SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2068

SPONSOR: Banking and Insurance Committee and Senator Grant

SUBJECT: Trusts and Trust Powers

DATE: April 6, 1999 REVISED: ________ ________ ________ ________

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Woodham	Deffenbaugh	BI	Favorable/CS
2.	Forgas	Johnson	JU	Favorable
3.				
4.				
5.				

I. Summary:

The Committee Substitute for Senate Bill 2068 provides circumstances under which a successor trustee is not personally liable for the actions or inactions of a prior trustee and is under no duty to institute an action against a prior trustee or the prior trustee's estate. It also authorizes the award of costs and attorney's fees in trust proceedings.

The bill amends s. 660.41, F.S., to retain a provision scheduled for repeal on September 1, 1999, which exempts banks or associations and trust companies from a prohibition against corporations conducting trust business in Florida. The bill adds to the exemption those banks or associations and trust companies created as a result of an interstate merger transaction with a Florida bank pursuant to s. 658.2953, F.S.

This bill amends the following sections of the Florida Statutes: 737.306, 737.2035, and 660.41.

II. Present Situation:

Successor Trustee Liability

Chapter 737, F.S., relates to the creation and administration of trusts; however, the law governing trusts has been primarily developed in case law rather than statute.

A “trust” may be defined as a fiduciary obligation or relationship protected by the courts in which one person, the “trustee,” holds a property interest for the benefit or use of another, the “beneficiary.” John G. Grimsley, *Fla. Law of Trusts* § 1-1 (4th ed. 1993).The general duty of a trustee is to administer the trust diligently for the benefit of the beneficiaries utilizing any special skills the trustee may possess. §§ 737.301-.302, F.S. (1997). Further, a trustee must administer a trust in accordance with the trust agreement, in good faith, and with due care, diligence and skill. Thomas v. Carlton, 106 Fla. 648, 143 So. 780 (1932). However, the specific duties and liabilities of trustees are ordinarily fixed by the terms of a trust agreement. Jones v. First Nat. Bank, 226 So.2d 834 (4th DCA Fla. 1969).

If a trustee breaches a fiduciary duty or improperly exercises a power, a beneficiary may take legal action against the trustee. Grimsley, *supra,* § 7-1, at 109. Examples of a breach of fiduciary duty include the negligent investment of trust funds, improper expenditures from the trust, misfeasance, malfeasance, breach of loyalty, maladministration, failure to act prudently and reasonably, improper exercise of powers granted by the trust agreement, and breach of trust committed in bad faith or intentionally. Id. John G. Grimsley, a leading trust law attorney in Florida, states that "[t]he scope of liability resting on the trustee must fairly be described as awesome . . . . When the liability potential of the trustee is contrasted to the modest compensation, the services of a qualified trustee must be considered a remarkable economic bargain." Id. at 110.

Certain beneficiaries are entitled to a statement of the trust's accounts on an annual basis, as well as upon termination of the trust or change in the trustee; however, a beneficiary or a beneficiary's representative may waive a trustee's duty to account. § 737.303(4)(a) & (d), F.S. (1997).

A beneficiary is barred from bringing a legal action against a trustee for breach of trust if the action is not commenced within 6 months after the beneficiary receives a final, annual, or periodic accounting or statement fully disclosing the matter. § 737.307, F.S. (1997). In any event, and notwithstanding lack of full disclosure, all claims by a beneficiary against a trustee are barred after the appropriate statute of limitations runs if the beneficiary received a final accounting issued by the trustee and the trustee informed the beneficiary of the location and availability of records for the beneficiary's examination. Id. A beneficiary has "received" an accounting if it is received by the beneficiary or the beneficiary's representative, as appropriate. Id.

A successor trustee has special concerns regarding the liability of a prior trustee who committed improper acts or possibly omitted the performance of certain required actions. Grimsley, *supra,* § 7-1, at 112. Based on the general duty of a trustee to take reasonable steps to enforce claims of the trust, a successor trustee is liable for breach of trust if the successor neglects to take proper steps to compel a predecessor to redress a breach of duty. Id. One writer on this subject expressed a fear that a successor trustee may become a "surety or guarantor for the misdeeds of someone else,[1]" especially if the successor trustee is held liable for failure to redress a predecessor's breach regardless of whether the successor trustee knows, or has reason to know, of the breach.[2]

A professional, corporate fiduciary is often chosen as a trustee because a corporate fiduciary has: permanence, financial responsibility, experience in administration and investments, and less risk of potential personality differences that may arise between an individual trustee and beneficiary. Grimsley, *supra*, §4-1, at 40. However, some corporate fiduciaries in Florida will not accept a successor trusteeship because of potential liabilities for acts of the prior trustees which may be difficult or impossible for the successor trustee to ascertain. Id. at 44.

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[1]Wohl, "The Successor Trustee as Scapegoat," 113 Trusts & Estates 159 (1974).

[2]Report, "Duties and Responsibilities of a Successor Trustee," 10 Real Property, Probate and Trust Journal 310 (1975); 2 Scott on Trusts §177 (4th ed. 1987); 2d Restatement, Trusts, §177.

Trust agreements frequently contain "exoneration clauses" to protect a trustee from liability or to limit liability. Some agreements may contain "exculpatory clauses" which are an attempt to release a trustee from liability for gross negligence, bad faith, or intentional breach of duties. Both types of clauses are narrowly construed by the courts and run the risk of being considered contrary to public policy. Id. at 119. Under current law, a trust agreement may contain an exoneration clause under which a successor trustee is not required to audit the accounts of a prior trustee and the successor trustee is relieved of liability for acts of a prior trustee. Id. at 45. However, the only sure protection for a successor trustee is court approval of the prior trustee's accounting. Id.

The trust administration statutes do not authorize an award of attorney's fees or costs, payable by the trust estate, in trust proceedings brought by beneficiaries against prior trustees. However, an attorney for a trustee is entitled to reasonable compensation for ordinary and extraordinary services as described in statute. §737.2041, F.S. (1997). The general rule is that a trustee is entitled to reimbursement in a reasonable amount for attorney's fees "properly incurred in the administration of the estate, and for the cost of suits properly brought on behalf of the estate." 56 Fla. Jur. 2d § 78.

In addition, the Florida Probate Code states that costs in probate proceedings may be awarded as in chancery actions, that any attorney who renders services to an estate may apply for an order awarding attorney fees, and that the court may, in its discretion, direct from what part of the estate costs and attorney's fees will be paid. § 733.106, F.S. (1997). This provision is the subject of numerous cases in which Florida courts have determined the appropriateness of awarding attorney's fees to beneficiaries in probate proceedings. The Florida Supreme Court declared that "an attorney who has rendered valuable services to an estate . . . may be paid for such services." In re Gleason's Estate, 74 So.2d 360 (Fla. 1954). However, the court further stated that "[i]f the services tend to break down, subtract from or dissipate the estate he cannot be compensated from it." Id. In 1989, the Third District Court of Appeal stated that attorney's fees should not be awarded if the action prolonged litigation, delayed administration, and did not produce a net enhancement in value or increase in assets to justify an award of attorney's fees. In re Estate of Simon, 549 So.2d 210 (Fla. 3d DCA 1989); *review denied,* 560 So.2d 788. More recently, the First District Court of Appeal addressed the issue of attorney's fees in probate proceedings and stated as follows:

> This provision has been construed to permit attorney's fees when the attorney's services were necessary for or beneficial to the probate estate. See In re Gleason's Estate, 74 So.2d 360 (Fla. 1954); Dew v. Nerreter, 664 So. 2d 1179, 1180 (Fla. 5th DCA 1995); Franklin v. Stettin, 579 So.2d 245, 247 (Fla. 3d DCA 1991); In re Estate of Simon, 549 So.2d 210, 212 (Fla.3d DCA 1989), review denied, 560 So. 2d 788 (Fla. 1990). The "benefit" to the estate may include services that enhance the value of the estate, as well as services that successfully give effect to the testamentary intention set forth in the will. Dew v. Nerreter, 664 So.2d at 1180; In re Estate of Lewis, 442 So.2d 290, 292 (Fla. 4th DCA 1983).

In re Estate of Brock, 695 So.2d 714 (Fla. 1st DCA 1996).

It should be noted that the Fourth District Court of Appeal recently stated that §733.106, F.S. (1997), is inapplicable to trust proceedings and authorizes attorney's fees only where services have been rendered to an estate. Nalls v. Millender, 721 So.2d 426 (Fla. 4th DCA 1998).

Fiduciary Powers of Banks and Trust Companies
The current law under s. 660.41, F.S., allows banks or associations and trust companies incorporated under the laws of Florida, having trust powers, and national banking associations or federal associations located in Florida, having trust powers, to act as: (1) a personal representative for an estate; (2) a receiver or trustee under appointment of any court in Florida; (3) assignee, receiver or trustee of any insolvent person or corporation or under any assignment for the benefit of creditors; (4) fiscal agent, transfer agent or registrar of any municipal or private corporation. All other corporations, except those specifically provided for, are prohibited under s. 660.41, F.S., from exercising any of the trust powers listed in (1) - (4).

When Florida authorized interstate banking and branching 2 years ago under s. 658.2953, F.S., after the enactment of the federal Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, interstate bank mergers produced financial services entities with trust powers which were neither chartered in Florida nor nationally chartered, but were chartered in another state.

Since July 1, 1997, pursuant to section 18, chapter 97-30, Laws of Florida, banks or associations and trust companies resulting from an interstate merger transaction with a Florida bank pursuant to s. 658.2953, F.S., and having trust powers, have been authorized to exercise any of the powers or duties and to act in any of the capacities, within the state of Florida, provided for in s. 660.41, F.S. However, this section is scheduled to be repealed on September 1, 1999. The purpose of the repeal date was to give the Division of Banking an opportunity to review the trust laws and recommend any necessary changes to the Legislature. The division has completed its review with no recommended changes to the trust statutes.

Under the current law, there is a possible conflict with federal law since, pursuant to federal law, a national bank based in another state, with no branches in Florida, is permitted to exercise fiduciary powers in Florida. The Florida statute appears to preclude this exercise, because if a bank is not authorized, qualified, located or chartered in Florida, it is limited in the fiduciary powers and duties it can exercise.

III. Effect of Proposed Changes:

Section 1. Amends s. 737.306, F.S. The committee substitute provides statutory limitations on the liability of successor trustees under certain circumstances. Specifically, a successor trustee will not be personally liable for actions or inactions of a prior trustee and will not have a duty to institute any action against any prior trustee, nor file any claim against any prior trustee's estate, for any of the prior trustee's acts or omissions under the following circumstances:

- if the prior trustee was a grantor of a trust that was revocable during the time that the grantor served as trustee;
- as to any beneficiary who waives an accounting, but only for the period included in the waiver;
- as to any beneficiary who releases the successor trustee from the duty to institute an action or file a claim;
- as to any person who is not a beneficiary as defined in § 737.303(4)(b), F.S. (1997);
- as to any beneficiary described in § 737.303(4)(b), F.S. (1997), if a “super majority” of the beneficiaries releases the successor trustee;

- as to any beneficiary described in § 737.303(4)(b), F.S. (1997), who does not properly commence a claim against a prior trustee within 6 months after the successor trustee's acceptance of the trust, if the beneficiary was notified of the acceptance and the notice advised the beneficiary that legal action must be commenced within 6 months or the beneficiary's right to proceed against the successor trustee would be barred;
- for any action or claim that a beneficiary, as described in § 737.303(4)(b), F.S. (1997), is barred from bringing against the prior trustee.

A "super majority" is at least two-thirds in interest of the beneficiaries, if the interests of the beneficiaries are reasonably ascertainable; otherwise, a "super majority" means at least two-thirds of the number of beneficiaries.

A release or waiver may be exercised by a legal representative or natural guardian of a beneficiary. The bill does not affect the liability of a prior trustee or the right of a successor trustee, or any beneficiary, to pursue an action or claim against the prior trustee.

Section 2. Creates s. 737.2035, F.S. The committee substitute allows costs and attorney's fees incurred in trust proceedings to be paid out of a trust, if the court determines that the attorney rendered services to the trust.

Specifically, if an attorney "has rendered services to a trust," the attorney may apply to the court for an order awarding attorney's fees, and after notice and service upon the trustee and all beneficiaries entitled to an accounting from the trustee, the court shall enter an order on the attorney's application. If the court grants the attorney's application for fees, the court may direct the attorney's fees to be paid from a particular part of the trust.

The language in the bill is similar to a provision in the probate code, which allows recovery of costs and attorney's fees from an estate under certain circumstances. § 733.106, F.S. (1997). Accordingly, case law construing that provision of the probate code may be persuasive to a court during its review of an application for attorney's fees incurred in a trust proceeding.

Section 3. The attorney's fees referenced in Section 2 above, may be awarded only for services rendered by an attorney on or after July 1, 1999.

Section 4. The bill affirmatively retains a provision scheduled for repeal on September 1, 1999, which currently exempts certain banks or associations and trust companies from a prohibition against corporations conducting trust business in Florida. Additionally, the bill amends s. 660.41, F.S., to affirm this exemption for banks or associations and trust companies created as a result of an interstate merger transaction with a Florida bank under s. 658.2953, F.S.
The bill also resolves the apparent conflict with federal law by allowing national banking associations or federal associations, which do not have banks in Florida, to continue to exercise trust powers in Florida already granted to them under federal law.

Section 5. Provides for an effective date of July 1, 1999.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Successor Trustee Liability
Proponents of the bill assert the attorney's fees provision was added to protect the interests of a minority beneficiary by allowing a minority beneficiary to recover attorney's fees from the trust estate under certain circumstances if the minority beneficiary is forced to proceed against the prior trustee. Florida Bankers Association, Trust Law Reformation (February 18, 1999). The provisions related to successor trustee liability "were designed to give successor trustees more certainly (sic) that they will be free from litigation while at the same time protecting the fundamental interests of beneficiaries." Florida Bankers Association, Trust Law Reformation (February 18, 1999). The bill will streamline the successor trustee decision making process, which has been a barrier to successor trustee business in the state of Florida.

Fiduciary Powers of Banks and Trust Companies
The bill will benefit banks, created as a result of an interstate merger transaction with a Florida bank, to have the same trust powers as those powers given to other out-of-state, nationally chartered banks. If the bill is not enacted, banks chartered in states other than Florida will not be able to continue the trust work they have been performing in Florida.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.