

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 Judiciary Committee

BILL: CS/SB 2164

INTRODUCER: Judiciary Committee and Senator Jones

SUBJECT: Trust Administration

DATE: March 27, 2008 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Maclure	JU	Fav/CS
2.			BI	
3.				
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill amends s. 736.0703, F.S., to allow a person to create a trust and allocate various responsibilities among more than one trustee. It provides that except in cases of willful misconduct by the directed trustee of which the excluded trustee has actual knowledge, an excluded trustee is not liable, individually or as a fiduciary, for any consequence that results from compliance with the exercise of the power. The excluded trustees are relieved from any obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of the power. The trustee or trustees having the power to direct or prevent actions of the trustees shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect the exercise of the power.

The bill amends s. 736.0802(10), F.S., to remove the requirement on a trustee to seek prior court approval to pay costs or attorney's fees to defend against an allegation of breach of trust. It also requires a trustee to provide written notice to qualified beneficiaries that attorney's fees and costs may be paid from the trust.

The bill revises time limitations for the bringing of legal claims by a beneficiary against a trustee for breach of trust. The bill provides that all claims by a beneficiary against a trustee are barred upon the later of:

- Ten years from the date that the trust terminates, the trustee resigns, or the fiduciary relationship between the trustee and the beneficiary otherwise ends; or
- Twenty years after the date of the act or omission of the trustee that is the basis of the complaint; or
- Forty years after the date the trust terminates, the trustee resigns, or the fiduciary relationship between the trustee and the beneficiary otherwise ends.

Statutes of repose can be extended by 30 years upon a showing of clear and convincing evidence by the beneficiary that a trustee actively concealed facts supporting a cause of action. The failure of the trustee to take corrective action is not a separate act or omission and does not extend the period of repose.

The bill amends sections 736.0703, 736.0802, and 736.1008, Florida Statutes.

II. Present Situation:

Trust Code

The Trust Code is the portion of the Florida Statutes that pertains to the administration of trusts. Florida's body of statutory law specific to trusts is found in ch. 736, F.S., and encompasses: trust registration; the jurisdiction of the courts; the duties and liabilities of trustees; the powers of the trustee; charitable trusts; and rules of construction for trusts. This chapter sets forth the default rules for trust administration which can be limited or altered by the grantor (creator of the trust) in the trust instrument. Trust provisions in statute are also supplemented by case law in areas such as requirements for trust creation, treatment of revocable trusts, and rights of creditors.

Florida's Trust Code is modeled on the Uniform Trust Code of 2000. The National Conference of Commissioners on Uniform State Laws adopted the Uniform Trust Code (UTC) in 2000, and it has been enacted in some form in 18 states and the District of Columbia. In Florida, the Ad Hoc Trust Code Revision Committee (the committee) of the Florida Bar reviewed and revised the UTC to account for distinctions found in Florida statutory and case law. The product of the committee's work was the basis of the new Florida Trust Code adopted in 2006.¹

A trust is generally defined as:

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, which arises as a result of a manifestation of an intention to create it. . . .[A] "beneficiary of a trust" [is] one who enjoys the benefit of the administration of the trust by a trustee. The trustee is the person

¹ Chapter 2006-217, L.O.F.

who holds the legal title to the property held in trust, for the benefit of the beneficiary. The settlor, or trustor, is the person who creates the trust.²

A “grantor” is “one who creates or adds to a trust and includes ‘settlor’ or ‘trustor’ and a testator who creates or adds to a trust.”³ The term “trustee” as used in a technical or legal sense means the person who takes and holds the legal title to trust property for the benefit of another.⁴ “Trustee” includes “an original, additional, surviving, or successor trustee, whether or not appointed or confirmed by court.”⁵

Cotrustees

A trust may comprise a variety of liquid and non-liquid assets. A trustee may be a natural person or may be a financial institution. A trustee may be selected for the trustee’s expertise in fiduciary administration, family governance, or management of a diversified portfolio of securities. The expertise of the trustee may be limited, however, when it comes to managing unique assets such as a family business, real estate, or large blocks of stock that cannot be easily diversified. Management of these types of assets may require a different skill set.

Clients sometimes wish to appoint a particular trustee for a trust but also want to have a cotrustee, adviser, or committee (not the trustee) control certain trust decisions. For example, if a grantor funds a trust with stock in the family company, he or she might want to continue to make decisions regarding the purchase, sale, and voting of such stock. Similarly, a family that has a long-standing relationship with a successful money manager might want that manager (not the trustee) to make investment decisions for trust assets. In addition, a client might want someone other than the trustee to decide when to make income or principal distributions to beneficiaries. In these situations, the client wants to minimize the trustee’s involvement in such decisions.

Even if a trust directs the trustee to make investments or distributions on the direction of someone else and relieves it from liability for following such directions, the trustee might have considerable monitoring or other responsibilities and may be subject to potential liability. Under present Florida law, the trustee still has the responsibility to oversee, monitor, and intervene to avoid a serious breach of trust by the advisor. Florida law provides that when a grantor of a trust confers “on a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power *unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust* (emphasis added).”⁶

² 55A Fla. Jur. 2d Trusts s. 1.

³ Section 731.201(19), F.S.

⁴ 90 C.J.S. Trusts s. 2.

⁵ Section 731.201(38), F.S.

⁶ Section 736.0808(2), F.S.

Duty of Loyalty

A trustee has a duty to administer the trust solely in the interests of the beneficiaries.⁷ In the absence of a contrary provision in the trust instrument, a court order,⁸ or a specific statutory exception, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account, or which is otherwise affected by a conflict between the trustee's personal and fiduciary interests, is voidable by an affected beneficiary.⁹ A trustee may not usurp an opportunity properly belonging to the trust.¹⁰ In voting shares of stock or in exercising powers of control over interests in other enterprises, the trustee must act in the best interest of the beneficiaries.¹¹

To be contrasted with the transactions described above are those entered into between the trustee and persons who have close business¹² or personal ties¹³ to the trustee. Such transactions are only presumed to be affected by a conflict between the personal and fiduciary interests of the trustee.¹⁴ Accordingly, the transactions are not voidable per se; they are voidable only if the presumption is not rebutted.

The Trust Code includes several exceptions to the basic duty of loyalty in the interest of fair, effective, and efficient trust administration. Notwithstanding the potential presence of a conflict between the personal and fiduciary interests of a trustee, the trustee's duty of loyalty does not preclude any of the following:

- Payment of reasonable compensation to the trustee or an agreement between a trustee and beneficiary relating to the appointment or compensation of the trustee;¹⁵
- Transactions between the trust and another trust, a decedent's estate, or a guardian of the property of which the trustee is a fiduciary or in which a beneficiary has an interest;¹⁶
- A deposit of trust money in a regulated financial-service institution operated by the trustee;¹⁷
- An advance by the trustee of money for the protection of the trust;¹⁸ or

⁷ See generally, s. 736.0802(1), F.S.

⁸ A trustee who is faced with a transaction that might involve a breach of the duty of loyalty may petition the court for appointment of a special fiduciary to act with respect to the transaction. Section 736.0802(9), F.S.

⁹ Section 736.0802(2), F.S.

¹⁰ Section 736.0802(4), F.S.

¹¹ Section 736.0802(6), F.S.

¹² Section 736.0802(3)(c) and (d), F.S. This includes an officer, director, employee, agent, or attorney of the trustee or a corporation or other person or enterprise in which the trustee (or a person owning a significant interest in the trust) has an interest that might affect the trustee's best judgment.

¹³ Section 736.0802(3)(a) and (b), F.S. This includes the trustee's spouse and the trustee's descendants, siblings, parents, or the spouse of any of them.

¹⁴ Section 736.0802(3), F.S.

¹⁵ Section 736.0802(7)(a) and (b), F.S.

¹⁶ Section 736.0802(7)(c), F.S.

¹⁷ Section 736.0802(7)(d), F.S.

¹⁸ Section 736.0802(7)(e), F.S.

- The employment of persons, including attorneys, accountants, investment advisers, or agents, even if they are the trustee or are associated with the trustee, to advise or assist the trustee in the performance of its administrative duties or the employment of agents to perform any act of administration, whether or not discretionary.¹⁹

The Trust Code empowers a trustee to pay costs or attorney fees incurred in any trust proceeding from trust assets without the approval of any person or a court, except prior court approval is required if an action has been filed, or defense asserted, against the trustee based upon a breach of trust.²⁰ Prior court approval is not required “if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a breach of trust.”²¹ The courts have held that when the personal interests of a trustee conflict with his or her position as trustee in the defense of an action, the trustee must obtain court approval before using trust funds to pay attorney’s fees from trust assets.²²

Limitations on Proceedings Against Trustees

The Trust Code specifies time limitations on bringing claims by a beneficiary against a trustee for breach of trust.²³ With respect to matters adequately disclosed on a trust accounting, the applicable limitation period depends on whether the trustee has sent the beneficiary a limitation notice that relates to that accounting. The shortest limitation period provided is six months. This period applies to actions on matters the trustee has adequately disclosed in a trust accounting or other trust disclosure document when the trustee has provided the beneficiary with a related limitation notice.²⁴ A limitation notice is a written statement informing the beneficiary that an action against the trustee for actions based on any matter adequately disclosed in the accounting may be barred unless the action is commenced within six months of receipt of the accounting or limitation notice, whichever is later.²⁵

A significantly longer limitation period applies to claims involving matters adequately disclosed on a trust accounting when no related limitation notice is sent to the beneficiary. The Trust Code provides that the claims are barred as provided in chapter 95, F.S.,²⁶ typically; this will result in a four-year limitation with the period beginning on the date of receipt of the adequate disclosure.²⁷ An exception applies to matters involving actual or constructive fraud by the trustee. In those cases, the action must be commenced within 12 years; however, the limitation period does not begin until the later of the time the facts giving rise to the action are discovered or the time the facts should have been discovered by an exercise of due diligence.²⁸

¹⁹ Section 736.0802(8), F.S.

²⁰ Section 736.0802(10) F.S.

²¹ *Id.*

²² *Shriner v. Dyer*, 462 So. 2d 1122 (Fla. 4th DCA 1984); *Brigham v. Brigham*, 934 So. 2d 544 (Fla. 3d DCA 2006); and *J.P. Morgan Trust Co. v. Siegel*, 965 So. 2d 1193 (Fla. 4th DCA 2007).

²³ Section 736.1008, F.S.

²⁴ Section 736.1008(2), F.S.

²⁵ Section 736.1008(4)(c), F.S.

²⁶ Section 736.1008(1)(a), F.S.

²⁷ See s. 95.11(3), F.S.

²⁸ Section 95.031(2)(a), F.S.

III. Effect of Proposed Changes:

The bill amends s. 736.0703, F.S., to provide that when the grantor appoints trustees for particular purposes:

- an excluded trustee²⁹ must act in accordance with the exercise of the power given to the included trustee;
- except in cases of willful misconduct on the part of the directed trustee of which the excluded trustee has actual knowledge, an excluded trustee is not liable, individually or as a fiduciary, for any consequence that results from compliance with the exercise of the power, regardless of the information available to the excluded trustee;
- excluded trustees are relieved of any obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of power; and
- a trustee having the power to direct or prevent actions of the trustees shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office, and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power.

The bill amends s. 736.0802(10), F.S., to remove the requirement on a trustee to seek prior court approval to pay costs or attorney's fees to defend against an allegation of breach of trust. If a claim or defense based upon breach of trust is made against a trustee, the bill requires a trustee to provide written notice to qualified beneficiaries that attorney's fees and costs may be paid from the trust. Upon a reasonable showing by evidence in the record or by proffering evidence that provides a reasonable basis for a court to conclude that there has been a breach, a court can enter an order prohibiting the trustee from paying costs or attorney's fees. The court may also order sanctions to trustees who fail to comply with a court order to reimburse the trust for fees taken prior to the court hearing.

The bill amends s. 736.1008(3), F.S., to provide that claims against a trustee for breach of trust based on a matter not adequately disclosed in a trust disclosure document are barred by the statute of limitations under ch. 95, F.S. It adds language to provide that these breach of trust claims accrue when the beneficiary has actual knowledge of the facts upon which the claim is based if such actual knowledge is established by clear and convincing evidence.

It creates a s. 736.1008(6), F.S., to provide that notwithstanding the present limitations in law described in subsections (1), (2), and (3) of the section, all claims by a beneficiary against a trustee are barred:

1. Upon the later of:
 - a. Ten years after the date the trust terminates, the trustee resigns, or the fiduciary relationship between the trustee and the beneficiary otherwise ends, provided that the beneficiary had actual knowledge of the existence of the trust during the 10-year period; or

²⁹ The "excluded trustee" is the trustee not assigned the specific power or purpose at issue.

- b. Twenty years after the date of the act or omission of the trustee that is complained of, provided that the beneficiary had actual knowledge of the existence of the trust during the 20-year period; or
2. Forty years after the date the trust terminates, the trustee resigns, or the fiduciary relationship between the trustee and the beneficiary otherwise ends.

Statutes of repose can be extended by 30 years upon a showing of clear and convincing evidence by the beneficiary that a trustee actively concealed facts supporting a cause of action. The failure of the trustee to take corrective action is not a separate act or omission and does not extend the period of repose. The bill provides that the failure of the trustee to take corrective action shall not be construed as a separate act or omission and shall not be construed to extend the period of limitation. The bill provides that this new subsection of law applies to claims based upon acts or omissions occurring on or after July 1, 2008.

The bill provides an effective date of July 1, 2008.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on March 25, 2008:

The committee substitute:

- Eliminates the provisions creating a lawyer-client privilege between fiduciaries and their counsel.
- Protects excluded trustees from liability for decisions made by the directed trustee unless the excluded trustee has actual knowledge of willful misconduct of the directed trustee.
- Requires a trustee to provide written notice to qualified beneficiaries that attorney's fees and costs may be paid from the trust. The court may also order sanctions against trustees who fail to comply with a court order to reimburse the trust for fees taken prior to the court hearing.
- Extends the statute of repose on trust claims an additional 30 years where a beneficiary can show by clear and convincing evidence that a trustee actively concealed the facts constituting a breach of trust.
- Makes technical changes to conform to the house bill.

- B. **Amendments:**

None.