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DATE: March 6, 2002

**HOUSE OF REPRESENTATIVES
COUNCIL FOR SMARTER GOVERNMENT
ANALYSIS**

BILL #: CS/HB 1127
RELATING TO: Probate & Trusts
SPONSOR(S): Council for Smarter Government and Representative Negron
TIED BILL(S): none

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIAL OVERSIGHT YEAS 10 NAYS 0
 - (2) COUNCIL FOR SMARTER GOVERNMENT YEAS 12 NAYS 0
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

This bill

- specifies that a person who may take by virtue of the exercise of an exercisable power of amendment or revocation over estate or trust property is bound by agreements and disclosures with respect to that power, but only to the extent of that person's interests;
- allows a decedent's surviving spouse to satisfy his or her elective share out of property interests contingent on the surviving spouse taking under the elective share, to the extent that including such interests does not diminish any others that would satisfy the elective share;
- makes clear that the presumption of undue influence by an actively involved substantial beneficiary under a will, who is in a fiduciary or confidential relationship with the testator, is a policy-based shifting of the burden of proof;
- provides that that an early claim against an estate is not time-barred;
- requires that any trust instrument creating a trust in which the grantor of the trust retains a right of revocation "must contain a notice that the trustee may have duties and responsibilities in addition to those described" in the trust instrument;
- provides validity to, and a framework for, trusts for the care of animals;
- makes liability for receiving improper trust distributions identical to current statutory liability for receiving improper probate distributions;
- specifies minimum form and content requirements for trust accountings;

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- requires a trustee or a substituted fiduciary to provide a beneficiary with a "limitation notice" before breach of trust or breach of fiduciary duty actions by that beneficiary founded on matters disclosed in trust accountings become subject to a six-month statute of limitations, instead of the four years plus statutory tolling provided by the general civil statute of limitations; and
- provides for the retrospective and prospective application of these changes.

There are constitutional and other concerns regarding this bill. See Section V. Comments herein.

This bill does not appear to have a fiscal impact on state or local governments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |

For any principle that received a “no” above, please explain: This bill requires particular language to be included in certain types of trust instruments, and imposes an additional requirement on trustees and substituted fiduciaries in order to avail themselves of current statutes of limitations.

B. PRESENT SITUATION:

See Section-by-Section Analysis.

C. EFFECT OF PROPOSED CHANGES:

See Section-by-Section Analysis.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. amending s. 731.303, regarding trust proceedings

Present Situation. Section 731.303, F.S., provides notice requirements with respect to trust administration proceedings, and specifies who is bound by what documents in such proceedings. Section 731.303(5), F.S., currently reads:

When a sole holder or coholder of a general, special, or limited power of appointment, including a power of amendment or revocation to the extent that the power has not become unexercisable in fact, persons who may take by virtue of the exercise or nonexercise of the power, are subject to the power.

Effect of Proposed Changes. This bill limits the effect of s. 731.303(5), F.S., to exercisable powers of amendment or revocation over estate or trust property. This bill further specifies that a person who may take by virtue of such a power being exercised is bound by agreements and disclosures with respect to that power, but only to the extent of that person’s interests. Finally, this bill also makes stylistic changes throughout s. 731.303, F.S.

Section 2. amending s. 732.2075, F.S., regarding a surviving spouse’s elective share

Present Situation. Section 732.201, F.S., provides that “[t]he surviving spouse of a person who dies domiciled in Florida has the right to a share of the elective estate of the decedent ... to be designated the elective share.” A decedent’s elective estate includes his or her probate estate, plus

numerous fractional, future or contingent ownership interests, and a limited category of former interests.¹ A surviving spouse's elective share is defined as 30% of the decedent's elective estate.²

In the absence of any contrary provision in the decedent's will or in a trust referred to in the decedent's will, s. 732.2075, F.S., specifies the priority of sources from which to pay a surviving spouse's elective share. In order, these are

- (a) To the extent paid to or for the benefit of the surviving spouse, the proceeds of any term or other policy of insurance on the decedent's life if, at the time of decedent's death, the policy was owned by any person other than the surviving spouse.
- (b) To the extent paid to or for the benefit of the surviving spouse, amounts payable under any [pension, retirement, deferred compensation or similar plan].
- (c) To the extent paid to or for the benefit of the surviving spouse, the decedent's one-half of any property [covered by the Florida Uniform Disposition of Community Property Rights at Death Act, ss. 732.216-732.228, F.S., or that is real property defined as community property by the jurisdiction it is located in].
- (d) Property held for the benefit of the surviving spouse in a qualifying special needs trust.
- (e) Property interests included in the elective estate that pass or have passed to or for the benefit of the surviving spouse.
- (f) Property interests that would have satisfied the elective share any preceding paragraph of this subsection but were disclaimed.

Effect of Proposed Changes. This bill amends s. 732.2075(1)(e), F.S., so that that paragraph includes interests that are contingent on the surviving spouse making the election in favor of the elective share as opposed to taking under the decedent's will (or under statutory intestacy,³ as the case may be). However, this bill includes these contingent interests in paragraph (e) "only to the extent that such contingent interests do not diminish other property interests that would be applied to satisfy the elective share in the absence of the contingent interests."

Section 3. amending s. 733.107, F.S., regarding presumptions and burdens of proof in will contests

Present Situation. The Florida Evidence Code, ch. 90, F.S, defines presumptions and their effects. "[A] presumption is an assumption of fact which the law makes from the existence of another fact or group of facts found or otherwise established."⁴ Section 90.302, F.S., specifies that

[e]very rebuttable presumption is either:

- (1) A presumption affecting the burden of producing evidence and requiring the trier of fact to assume the existence of the presumed fact, unless credible evidence sufficient to sustain a finding of the nonexistence of the presumed fact is introduced, in which event, the existence or nonexistence of the presumed fact shall be determined from the evidence without regard to the presumption; or

¹ See s. 732.2035, F.S. (defining "[p]roperty entering into elective estate.")

² See s. 732.2065, F.S.

³ See ss. 732.101-732.111, F.S.

⁴ Section 90.301(1), F.S.

(2) A presumption affecting the burden of proof that imposes upon the party against whom it operates the burden of proof concerning the nonexistence of the fact.

A presumption that serves “primarily to facilitate the determination of the particular action in which the presumption is applied, rather than to implement public policy,” shifts only the burden of producing evidence.⁵ Such a presumption is called a “vanishing presumption” because any evidence to rebut the presumption eliminates the presumption from the proceeding altogether.⁶ Any other presumption (*i.e.*, a presumption that does serve primarily to implement public policy) shifts the burden of proof, and therefore does not “vanish” upon production of rebuttal evidence.⁷

Section 733.107, F.S., currently reads:

In all proceedings contesting the validity of a will, the burden shall be upon the proponent of the will to establish prima facie its formal execution and attestation. Thereafter, the contestant shall have the burden of establishing the grounds on which the probate of the will is opposed or revocation sought.

Under longstanding case law, there is a presumption that a will was procured by undue influence when a person in a fiduciary or confidential relationship with the testator was active in preparing or executing the will and that person is a substantial beneficiary under the will.⁸ The Supreme Court of Florida first expounded this doctrine in the 1941 case of *In re Aldrich's Estate*,⁹ where it held that this presumption shifts the burden of proof. Thirty years later, in *In re Estate of Carpenter*,¹⁰ the Court reversed itself and ruled that the presumption shifts only the burden of producing evidence.

In 1976, the Legislature enacted the Florida Evidence Code, which became effective on July 1, 1979.¹¹ Since then, courts have divided over whether the Evidence Code legislatively overrules *Carpenter* by making the presumption of undue influence shift the burden of proof.¹²

Effect of Proposed Changes. This bill amends s. 733.107, F.S., to make clear that the presumption of undue influence by an actively involved substantial beneficiary who is in a fiduciary or confidential relationship with the testator is a policy-based shifting of the burden of proof. This ensures that the presumption does not “vanish” upon production of rebuttal evidence by the proponent of the will.

Section 4. amending s. 733.702, F.S., regarding notice to a decedent's creditors

Present Situation. The personal representative of a decedent is required to publish notice to the decedent's creditors once a week for two consecutive weeks, and to serve notice on the decedent's creditors if reasonably possible.¹³ For claims against a decedent to survive the decedent's death and be transferred to his or estate, and for certain expenses directly related to the decedent's death

⁵ Section 90.303, F.S.

⁶ *Insurance Co. of Pennsylvania v. Guzman's Estate*, 421 So.2d 597, 601 (Fla. 4th DCA 1982).

⁷ See s. 90.304, F.S. See also *Caldwell v. Division of Retirement*, 372 So.2d 438 (Fla. 1979).

⁸ See *Cripe v. Atlantic First Nat'l Bank*, 422 So.2d 820 (Fla. 1980); *Zinnser v. Gregory*, 77 So.2d 611 (Fla. 1955); *In re Palmer's Estate*, 48 So.2d 732 (Fla. 1950). See generally Judge John E. Fennelly, *Up From Carpenter: Undue Influence in Will Contests*, 16 NOVA L. REV. 515 (1991).

⁹ 3 So.2d 856 (Fla. 1941).

¹⁰ 253 So.2d 697 (Fla. 1971).

¹¹ See s. 1, ch. 76-237, L.O.F.

¹² See, e.g., *Estate of Brock*, 692 So.2d 907 (Fla. 1st DCA 1996); *Gorman v Harrison*, 559 So.2d 643 (Fla. 3d DCA 1990); *Thomas for Fennell v. Lampkin*, 470 So.2d 37 (Fla. 5th DCA 1985); *In re Estate of Davis*, 462 So.2d 12 (Fla. 4th DCA 1984) (“*Davis II*”); *In re Estate of Davis*, 428 So.2d 774 (Fla. 4th DCA 1983) (“*Davis I*”); *Jordan v. Noll*, 423 So.2d 368 (Fla. 1st DCA 1983).

¹³ See s. 733.2121, F.S.

to attach to his or her estate, the decedent's creditors must file in the probate proceeding within a statutory claims period or be barred from pursuing the claim.¹⁴ This period is provided by the "statute of nonclaim," s. 733.702(1), F.S., which presently reads:

If not barred by s. 733.710, no claim or demand against the decedent's estate that arose before the death of the decedent, including claims of the state and any of its subdivisions, even if the claims are unmatured, contingent, or unliquidated; no claim for funeral or burial expenses; no claim for personal property in the possession of the personal representative; and no claim for damages, including, but not limited to, an action founded on fraud or another wrongful act or omission of the decedent, is binding on the estate, on the personal representative, or on any beneficiary unless filed in the probate proceeding within the later of 3 months after the time of the first publication of the notice to creditors or, as to any creditor required to be served with a copy of the notice to creditors, 30 days after the date of service on the creditor, even though the personal representative has recognized the claim or demand by paying a part of it or interest on it or otherwise. The personal representative may settle in full any claim without the necessity of the claim being filed when the settlement has been approved by the interested persons.

The Supreme Court of Florida has ruled that requiring claims to be filed "within" the statute of nonclaim's specified time-frame effectively bars claims that are filed early, *i.e.*, claims filed before a decedent's personal representative publishes or serves the statutorily required notice to creditors.¹⁵

Effect of Proposed Changes. This bill amends s. 733.702(1), F.S., to change the filing deadline to "on or before" the specified dates, rather than "within." Thus, an early claim is not time-barred. This bill also makes grammar and style changes.

Section 5. creating s. 737.115, F.S., regarding notice of a trustee's duties in a trust instrument

Present Situation. Section 733.707(1), F.S., breaks down "the expenses of the administration and obligations of [a] decedent's estate" into eight classes and specifies the order among those classes in which a decedent's personal representative must pay those claims. In addition, s. 733.707, F.S., further provides, in pertinent part:

(2) After paying any preceding class, if the estate is insufficient to pay all of the next succeeding class, the creditors of the latter class shall be paid ratably in proportion to their respective claims.

(3) Any portion of a trust with respect to which a decedent who is the grantor has at the decedent's death a right of revocation, as defined in paragraph (e), either alone or in conjunction with any other person, is liable for the expenses of the administration and obligations of the decedent's estate to the extent the decedent's estate is insufficient to pay them as provided in s. 733.607(2).

...

(e) For purposes of this subsection, a "right of revocation" is a power retained by the decedent, held in any capacity, to:

1. Amend or revoke the trust and revest the principal of the trust in the decedent; or
2. Withdraw or appoint the principal of the trust to or for the decedent's benefit.

¹⁴ See s. 733.702(2), F.S.

¹⁵ See *May v. Illinois Nat. Ins. Co.*, 771 So.2d 1143 (Fla. 2000).

Section 733.607(2), F.S., entitles the personal representative of a decedent's estate to payment of any insufficiency in satisfying claims against the estate from the trustee of any trust granted by the decedent in which the decedent retained a right of revocation.

Chapter 737, F.S., entitled "Trust Administration," contains all of Florida's statutory requirements with respect to the basic form of trusts (and of the trust instruments creating them).

Effect of Proposed Changes. This bill creates a new s. 737.115, F.S. This new section requires that any trust instrument creating a trust in which the grantor of the trust retains a right of revocation "must contain a notice that the trustee may have duties and responsibilities in addition to those described" in the trust instrument.

The new s. 737.115, F.S., also provides a model version of this new notice, although the new section does not require conformity with the model notice. The statutory model notice reads: "The trustee of a trust may have duties and responsibilities in addition to those described in the instrument creating the trust. If you have questions you should obtain legal advice."

In addition, new s. 737.115, F.S., provides that absence of the notice required by the new section from a trust instrument does not affect a trust's validity, nor does absence of the notice relieve a trustee from any duties. Finally, the new section provides that no one is liable for failing to include in a trust instrument the notice that the section requires.

Section 6. creating s. 737.116, F.S., regarding trusts for the care of animals

Present Situation. Neither Florida statutes nor case law currently address the validity of trusts for the care of animals. However, other states have treated such trusts as valid charitable trusts.¹⁶

Effect of Proposed Changes. This bill provides that trusts for the care of animals are valid, and that such trusts terminate upon the death of the last animal for which the trust is established. In addition, this bill provides for persons to be designated to enforce such trusts in the nature of a beneficiary, and allows courts to appoint such a person if none is specified in the trust instrument. Finally, this bill specifies an order in which to distribute any trust assets remaining upon termination of a trust for the care of animals, and provides for this section to apply to trusts created on or after January 1, 2003.

Section 7. creating s. 737.209, F.S., regarding liability for improper trust distributions

Present Situation. Current does not address liability for receiving improper trust distributions; however, s. 733.812, F.S., addresses liability for improper distributions from a decedent's probate estate. In language extensively revised in 2001,¹⁷ s. 733.812, F.S. provides:

A distributee or a claimant who was paid improperly must return the assets or funds received, and the income from those assets or interest on the funds since distribution or payment, unless the distribution or payment cannot be questioned because of adjudication, estoppel, or limitations. If the distributee or claimant does not have the property, its value at the date of disposition, income thereon, and gain received by the distributee or claimant must be returned.

Effect of Proposed Changes. This bill adopts the language of s. 733.812, F.S., to apply to liability for receiving improper trust distributions. This bill thereby makes liability for receiving improper trust distributions identical to liability for receiving improper probate distributions.

¹⁶ See 15 AM. JUR. 2D CHARITIES § 71 and authorities cited therein.

¹⁷ See s. 162, ch. 2001-226, L.O.F.

Section 8. amending s. 737.303, F.S., regarding a trustee's duty to inform and account to beneficiaries

Present Situation. Section 737.303, F.S., requires a trustee to "keep the beneficiaries of [a] trust reasonably informed of the trust and its administration." As a part of this requirement, under s. 737.303(4), F.S., a trustee must provide beneficiaries with "a statement of the accounts of the trust annually and upon termination of the trust or upon change of the trustee[.]" This provision gives each beneficiary of a trust an enforceable cause of action for an accounting against the trustee of that trust.¹⁸ However, trustees of revocable trusts under s. 733.707(3), F.S., owe this duty to provide statements of accounts only to the grantor of the trust or the grantor's legal representative.¹⁹

Effect of Proposed Changes. This bill amends s. 737.303(4), F.S., to change all of that section's references to "a statement of accounts" to "a trust accounting," to conform with the trust accounting requirements provided in this bill's new s. 737.3035, F.S. (See below).

This bill also creates a new s. 737.303(5), F.S. This new subsection provides that s. 737.303, F.S., applies to trust accountings for accounting periods beginning on or after January 1, 2003.

Section 9. creating s. 737.3035, F.S., regarding trust accounting

Present Situation. The required form and contents of a trustee's statements of trust accounts is currently governed entirely by case law. Courts require that such statements be "clear, distinct, and accurate[.]"²⁰ but do not require particular contents to always be included in them.

Effect of Proposed Changes. This bill creates a new s. 737.3035, F.S. This new section provides a formal framework and minimum contents for any "trust accounting," as required by this bill's amended s. 737.303, F.S. (See above). This new section specifies that trust accountings cover the period from the date of the last accounting or, if none, from the date when the trustee became accountable. Furthermore, under new s. 737.3035(1), trust accountings must be "reasonably understandable" and must "adequately disclose[] the information required in subsection (2)."

New s. 737.3035(2), F.S., requires a trust accounting to begin with a statement identifying the trust, the trustee and the period of time covered by the accounting. Under this new subsection, a trust accounting must

- state all cash and property transactions,
- state all "significant transactions affecting administration" specifically including compensation paid to the trustee,
- "[t]o the extent feasible," identify and value trust assets on hand at the close of the accounting period, including both acquisition or carrying value and estimated current value,
- "[t]o the extent feasible," show significant transactions not affecting value, such as name changes in investment holdings, changes in custodial institutions, or stock splits, and

¹⁸ See, e.g., *Weiss v. Courshon*, 618 So.2d 255 (Fla. 3d DCA 1993).

¹⁹ See s. 737.303(4)(c), F.S.

²⁰ *Benbow v. Benbow*, 157 So. 512, 519 (1934). See also *Bravo v. Sauter*, 727 So.2d 1103 (Fla. 4th DCA 1999); *Beck v. Beck*, 383 So.2d 268 (Fla. 3d DCA 1980). See generally 55A FLA. JUR 2D TRUSTS § 168.

- reflect the allocation of funds received and distributed between income and principal when such allocation affects any beneficiary's interests.

Finally, new s. 737.3035(3), F.S., provides that this new section's requirements apply to trust accountings for accounting periods beginning on or after January 1, 2003.

Section 10. amending s. 737.307, F.S., regarding statutes of limitations for breach of trust proceedings against trustees

Present Situation. Section 737.307, F.S., currently provides:

Unless previously barred by adjudication, consent, or limitations, an action against a trustee for breach of trust is barred for any beneficiary who has received a final, annual, or periodic account or other statement fully disclosing the matter unless a proceeding to assert the claim is commenced within 6 months after receipt of the final, annual, or periodic account or statement. In any event, and notwithstanding lack of full disclosure, all claims against a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for his or her examination are barred as provided in chapter 95.

In *Weiss v. Courshon*,²¹ the Third District Court of Appeal explained that the following could constitute a breach of trust by a trustee:

[T]he making of unauthorized payments to other beneficiaries, the conversion of the trust property, negligence in recording instruments affecting the trust property, or in obtaining security, or in collecting the trust property, or in the retention of property until it is worthless, wrongful sale of trust property, or negligence or misconduct in the making or retaining of investments[.]²²

Chapter 95, F.S., provides general statutes of limitations for most civil causes of action. Civil actions founded on either negligence,²³ fraud,²⁴ or any intentional tort,²⁵ or not otherwise provided with a different statute of limitations elsewhere,²⁶ must be brought within four years. However, this statute of limitations is tolled under s. 95.051(1), F.S., by:

- (a) Absence from the state of the person to be sued.
- (b) Use by the person to be sued of a false name that is unknown to the person entitled to sue so that process cannot be served on the person to be sued.
- (c) Concealment in the state of the person to be sued so that process cannot be served on him or her.
- (d) The adjudicated incapacity, before the cause of action accrued, of the person entitled to sue. In any event, the action must be begun within 7 years after the act, event, or occurrence giving rise to the cause of action.

²¹ 618 So.2d 255 (Fla. 3d DCA 1993).

²² *Id.* at 257 (citing George T. Bogert, *The Law of Trusts and Trustees* § 861, at 27-31).

²³ *See* s. 95.11(3)(a), F.S.

²⁴ *See* s. 95.11(3)(j), F.S.

²⁵ *See* s. 95.11(3)(o), F.S.

²⁶ *See* s. 95.11(3)(p), F.S.

(e) Voluntary payments by the alleged father of the child in paternity actions during the time of the payments.

(f) The payment of any part of the principal or interest of any obligation or liability founded on a written instrument.

(g) The pendency of any arbitral proceeding pertaining to a dispute that is the subject of the action.

(h) The minority or previously adjudicated incapacity of the person entitled to sue during any period of time in which a parent, guardian, or guardian ad litem does not exist, has an interest adverse to the minor or incapacitated person, or is adjudicated to be incapacitated to sue; except with respect to the [qualified, but generally two-year] statute of limitations for a claim for medical malpractice as provided in s. 95.11. In any event, the action must be begun within 7 years after the act, event, or occurrence giving rise to the cause of action.

Therefore, pursuant to s. 737.307, F.S., an action by a beneficiary for a breach of trust must be brought within six months if that action is based on a matter fully disclosed in the last statement of trust accounts to which that beneficiary was entitled. However, if such a matter is not fully disclosed, a beneficiary may bring suit against a trustee for breach of trust up to four years after the cause of action accrues, and may also extend that period to as many as seven years through the tolling provisions of s. 95.051(1), F.S.

Effect of Proposed Changes. This bill amends s. 737.307, F.S., throughout, to replace references in that section to “accounts or other statements” with references to “trust disclosure documents.” This bill defines a “trust disclosure document” as a trust accounting (see Section 9 above) or any other written report of the trustee.

This bill changes the threshold for the six-month statute of limitations for breach of trust actions by a beneficiary from “full disclosure” to “adequate disclosure,” which this bill defines as “provid[ing] sufficient information so that a beneficiary knows of a claim or reasonably should have inquired into the existence of a claim with respect to that matter.”

However, for the six-month statute of limitations to attach, instead of the general statute of limitations under ch. 95, F.S., this bill also requires that a trustee deliver a “limitation notice” to a beneficiary. This bill defines a “limitation notice” as:

a written statement of the trustee that an action by a beneficiary against the trustee for breach of trust based on any matter adequately disclosed in a trust disclosure document may be barred unless the action is commenced within 6 months after receipt of the trust disclosure document or receipt of a limitation notice that applies to that trust disclosure document, whichever is later.

This bill allows such a limitation notice to be contained as part of the trust disclosure document that it applies to, or separately if the limitation notice

- accompanies the trust disclosure document, or
- is delivered separately within ten days of the delivery of the trust disclosure document, or
- is contained in another trust disclosure document received within one year, or

- accompanies another trust disclosure document received within one year, or
- is delivered separately within ten days of the delivery of another trust disclosure document received within one year, or
- is received later, if the limitation notice references the trust disclosure document to which it applies, and either is accompanied by a copy of that trust disclosure document, or offers to provide the beneficiary with another copy of that trust disclosure document.

This bill also provides a model limitation notice, although it does not require limitation notices to conform to this model notice. This model limitation notice reads:

An action for breach of trust based on matters disclosed in a trust accounting or other written report of the trustee may be subject to a 6-month statute of limitations from the receipt of the trust accounting or other written report. If you have questions, please consult your attorney.

Finally, new s. 737.307(5), F.S., provides that s. 737.307, F.S., applies to trust accountings for accounting periods beginning on or after January 1, 2003, and to other written reports by a trustee received by a beneficiary on or after January 1, 2003.

Section 11. amending s. 660.46, F.S., regarding statutes of limitations for breach of trust or breach of fiduciary duties by a substituted fiduciary

Present Situation. Chapter 660, F.S., entitled "Trust Business," governs the operation of trust companies and the granting of trust powers to the trust departments of banks and other associations.

Section 660.25(2), F.S., defines a "[f]iduciary account" as "the estate, trust, or other fiduciary relationship which, by any governing instrument or in any other lawful manner, has been or is established or provided for with a trust company, trust department, or other person and includes the assets, rights, liabilities, and obligations thereof."

Section 660.46(2), F.S., allows a trust company or trust department that currently holds a fiduciary account (an "original fiduciary") to substitute another such entity (a "proposed substitute fiduciary") in its place with respect to that account, in this manner:

Any original fiduciary and any proposed substitute fiduciary may, with respect to any fiduciary account or accounts which they shall mutually select, initiate proceedings by joining in the filing of a petition in the circuit court, requesting the substitution of the proposed substitute fiduciary for the original fiduciary as to such fiduciary account or accounts. The petition may be filed in the county in which the main office of the original fiduciary is located and, except to the extent inconsistent with the provisions of this section, shall be governed by the Florida Rules of Civil Procedure; however, if any fiduciary account is then the subject of a proceeding in a court in this state pursuant to the Florida Probate Code, the Florida Guardianship Law, chapter 737, or chapter 747, the petition relating to such fiduciary account shall be filed in that proceeding and shall be governed by the procedural or other relevant rules applicable to such proceeding except to the extent inconsistent with the provisions of this section.

Section 660.46(8), F.S., provides, in pertinent part and in language nearly identical to s. 737.307, F.S., that

Unless previously or otherwise barred by adjudication, waiver, consent, limitation, or the foregoing provisions of this subsection, an action for breach of trust or breach of fiduciary duties or responsibilities against an original fiduciary in whose place and stead another trust company or trust department has been substituted pursuant to the provisions of this section is barred for any beneficiary who has received a final, annual or periodic account or other statement fully disclosing the matter unless a proceeding to assert the claim is commenced within 6 months after receipt of the final, annual or periodic account or statement. In any event, and notwithstanding lack of full disclosure, all claims against such original fiduciary which has issued a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for his or her examination are barred as provided in chapter 95.

Effect of Proposed Changes. This bill adds definitions of “limitation notice,” “trust accounting” and “trust disclosure document” to s. 660.46, F.S., to conform to the definitions of those terms provided elsewhere in this bill. (See above).

This bill amends s. 660.46, F.S., throughout, to substitute references to “trust accounting” for “accounts” and to substitute references to “trust disclosure document or limitation notice, whichever is received later,” for “final, annual or periodic account or statement.” This bill also applies the definition of “adequate disclosure” from new s. 737.307(2), F.S., to s. 660.46, F.S. (See Section 10 above).

Finally, this bill amends s. 660.46(8) in same manner as it amends s. 737.307, with respect to notices of limitation and the six-month statute of limitations for breach of trust (or for breach of fiduciary duty here). (See Section 10 above).

Section 12. regarding retrospective and prospective application

Present Situation. The Legislature may provide statutes with retrospective application unless prohibited from doing so by federal law or by the Florida Constitution.²⁷ However, the Legislature must do so expressly, as courts presume against legislative intent to provide retroactivity.²⁸

Effect of Proposed Changes. This bill provides s. 731.303, F.S., as amended by this bill, with retroactive application. This bill further provides that ss. 737.303, 737.307 and 660.46, as they exist prior to being amended by this bill, are preserved and continue to apply to accounts for accounting periods beginning before January 1, 2003 and to other written reports by a trustee received by a beneficiary before January 1, 2003.

Section 13. providing an effective date of upon becoming law, except as otherwise provided in the rest of this bill

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

²⁷ See *McCord v. Smith*, 43 So.2d 704 (Fla. 1949).

²⁸ See *Singletary v. Van Meter*, 708 So.2d 266 (Fla. 1998).

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority of counties or municipalities to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Article V., s. 2(a), Fla. Const., provides that the "Supreme Court shall adopt rules for the practice and procedure in all courts." This bill's shifting of the burden of proof in will contests may raise concerns under this provision.

Florida courts protect their rulemaking power by striking down laws that conflict with their rules. For example, in 1976, the Florida Supreme Court ruled unconstitutional a statute regarding the state mental hospital because it was in conflict with a previously passed criminal rule of procedure regarding persons found not guilty by reason of insanity.²⁹ In 1991, the Court ruled that a statute

²⁹ See *In re Connors*, 332 So.2d 336 (Fla. 1976).

requiring mandatory severance of a mortgage foreclosure trial from a trial on any other counterclaims was unconstitutional because it conflicted with an existing rule of civil procedure.³⁰

Essentially, the rule is that substance is legislative and procedure is judicial. In practice, determining the difference is not simple or clear. In 1973, Justice Adkins described the difference between substance and procedure in this way:

The entire area of substance and procedure may be described as a "twilight zone" and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made. From extensive research, I have gleaned the following general tests as to what may be encompassed by the term "practice and procedure." Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.³¹

This "twilight zone" remains to this day, and causes in the analysis of many enactments a difficult determination of whether a matter is procedural or substantive.

In the administrative context of worker's compensation, Florida courts have consistently held that burdens of proof are procedural rather than substantive.³² At the opposite extreme, in the criminal context, the Supreme Court of the United States has held that the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires proof of a defendant's guilt beyond a reasonable doubt; moreover, this requirement applies to juvenile proceedings even if they are technically "civil."³³ The Supreme Court of Florida has held that criminal statutes of limitations are substantive,³⁴ but strongly suggested that civil statutes of limitations are procedural.³⁵ It is therefore possible that a court might determine burdens of proof in will contests to be either substantive or procedural.

However, even if a court held that burdens of proof in will contests are procedural, that court might not strike down this bill's shifting of the burden of proof with respect to the presumption of undue influence. Despite treating it as procedural, the Supreme Court of Florida in *Kalway v. Singletary*³⁶ nonetheless upheld a thirty-day statute of limitations for the filing of an action challenging a prisoner disciplinary proceeding. In discussing the separation of powers issue, the Court said:

As a practical matter, the Court on occasion has deferred to the expertise of the legislature in implementing its rules of procedure. See, e.g., *Amendment to Florida Rule of Juvenile Procedure 8.100(a)*, 667 So.2d 195, 195 (Fla.1996) (noting that the need for juvenile detention shall be made "according to the criteria provided by law" and explaining that these "include

³⁰ See *Haven Federal Savings & Loan Ass'n v. Kirian*, 579 So.2d 730 (Fla. 1991).

³¹ *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1973).

³² See *Sullivan v. Mayo*, 121 So.2d 424 (Fla. 1960); 57 FLA. JUR. 2d WORKERS' COMPENSATION § 12 and authorities cited therein.

³³ See *In re Winship*, 397 U.S. 358 (1970).

³⁴ See *Rubin v. State*, 390 So.2d 322 (Fla. 1980).

³⁵ See *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000); *State ex rel. Butterworth v. Kenny*, 714 So.2d 404 (Fla. 1998).

³⁶ 708 So.2d 267 (Fla. 1998).

those requirements set out in section 39.042, Florida Statutes (1995)"); *In re Family Law Rules of Procedure*, 663 So.2d 1049, 1086 (Fla.1995) (setting forth amended rule 12.740, which provides that all contested family matters may be referred to mediation, "[e]xcept as provided by law"). The setting of an interim time frame for challenging the Department's disciplinary action following the exhaustion of intra-departmental proceedings is a technical matter not outside the purview of the legislature. We do not view such action as an intrusion on this Court's jurisdiction over the practice and procedure in Florida courts.³⁷

Given this bill's express legislative findings of public policy served by shifting the burden of proof with respect to the presumption of undue influence in will contests, it is possible that a court that treated this change as procedural would still defer to the Legislature. It is also possible that such a court would instead strike down the language that this bill adds to s. 733.107, F.S., as encroaching on the judiciary's rulemaking power.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

This bill requires notice in trust instruments that a trustee may have duties other than those in the instrument, yet expressly provides that there is no penalty to anyone for failing to meet this requirement.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On February 12, 2002, the Committee on Judicial Oversight adopted one amendment to HB 1127. This amendment specifies that "[a]ll persons who may take by virtue of, and whose interests are subject to, the exercise or non-exercise of [a] power [of amendment or revocation] are also bound [by the trust accounting provisions of 731.303(5), F.S.], but only to the extent of their interests." This amendment also makes liability for receiving improper trust distributions identical to liability for receiving improper probate distributions. Furthermore, this amendment extensively revises the trust accounting provisions of ss. 737.307 *et seq.*, F.S. In addition, this amendment provides for trusts for the care of animals. Finally, this amendment provides for retrospective and prospective application of these provisions.

The Committee then reportedly this bill favorably, as amended.

On February 19, 2002, the Council for Smarter Government adopted one amendment to this bill. This amendment applies this bill's changes in trust accounting to substitution of fiduciaries under s. 660.46, F.S. This amendment also provides that s. 660.46, F.S., as it exists prior to being amended by this bill, shall be preserved and continue to apply to accounts for accounting periods beginning before January 1, 2003.

The Council then reported this bill favorably as a council substitute.

³⁷ *Id.* at 269.

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VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

David L. Jaroslav, J.D.

Staff Director:

Nathan L. Bond, J.D.

AS REVISED BY THE COUNCIL FOR SMARTER GOVERNMENT:

Prepared by:

David L. Jaroslav, J.D.

Council Director:

Don Rubottom