee is not personally liable for actions taken by a former trustee, nor does any successor trustee have a duty to institute any proceeding against a former trustee, for any of the former trustee's actions as trustee under any of the following circumstances:

- As to a successor trustee who succeeds a trustee who was also the settlor of a trust that was revocable during the time that the settlor serves as trustee;
- As to any beneficiary who has waived any required accounting, but only as to the periods included in the waiver;
- As to any beneficiary who has released the successor trustee from the duty to institute any proceeding or file any claim;
- As to any person who is not an eligible beneficiary; or
- As to any beneficiary:
  - If a super-majority of the eligible beneficiaries has released the successor trustee;
  - If the eligible beneficiary has not delivered a written request to the successor trustee to institute an action or file a claim against the former trustee within six months after the date the successor trustee accepted the trusteeship, if the successor trustee notified the beneficiary in writing of such acceptance; or
  - For any action or claim that the eligible beneficiary is barred from bringing against the former trustee.

However, this section clarifies that nothing therein affects the former trustee's liability or a successor trustee's or beneficiary's right to pursue an action or claim against the former trustee. Taking this together, Florida law currently reads to suggest that, where a beneficiary is barred from bringing an action or claim against a former trustee, the successor trustee might still be able to do so in his or her discretion.

### [Ademption by Satisfaction](#)

Section [732.609, F.S.](#), under the Florida Probate Code,<sup>42</sup> addresses ademption by satisfaction in the case of a will<sup>43</sup> – that is, what happens when property that is to be devised by a testator's<sup>44</sup> will is no longer a part of the testator's estate<sup>45</sup> at the time of his or her death because it was given to someone during the testator's lifetime. Specifically, this section provides that property that a testator gave to someone in the testator's lifetime is treated as a satisfaction of a devise to that person 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 thereof; or
- The devisee acknowledges in writing that the gift is in satisfaction of the devise.

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<sup>42</sup> The Probate Code is codified in the following chapters of Florida law: [ch. 731, F.S.](#); [ch. 732, F.S.](#); [ch. 733, F.S.](#); [ch. 734, F.S.](#); and [ch. 735, F.S.](#)

<sup>43</sup> "Will" means a testamentary instrument executed by a person in the manner prescribed in the Florida Probate Code, which disposes of the person's property on or after his or her death. S. [731.201\(40\), F.S.](#)

<sup>44</sup> "Testator" means a person who has died and left a will. Legal Information Institute, *Testator*, <https://www.law.cornell.edu/wex/testator> (last visited Mar. 5, 2025).

<sup>45</sup> "Estate" means the property of a decedent that is the subject of administration, which, in turn, is the legal process that ensures the orderly distribution of a decedent's assets and the settlement of his or her debts. S. [731.201\(14\), F.S.](#)



Under this section, 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 testator's death, whichever occurs first.

In some instances, a person considering how best to distribute his or her property upon his or her death may choose to place the property into a revocable trust in lieu of devising it by will; however, the Florida Trust Code does not currently contemplate the concept of ademption by satisfaction in the case of a revocable trust. In other words, the Trust Code does not address what happens when property that is to be devised to or from a revocable trust is not part of the trust's assets when the trust becomes irrevocable (that is, when the settlor dies) because it was given to someone during the settlor's lifetime.

### [Community Property Trusts](#)

Generally speaking, Florida is a "common law property" state, meaning that assets and debts acquired during marriage are, with few exceptions, subject to equitable (though not necessarily equal) distribution by the courts upon a dissolution of the marriage. This is in contrast to "community property" states, where assets and debts acquired during marriage are, with few exceptions, owned (or owed) equally by both spouses and divided equally by the courts upon a dissolution of the marriage. However, since 2021, Part XV of the Florida Trust Code has allowed married persons to transfer property to a "community property trust," essentially establishing "community property" in Florida, the benefit of which may be significant income tax savings for a settlor spouse upon the other settlor spouse's death.<sup>46</sup>

Under [s. 736.1502\(1\), F.S.](#), "community property" means the property and the appreciation of income from the property owned by a qualified trustee of a community property trust during the settlor spouses' marriage, which property and the appreciation of income is "deemed to be" community property for the purposes of general law. Further, under [s. 736.1502\(2\), F.S.](#), of this Part, "community property trust" means an express trust,<sup>47</sup> "created" on or after July 1, 2021, that complies with [s. 736.1503, F.S.](#); this section in turn provides that an arrangement is a community property trust if one or both of the settlor spouses transfers property to a trust that:

- Expressly declares that the trust is a community property trust;
- Has at least one trustee who is a qualified trustee;
- Is signed by both settlor spouses consistent with the formalities required for trust execution; and
- Contains statutorily-specified language at the beginning of the community property trust agreement relating to the arrangement's consequences.

Property that may be transferred to a community property trust includes [homestead property](#);<sup>48</sup> however, confusion exists as to whether such a transfer is considered a [change of ownership](#)<sup>49</sup> for property tax appraisal purposes, or instead a transfer of legal or equitable ownership between spouses. Whether such a transfer is a change of ownership matters, as current Florida law provides a tax benefit (known as the "Save Our Homes" benefit) that limits the rate at which a property tax assessment on homestead property may increase per year following the first assessment after a home receives a homestead exemption upon a change of ownership; currently, that annual increase is limited to three percent of the previous years' value or the percent change in the Consumer Price Index,<sup>50</sup> whichever is less.<sup>51</sup> However, a change of ownership would trigger a new property tax assessment, the assessed value of which would then serve as the baseline for the Save Our Homes benefit; practically speaking, property taxes on the home may increase as a result.<sup>52</sup>

<sup>46</sup> There are also ramifications for how courts distribute property during a dissolution of marriage proceeding, not discussed here.

<sup>47</sup> An "express trust" is a trust created with the settlor's express intent, usually declared in writing. *Byrne Realty Co. v. South Florida Farms Co.*, 89 So. 318 (Fla. 1921).

<sup>48</sup> Under Florida law, when someone owns property that is his or her permanent residence, and where such property is no more than half an acre within a municipality or 160 acres within an unincorporated area of a county, the property owner may be eligible to receive a homestead exemption that would decrease the property's taxable value by up to \$50,000. Property that qualifies for such an exemption is known as "homestead property." [Art. VII, s. 6, Fla. Const.](#); [s. 196.031, F.S.](#)

<sup>49</sup> "Change of ownership" means any sale, foreclosure, or transfer of legal title or beneficial title in equity to any person, absent an exception; such exceptions include the transfer of legal or equitable title between spouses. [S. 193.155, F.S.](#)

<sup>50</sup> The Consumer Price Index is a measure of the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services. U.S. Bureau of Labor Statistics, *Consumer Price Index*, <https://www.bls.gov/cpi/> (last visited Mar. 5, 2025).

<sup>51</sup> [S. 193.155, F.S.](#); Florida Department of Revenue, *Save Our Homes Assessment Limitation and Portability Transfer*, <https://floridarevenue.com/property/Documents/pt112.pdf> (last visited Mar. 5, 2025).

<sup>52</sup> *Id.*

Further, confusion exists as to whether an existing community property trust formed under the laws of a foreign state but then amended or restated to qualify as a Florida community property trust is “created” on or after July 1, 2021, as the current definition of “community property trust” contemplates. This confusion may impact married couples with existing community property trusts who wish to relocate to Florida and receive the benefits of a Florida community property trust.

Retroactivity

In determining whether a law may be applied retroactively, courts first determine whether the law is procedural, remedial, or substantive in nature.<sup>53</sup> A purely procedural or remedial law may apply retroactively without offending the Constitution, but a substantive law generally may not apply retroactively absent clear legislative intent to the contrary.<sup>54</sup> However, even where the Legislature has expressly stated that a law will have retroactive application, a court may reject that application if the law impairs a vested right, creates a new obligation, or imposes a new penalty.<sup>55</sup> Further, where a law is designed to serve a remedial purpose, a court may decide not to apply the law retroactively where doing so “would attach new legal consequences to events completed before its enactment.”<sup>56</sup>

**BILL HISTORY**

<b>COMMITTEE REFERENCE</b>	<b>ACTION</b>	<b>DATE</b>	<b>STAFF DIRECTOR/ POLICY CHIEF</b>	<b>ANALYSIS PREPARED BY</b>
<a href="#">Civil Justice &amp; Claims Subcommittee</a>	18 Y, 0 N, As CS	3/5/2025	Jones	Mawn
THE CHANGES ADOPTED BY THE COMMITTEE: Made technical changes which conformed the House Bill to the Senate Bill.				
<a href="#">Insurance &amp; Banking Subcommittee</a>				
<a href="#">Judiciary Committee</a>				

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**THIS BILL ANALYSIS HAS BEEN UPDATED TO INCORPORATE ALL OF THE CHANGES DESCRIBED ABOVE.**  
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<sup>53</sup> A procedural law merely establishes the means and methods for applying or enforcing existing duties or rights. A remedial law confers or changes a remedy, i.e., the means employed in enforcing an existing right or in redressing an injury. A substantive law creates, alters, or impairs existing substantive rights. *Windom v. State*, 656 So. 2d 432 (Fla. 1995); *St. John’s Village I, Ltd. v. Dept. of State*, 497 So. 2d 990 (Fla. 5th DCA 1986); *McMillen v. State Dept. of Revenue*, 74 So. 2d 1234 (Fla. 1st DCA 1999).

<sup>54</sup> *State Farm Mutual Automobile Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995).

<sup>55</sup> *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873 (Fla. 2010).

<sup>56</sup> *L. Ross, Inc. v. R.W. Roberts Const. Co.*, 481 So. 2d 484 (Fla. 1986).