HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS

BILL #:	CS/CS/HB 277	**FINAL HOUSE FLOOR ACTION:**			
SUBJECT/SHORT TITLE	Wills and Trust	73	**Y's**	44	**N's**
SPONSOR(S):	Judiciary Committee; Civil Justice & Claims Subcommittee; Grant, J.; White and others	**GOVERNOR'S ACTION:**		Vetoed	
COMPANION BILLS:	CS/CS/CS/SB 206				

SUMMARY ANALYSIS

CS/CS/HB 277 passed the House on April 28, 2017. The bill was amended in the Senate on April 28, 2017, and was returned to the House. The House concurred with the Senate amendment as amended and returned the bill to the Senate on May 4, 2017. The Senate concurred with the House amendments and passed the bill on May 5, 2017. The bill includes portions of CS/CS/HB 481 and CS/HB 1379. The bill amends laws on wills and trusts.

A will is a legal document used to designate the distribution of a person's assets upon death. To be admitted to probate, a will must have been signed by the testator (the person making the will) in the presence of 2 witnesses, one of which must testify to the authenticity of the bill unless certain other conditions are met or unless the will is self-proved. The bill provides for electronic wills. An electronic will is executed, modified, and revoked similar as to how a paper will is under current law. However, an electronic will may be witnessed through remote presence of witnesses, in cases where a witness is an attorney or a notary public. The bill provides a means for self-proof of an electronic will, storage, filing, and venue. The bill creates a concept of a "qualified custodian" who is responsible for possessing and controlling the electronic will in addition to other various responsibilities outlined in the bill. Qualified custodians must maintain a surety bond as well as a liability insurance policy.

The Florida Trust Code governs express trusts. Historically, a trust was administered with the primary intent of accomplishing the intent of the settlor. This bill deletes language related to benefiting the beneficiaries and thus makes the intent of the settlor the primary intent of trust administration. The bill changes portions of the Code related to the trustee and their duties, liabilities, and powers to provide which provisions of the Code govern a trustee's duty to provide an accounting to the beneficiaries and extend the period for beneficiaries to file actions alleging a breach of trust. Additionally, the bill amends the application of the portion of the Code relating to posting documents electronically. The bill expands a trustee's ability to decant trust principal under the terms of the trust; provides support for disabled beneficiaries; and imposes greater notice requirements when a trustee exercises the ability to decant trust principal. Lastly, the bill modifies portions of the Code related to notices for charitable trusts. The bill requires that notice be sent to only one entity, the Attorney General.

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

The effective date of this bill was July 1, 2017, however this bill was vetoed by the Governor on June 26, 2017. Parts of the bill passed in CS/HB 1379 (Ch. 2017-155).

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Wills and trusts are used to manage and distribute one's property. Where a will only applies upon death, a trust typically provides for transfers during the life of the maker in addition to transfers upon death. This bill affects both wills and trusts.

Background and Current Law for Wills

A will, very generally, is a legal document that a person (a "testator") may use to determine who receives his or her property when he or she dies. As set forth in the Florida Probate Code, codified as ch. 731-735, F.S., the legal definition of a will is:

> an instrument, including a codicil, executed by a person in the manner prescribed by this code, which disposes of the person's property on or after his or her death and includes an instrument which merely appoints a personal representative or revokes or revises another will.[1]

Wills do not dispose of all of a testator's property, but only his or her "estate"—i.e., those assets that are subject to probate administration.[2] Probate is a court-supervised process for identifying and gathering the assets of a deceased person (decedent), paying the decedent's debts, and distributing the decedent's assets to his or her beneficiaries. Other assets are disposed of outside of probate.

Without a will, a decedent's estate is distributed pursuant to the intestacy statutes, which devise a decedent's estate according to what might be described as default rules. With a will, however, a testator may, as a general matter, devise his or her estate to whomever he or she likes. Also, with a will, a testator may designate a person known as a personal representative to carry out the terms of the will. Otherwise, a court will choose the personal representative.

A will is an important tool for estate planning. A will is also by its nature a sensitive document, as it speaks for someone who can no longer speak about distributing his or her estate. Moreover, the assets of an estate may be substantial, and the beneficiaries might not be cooperative or trusting of each other. Current law provides for the methods of a will's creation, execution, preservation, revocation, filing, and other aspects to certain formalities.

Executing a Will

A will must be "in writing" and signed at its end by either the testator or by someone else for the testator. If someone else signs for the testator, the person must do so in the testator's presence and at the testator's direction.[3] At least two persons must witness the testator sign the will or must witness the testator's acknowledgement that he or she previously signed the will or that another person subscribed the testator's name to the will.[4] These witnesses must sign the will in the presence of each other and the testator.[5] For wills executed in other states, the requirements may be different. The consequence of failing to strictly comply with these requirements is that the will is not valid.[6]

---

[1] s. 731.201(40), F.S.
[2] s. 731.201(14), F.S.
[3] s. 732.502(1)(a), F.S.
[4] s. 732.502(1)(b), F.S.
[5] s. 732.502(1)(c), F.S.
[6] *See*, s. 732.502(2), F.S. A will executed in another state is valid in Florida if the will is executed in accordance with the laws of this state, the laws of the state in which it was executed, or both. This does not apply to nuncupative wills (oral wills) or holographic wills (wills written in the hand of the testator, but not properly executed as set forth in section 732.502(1), F.S.), which are not valid in Florida regardless of whether they were executed according to the laws of the state in which they were executed.

Though s. 732.502(1), F.S., specifies that a will must be "in writing" and that certain persons must "sign" or attach their "signature," these terms are not defined in the statutes. Moreover, there is no explicit statement in the Florida Probate Code that an electronic will is invalid, that an electronic signature is invalid, or that a will must be executed on paper.

Section 668.004, F.S., states that, "[u]nless otherwise provided by law, an electronic signature may be used to sign a writing and shall have the same force and effect as a written signature."[7] An electronic signature, as defined in s. 668.003(4), F.S., is:

> any letters, characters, or symbols, manifested by electronic or similar means, executed or adopted by a party with an intent to authenticate a writing. A writing is electronically signed if an electronic signature is logically associated with such writing.

The Florida Probate Code does not specify how a will must be stored. However, the custodian of a will must deposit the will with the court within 10 days after receiving information of the testator's death.[8] If the custodian fails to do so without just or reasonable cause, he or she is be subject to liability.

Self-Proved Wills

The necessity of procuring an attesting witness as part of the estate administration process, before a will can be admitted to probate is dispensed with when the will is self-proved. Section 733.201(1), F.S., provides that a will which is self-proved in accordance with the Code may be admitted to probate without further proof. In a will contest, when the proponent initially has the burden to establish prima facie the will's formal execution and attestation, a self-proving affidavit executed in accordance with s. 732.503, F.S., is admissible to meet and satisfy this burden. The affidavit must be evidenced by a certificate attached to or following the will. [9]

The will can be self-proved either at the time of its execution or at a subsequent date. Section 732.503(1), F.S., provides that when the will or codicil is self-proved at a subsequent date, the testator is required to acknowledge it. Other than dispensing with the requirement that a witness be brought forward so that the will can be admitted to probate, the self-proving provision has no other effect.

Proving a Will in Probate

To acquire a court order distributing the testator's estate assets in line with the terms of a will, the will must be probated.[10] For a will to be admitted to probate in Florida, it must be "proved." No statute describes what it means for a will to be proved or what it is about the will or purported will that is being proved. However, it is apparent that proving a will means proving that the will is what it purports to be—i.e., the last will and testament of the testator—and that it was validly executed. The venue for a probate proceeding is set forth in s. 731.101(1), F.S., which states:

> (1) The venue for probate of wills and granting letters shall be:
> (a) In the county in this state where the decedent was domiciled.

---

[7] The Uniform Electronic Transaction Act is set forth in s. 668.50, F.S. It includes a statement that the "section" does not govern, among other things, a transaction that is governed by a law governing the creation and execution of wills. Section 668.004, which provides broad permission to electronically sign a document, is of course a different section. But even if it were not, or even if it did not exist, section 668.50, F.S., would not appear to *prohibit* electronically signing a will.
[8] s. 732.901(1), F.S.
[9] The officer's certificate must be substantially in the form set forth at s. 732.503, F.S. The form requires that the witnesses state that they witnessed the testator *sign* the will. However, the statutory requirements for executing a will do not require witnesses to witness the testator sign the will. Section 732.502, F.S., provides that the witnesses may either witness the testator sign, or witness the testator acknowledge his or her prior signature.
[10] *See* s. 733.103(1), F.S.

(b) If the decedent had no domicile in this state, then in any county where the decedent's property is located.
(c) If the decedent had no domicile in this state and possessed no property in this state, then in the county where any debtor of the decedent resides.

A will may be proved by having one of the attesting witnesses swear or affirm an oath regarding the will before a circuit judge or any of the other persons set forth in s. 733.201(2), F.S. If it appears to the court that no attesting witness can be found, that no attesting witness still has capacity, or that the testimony of an attesting witness cannot be obtained within a reasonable time, the court must resort to another method of proving a will.

The other method is through an oath of the personal representative nominated by the will or a different person who has no interest in the estate under the will. This oath must include a statement that "the person believes the writing exhibited to be the last will and testament of the decedent."[11]

Under s. 732.506, F.S., a will may be revoked by the testator at any time prior to their death. In order to properly revoke a will, the testator, or some other person in the testator's presence and at the testator's direction, can burn, tear, cancel, deface, obliterate, or destroy it with intent, "and for the purpose, of revocation.

Additionally, a testator may revoke their will pursuant to a writing signifying the testators intent to revoke or by creating a new will inconsistent with the contents of the original will, so long as the signature requirements of s. 732.502, F.S., are met.

Effect of Proposed Changes: Wills

This bill creates the Florida Electronic Wills Act, which regulates and expressly allows the use of "electronic wills." The Act defines an electronic will as:

> a will, including a codicil, executed in accordance with s. 732.523 by a person in the manner prescribed by this act, which disposes of the person's property on or after his or her death and includes an instrument that merely appoints a personal representative or revokes or revises another will or electronic will.

The Act does not replace the existing Florida Probate Code, either in whole or in part. Thus, the Act exists "within," and must be read together with, the rest of the Florida Probate Code.

Executing an Electronic Will

In order for an electronic will to be valid under the bill, it must meet all of the following requirements:

- Exist in an electronic record that is unique and identifiable;
- Be electronically signed by the testator in the presence of at least two witnesses; and
- Be electronically signed by the attesting witnesses in the presence of the testator and in the presence of each other.

For purposes of satisfying the presence requirements in executing an electronic will, the bill provides that an individual is deemed to be in the presence of another individual if the individuals are in the same physical location. Presence will also be satisfied if the individuals are in different locations where they can communicate with each other by means of live video and audio conference, provided that the following requirements are met:

[11] s. 733.201(3), F.S.

- The testator may not be in an end-stage medical condition nor be a vulnerable adult. The bill provides that a person challenging an electronic will has the burden of proving that one of these conditions existed.
- The signal transmission must be live and in real time;
- The signal transmission must be secure from interception through lawful means by anyone other than the persons communicating;
- The persons communicating must simultaneously see and speak to one another with reasonable clarity;
- The persons communicating must establish the identity of the testator or principal by personal knowledge or through the presentation of documentation that provides reasonable proof of the identity of the testator or principal;
- The person communicating must demonstrate awareness of the events taking place;
- The testator or principal must state that he or she is acting of his or her own free will; and
- One of the persons must either be:
    - An attorney who signs as a witness and who states that the execution of the document complied with the new section on execution of an electronic will; or
    - A notary who signs the document using an electronic notary seal as authorized by s. 117.021(3), F.S. and who states that the execution of the document complied with the new section on execution of an electronic will.

The bill also requires the testator or principal to provide verbal answers to a serious of questions contained in the Florida Electronic Wills Act.

The requirement that the document be signed is satisfied by an electronic signature. The bill defines "electronic signature" as an electronic mark visibly manifested in a record as a signature and executed or adopted by a person with the intent to sign the record. Moreover, a document that is signed electronically is deemed to be executed in this state if any one of the following requirements is met:

- The document states that the person creating the document intends to execute and understands that he or she is executing the document in, and pursuant to the laws of this state;
- The person creating the document is, or attesting witnesses or Florida notary public whose electronic signatures are obtained in the execution of the document are, physically located within this sate at the time the document is executed; or
- In the case of a self-proved electronic will, the electronic will designates a qualified custodian who is domiciled in and a resident of this state or incorporated in this state.

With limited exceptions, as provided for in the bill, all questions as to the force, effect, validity, and interpretation of an electronic will that complies with the applicable sections must be determined in the same manner as a will executed in accordance with s. 732.502, F.S. A time-stamped recording of the entire video conference must be identifiable with the document being signed and stored in the electronic record containing the document by a qualified custodian as the manner provided by the Act.

The changes above to allow and regulate remote presence in the signing of an electronic will also apply to the execution of a living will.

Self-Proof of an Electronic Will

The bill provides that an electronic will is self-proved if all of the following requirements are met:

- The will is executed in conformity with the Florida Electronic Wills Act;
- The acknowledgement of the electronic will by the testator and the affidavits of the witnesses are made in accordance with s. 732.503, F.S., and the same acknowledgement and affidavits are made a part of, or are attached to or logically associated with, the electronic will; and

- The electronic will designates a qualified custodian, who at all times is in control of the electronic will, and who executes a certification that meets the requirements set forth in the bill.

Qualified Custodians

The bill defines a qualified custodian of an electronic will as a person who meets all of the following requirements:

- Is not an heir or devisee of the testator or named as a fiduciary under the electronic will;
- Is domiciled in and is a resident of Florida, or is incorporated or organized in Florida;
- Consistently employs a system for ensuring the safekeeping of electronic records and stores electronic records containing electronic wills under the system; and
- Furnishes for any court hearing involving an electronic will that is currently or was previously stored by the qualified custodian any information requested by the court pertaining to the qualified custodian's policies and procedures.

The bill includes several provisions designed to hold qualified custodians accountable. These include liability for the negligent loss or destruction of an electronic record and the inability to limit liability for doing so, a prohibition on suspending or terminating a testator's access to electronic records, and a requirement to keep a testator's information confidential. Also, a testator may force the qualified custodian to "immediately" hand over to the testator the electronic record of an electronic will, the electronic will itself, and a paper copy of the will at any time. The requirement to hand over records does not, however, involve the qualified custodian stepping down or passing the office to the testator.

Moreover, the bill provides that one may not serve as a qualified custodian unless the person agrees in writing to serve in this capacity. A person who at any time serves as the qualified custodian of a given electronic record or an electronic will is free to choose to stop serving in this capacity.

Upon receiving information of the death of the testator, the qualified custodian is required to deposit the electronic will with the court as required by s. 732.901, F.S. Moreover, an electronic will that is filed electronically with the clerk through the Florida Courts E-Filing Portal is deemed to have been deposited with the clerk as an original of the electronic will.

Qualified custodians are also required to either post and maintain a blanket surety bond or liability insurance of at least $250,000 in the aggregate covering the acts or omissions of the qualified custodian and their agents or employees, to secure the faithful performance of all duties and obligations under the Act. A bond must be payable to the Governor and his or her successors in office for the benefit of all persons who store electronic records with a qualified custodian and their estates, beneficiaries, successors, and heirs.

Attorney General Standing

The bill grants the Attorney General standing to petition a court for the appointment of a receiver to manage the electronic records of a qualified custodian for proper delivery and safekeeping, when any of the following conditions are met:

- The qualified custodian is ceasing operation;
- The qualified custodian intends to close the facility and adequate arrangements have not been made for the proper delivery of the electronic records in accordance with the Act;
- The Attorney General determines that conditions exist which present a danger that electronic records will be lost or misappropriated; or
- The qualified custodian fails to maintain and post a surety bond or maintain insurance as required under the Act.

Venue; Admitting an Electronic Will to Probate

The bill provides that venue for probate of an electronic will may be anywhere that venue would be proper for a traditional will.[12] While venue for probating an electronic will is the same as it is for a traditional will, the venue for a *nonresident's* electronic will is also proper in the county in which the qualified custodian or attorney for the petitioner or personal representative has his or her domicile or registered office.

The bill expressly grants the right to admit an electronic will, other than a holographic or nuncupative will, to probate in this state if the will was "executed or deemed executed in another state in accordance with the laws of that state or of" Florida. Florida courts are expressly granted jurisdiction over these electronic wills. However, contractual provisions between a qualified custodian and a testator are not valid or enforceable to the extent that such provisions require a specific jurisdiction or venue for any proceeding relating to the probate of an estate or the contest of an electronic will.

The bill allows the admission to probate of an electronic will or a "true and correct copy" of an electronic will. An electronic will that is not self-proved may be admitted to probate on the oath of the two attesting witnesses to the electronic will. These oaths must be sworn or affirmed before a circuit judge or the other persons set forth in the bill.

Under the bill, if it appears to the court that the two attesting witnesses cannot be found, have lost capacity, or cannot testify within a reasonable time, two "disinterested" witnesses must swear or affirm an oath as to a list of factors that indicate authenticity.

Overview of the Florida Trust Code

Chapter 736, F.S., is referred to as the "Florida Trust Code." The Code applies to express trusts, charitable or noncharitable, and trusts created pursuant to law, judgment, or decree that requires the trust to be administered in the manner of an express trust. An express trust is 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, which arises as a result of a manifestation of an intention to create it.

The term "terms of a trust" is defined to mean the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.[13] Under the Code, "settlor" is defined as a person who creates or contributes property to a trust.[14] A "beneficiary" of the trust is a person who has a present or future beneficial interest in the trust.[15] A trustee is the person in the trust transaction who holds the legal title to the property of the trust.

A trustee is essential to the creation and validity of a trust; however, occupancy of the position by a designated person is not essential since in the absence of a trustee, whether by failure of appointment, nonacceptance, disqualification, or other cause, a court will ordinarily appoint a trustee in order to administer a trust.

The trustee is granted certain powers and is subject to certain duties imposed by the terms of the trust, equity jurisprudence, or by statute. A trustee may have the power or duty to perform various acts of management in administering the trust estate. To be able to enforce the trustee's duties, the beneficiary of a trust must know of the existence of the trust and be informed about the administration of the trust. Accordingly, s. 736.0813, F.S., imposes a duty on a Florida trustee to keep the qualified beneficiaries of

[12] *See* s. 731.101(1), F.S.
[13] s. 736.0103(21), F.S.
[14] s. 736.0103(18), F.S.
[15] s. 736.0103(4), F.S.

an irrevocable trust reasonably informed of the trust and its administration. The duty includes, but is not limited to:

- Notice of the existence of the irrevocable trust, the identity of the settlor or settlors, the right to request a copy of the trust instrument, the right to accountings, and applicability of the fiduciary lawyer-client privilege.
- Notice of the acceptance of the trust, the full name and address of the trustee, and the applicability of the fiduciary lawyer-client privilege.
- Disclosure of a copy of the trust instrument upon reasonable request.
- An annual accounting of the trust to each beneficiary and an accounting on termination of the trust or on change of the trustee. The accounting must address the cash and property transactions in the accounting period and what trust assets are currently on hand.
- Disclosure of relevant information about the assets and liabilities of the trust and the particulars relating to administration upon reasonable request.
- Such additional notices and disclosure requirements related to the trust administration as required by the Florida Trust Code.[16]

It is from the trust instrument that a trustee derives his or her rule of conduct, extent and limit of authority, and measure of obligation. Thus, the extent of a trustee's duties and powers is determined by the trust instrument and by the applicable rules of law, and not by the trustee's own interpretation of the trust instrument or by his or her own belief as to rules of law. Under the Code, a violation by a trustee of a duty the trustee owes a beneficiary is a breach of trust. A breach of trust by a trustee gives rise to liability by the trustee to the beneficiary for any loss of the trust estate.

A beneficiary must bring an action for breach of trust as to any matter adequately disclosed within an accounting or any other written report of the trustee, also known as trust disclosure documents, within 6 months of *receiving* the trust disclosure document or a limitation *notice* from the trustee that applies to that trust disclosure document, whichever occurs later. A limitation notice informs the beneficiary that an action against the trustee for breach of trust based on any matter adequately disclosed in the trust disclosure document may be barred unless the action is commenced within 6 months.

A trustee is required to provide notice to qualified beneficiaries and other individuals when performing various duties while administering a trust. The Code provides that the only permissible methods of sending notice or a document to such persons are by first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, a properly directed facsimile or other electronic message, or by posting a document to a secure electronic account or website.[17]

Except as otherwise provided in the terms of the trust, the Code governs the duties and powers of a trustee, relations among trustees, and the rights and interests any beneficiaries. The terms of a trust prevail over any provision of the Code, except as provided in s. 736.0105(2), F.S. In all, the Code currently provides 23 terms that are solely governed by the Code and cannot be changed, waived, or otherwise altered by the terms of the trust.[18]

---

[16] *See, e.g.,* s. 736.0108(6), F.S. (notice of a proposed transfer of a trust's principal place of administration); s. 736.04117(4), F.S. (notice of the trustee's exercise of the power to invade the principal of the trust); s. 736.0414(1), F.S. (notice of terminating certain minimally funded trusts); s. 736.0417(1), F.S. (notice prior to combining or dividing trusts); s. 736.0705 (notice of resignation of trustee); s. 736.0802, F.S. (disclose and provide notice of investments in funds owned or controlled by trustee; the identity of the investment instruments, and the identity and relationship to the trustee to any affiliate that owns or controls the investment instruments; and notice to beneficiaries whose share of the trust may be affected by certain legal claims); and s. 736.0902(5), F.S. (notice of the non- application of the prudent investor rule to certain transactions).

[17] s. 736.0109, F.S.

[18] *See* s. 736.0105(2)(a-w), F.S.

Current Florida Trust Code Provisions and Effect of Proposed Amendments

The bill amends portions of Florida's Trust Code related to the intent of the settlor and interest of the beneficiaries, the duties, and powers of the trustee, procedural requirements for charitable trusts, and the Code's method of electronic notice.

Settlor Intent and Interest of the Beneficiaries

In order for a settlor to create an express trust, he or she must indicate an intention to create it. This requirement is what distinguishes an express trust from an implied trust, such as a constructive or resulting trust. In the case of an express trust, the settlor's intent usually is evidenced by a written trust document such as a will or a trust agreement that designates a trustee and indicates that the trustee is to hold the trust property in trust and designates the beneficial interests of the trust.[19] A written instrument, however, is not required to create a trust; rather, the terms of the trust may be established by clear and convincing evidence.[20] Under current law, however, the settlor's intent may be restricted in the interest of protecting the beneficiaries when interpreting and applying the Code.

Under s. 736.0105(2)(c), F.S., the trust and its terms is required to be for the benefits of the trust's beneficiaries. The Code also includes limitations on the purpose for which a trust may be created and the affect it would have on the beneficiaries of the trust. In order for a trust to be created, the trust must have a lawful purpose that does not contravene public policy, that is possible to achieve, and the trust and its terms must be for the "benefits of its beneficiaries."[21]

The bill amends ss. 736.0103(11), 736.0105(2)(c), and 736.0404, F.S., to remove the current language in those statutes that a trust and its terms be administered for the benefit of the beneficiaries. The effect is to establish the settlor's intent as the guiding principle with respect to the terms, interests, and purposes of a trust. Specifically:

- The definition of "interests of the beneficiaries" under s. 736.0103(11), F.S. is amended to mean the beneficial interests *intended by the settlor* as provided under the terms of the trust.
- The exception to the general rule that the terms of the trust prevail over provisions of the Code contained in s. 736.0105(2)(c), F.S., is amended to remove the mandatory requirement that the terms of the trust be for the benefit of the beneficiaries.
- Section 736.0404, F.S., is likewise amended to remove the requirement that trust and its terms be for the benefit of the beneficiaries. As amended, a trust's purpose only needs to be lawful, not contrary to public policy, and possible to achieve.

The Trustee: Duty to Account

One duty a trustee is required to perform under the Code is a duty to account to trust beneficiaries. The trustee is required to keep beneficiaries reasonably informed and to provide the beneficiaries with a statement of the trust account annually. If the trustee does not keep clear, distinct, and accurate accounts, or if the trustee loses his or her accounts, all presumptions will be made against the trustee and the trustee will bear the costs of any resulting damages. In addition to the Code's requirements to inform and account to beneficiaries, current law provides standards for the form and content of the accounting.[22] Subsection (3) of s. 736.08135, F.S., provides the standards for the accounting and includes the language:

[19] The Code defines "interests of the beneficiaries" to mean the beneficial interests provided in the terms of the trust. s. 736.0103(11), F.S.
[20] s. 736.0407, F.S.
[21] s. 736.0404, F.S.
[22] s. 736.08135(1-2), F.S.

(3) This section applies to all trust accountings rendered for any accounting periods beginning on or after January 1, 2003.

A trustee's liability for failing to perform duties, such as providing trust accounting, is limited by s. 736.1008, F.S. This section provides the limitations on proceedings against the trustee, with subsection (3) addressing a claim against the trustee for a breach of trust related to the trustee's accounting duties. Current law states that any claim against the trustee for a breach of trust based on a matter not adequately disclosed in a trust disclosure document is barred as provided in ch. 95, F.S. A cause of action for such claims begins to accrue when the beneficiary has actual knowledge of:

(a) The facts upon which the claim is based if such actual knowledge is established by clear and convincing evidence; or
(b) The trustee's repudiation of the trust or adverse possession of the trust assets.[23]

In *Corya v. Sanders*,[24] the Fourth District Court of Appeal used both ss. 736.08135(3) and 736.1008(3), F.S., in determining a case involving a trustee's liability for failing to prepare trust accounts and inform the beneficiaries of the trust. With respect to s. 736.08135(3), F.S., the court determined that a trustee was not required to prepare an accounting for dates prior to January 1, 2003, saying:

> [W]e construe that language as limiting the beginning period for the first accounting, in situations where an accounting had never been done or was not prepared annually, to be no earlier than January 1, 2003.

In effect, this barred a beneficiary of an express trust from seeking to compel a trust accounting for all periods prior to January 1, 2003.

The court in *Corya* also held that a beneficiary of an express trust who has actual knowledge that he or she is a beneficiary of a trust and has not received a trust accounting is barred by s. 95.11(6), F.S.,[25] from seeking a trust accounting for any period more than 4 years prior to the filing of the action. In other words, the court held that the right of a beneficiary, with knowledge that they have not received a trust accounting, to seek an accounting is subject to a 4 year limitations period that begins to run as soon as a trust accounting is overdue.[26]

The bill amends s. 736.08135(3), F.S., to govern the form of content for all trust accountings rendered, including those for accounting periods prior to 2003. The bill amends s. 736.1008, F.S., to provide that a beneficiary's actual knowledge that he or she has not received a trust accounting does not cause a claim to accrue against the trustee for a breach of trust. Moreover, the beneficiary's actual knowledge of that fact does not commence the running of any statute of limitations concerning such claims.

The Trustee: Posting Documents or Notices Electronically

Ch. 2015-176 L.O.F. added posting to a secure electronic account or website to the list of acceptable methods for delivery of notices and documents. The posting of documents to a secure website or account that is accessible to the recipient is only acceptable if the recipient provides written authorization. The written authorization to provide electronic posting of documents must:

- Be limited solely to posting documents on the electronic account or website.
- Enumerate the documents that may be posted on the electronic website or account.

[23] s. 736.1008(3), F.S.
[24] 155 So.3d 1279 (Fla. 4th DCA 2015).
[25] Related to "Laches."
[26] This holding is in direct conflict with *Taplin v. Taplin*, 88 So.3d 344 (Fla. 3d DCA 2012) and *Nayee v. Nayee*, 705 So.2d 961 (Fla. 5th DCA 1998).

- Contain specific instructions for accessing the electronic website or account, including any security measures.
- Advise that a separate notice will be sent, and the manner in which it will be sent, when a document is posted to the electronic website or account.
- Advise that the authorization may be amended or revoked at any time and provide instructions to amend or revoke authorization.
- Advise that the posting of a document on the electronic account or website may commence a limitations period as short as 6 months even if the recipient never access the electronic account, website, or document.

The trustee is required to send a notice to a person receiving trust documents by electronic posting, which notice may be made by any permissible method of notice under the Code except electronic posting, at the following intervals:

- Each time a document is posted and the notice must identify each document that has been posted and how the person may access the document.
- Every year (the "annual notice") to advise such persons that posting of a document commences a limitations period as short as 6 months even if the recipient never accesses the website, account, or document. The annual notice must also address the right to amend or revoke a previous authorization to post trust documents on a website or account. The bill provides the suggested form of the annual notice, which is substantially similar to the suggested form of a limitations notice provided in s. 736.1008(4)(c) F.S. The failure of a trustee to provide the annual notice within 380 days of the previous notice will automatically revoke the person's authorization to post trust documents on an electronic website or account.

The website or account must allow the recipient to download or print the posted document. A document provided solely through electronic posting must be retained on the website or account for at least 4 years after the date it is received.

A document delivered by electronic posting is deemed received by the recipient on the earlier of the date that notice of the document's posting is received or the date that the recipient accesses the document on the electronic account or website. The posting of a document to an electronic account or website is only effective if done in compliance with the requirements of the new provisions. The trustee has the burden of demonstrating compliance with such requirements.

The bill provides that the enumerated procedures for electronic posting are solely for the purposes of meeting the notice requirements of s. 736.0109, F.S., They are not intended to restrict or govern courtesy postings in any way. Moreover, the bill provides that the retention requirements only apply if electronic posting is the only method of giving notice.

The bill requires that the initial customer authorization specifically state whether trust accountings, trust disclosure documents, and limitation notices, each as defined in s. 736.1008(4), F.S., may be posted electronically, but allows a more general description of other types of documents that the sender may provide by posting.

The bill allows a recipient to terminate authorization to receive documents via posting by following the procedures on the web site instead of giving written notice of such termination.

The bill additionally amends the 4 year document retention requirement as follows:

- If access is terminated by the sender before the end of the 4 year retention period, then the running of the applicable statute of limitations periods contained in s. 736.1008(1) & (2), F.S., are suspended until 45 days after the sender sends a notice by separate means to the recipient that either access has been restored, or access has been terminated and that the recipient may request copies of the posted documents at no cost.

- The applicable statute of limitations is also suspended from the time the recipient asks for copies until 20 days after those documents are provided.
- Documents do not need to be maintained on the website once the recipient's access has been terminated.
- No retention is required, and no statute of limitations is suspended, if access is terminated by the action of, or at the request of the recipient. Revocation of authorization by a customer to receive documents via posting is not considered to be a request to terminate access to documents already posted.
- Failure to maintain access does not invalidate the initial notice

The Trustee: The Decanting Statute

In some instances, the terms of a trust may grant the trustee "absolute power" to perform certain duties and responsibilities for the trust. One absolute power that may be granted to a trustee is the power to distribute trust property, or "principal," to or for the benefit of one or more beneficiaries. The term "decanting" describes a trustee's distribution of principal from one trust into a second trust (as opposed to distributing principal directly to the beneficiary).[27]

Decanting is generally used by trustees who wish to cure or avoid issues with the terms of the first trust without distributing to a beneficiary outright. In this way, decanting can fix issues with a trust while still preserving the settlor's intention of maintaining the assets in trust. Unlike a trust modification, which often times is only available through a court proceeding, a trust decanting is an exercise of the trustee's discretionary authority to make distributions. This exercise avoids having to expend trust funds for judicial involvement.

Under s. 736.04117, F.S., a trustee is allowed to decant principal to a second trust from a first when the trustee has absolute power to make principal distributions.

Although it is not necessary that the trust instrument use the term "absolute," it is necessary that the trustee's invasion power not be limited to a specific or ascertainable purpose. Thus, a power to invade for a beneficiary's best interests, welfare, comfort, or happiness is an absolute invasion power under the statute but a power to distribute or invade for a beneficiary's health, education, maintenance, or support is not.[28] Moreover, and for purposes of the analysis, a trustee may only decant principal to a supplemental needs trust[29] when the terms of the trust provide that the trustee has absolute power to invade the principal for the benefit of a disabled beneficiary.

The trustee's decision to decant is held to the same fiduciary standards as the decision to make a discretionary principal distribution (i.e., the beneficiary can sue the trustee for a decanting distribution to the same extent the beneficiary could sue the trustee for an outright distribution). Current law also imposes both procedural and substantive restrictions on a trustee's exercise of decanting power. For instance, s. 736.04117(4), F.S. requires notice, in writing, be made to all beneficiaries of the first trust at least 60 days prior to the date the trustee exercises their power to invade the trust principal.

The bill substantially amends s. 736.04117, F.S., related to the trustee's power to invade principal and expands the ability of the trustee to decant when granted less than absolute power under the terms of the trust. The bills three major effects can be summarized as follows:

1. The bill authorizes a trustee to decant principal to a second trust pursuant to a power to distribute that is not absolute. When such power is not absolute, the authorized trustee's decanting authority is restricted so that each beneficiary of the first trust must have a substantially similar interest in the second trust. The bill provides a definition for "substantially

[27] *See Phipps v. Palm Beach Trust Co.*, 196 So. 299 (1940).
[28] s. 736.04117(1)(b), F.S.
[29] The assets in a supplemental needs trust are excluded in the determination of entitlements to government benefits.

similar" to mean, in relevant part, that "there is 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."[30]

2. The bill authorizes a trustee to decant principal to a supplemental needs trust where a beneficiary is disabled. The trustee may take this action regardless of whether the authorized trustee has an absolute discretionary power or discretionary power limited to an ascertainable standard. The bill provides a definition for "supplemental needs trust" to mean a trust that the authorized trustee believes would not be considered a resource for purposes of determining whether the beneficiary who has a disability is eligible for governmental benefits.[31]
3. The bill expands the notice requirements under the state's current decanting statute. Specifically, notice is required to be provided to the settlor of the first trust, if the first trust was not a grantor trust and the second trust will be a grantor trust, all trustees of the first trust, and to any person with the power to remove the authorized trustee of the first trust. Moreover, the notice must include copies of both the first and second trust instruments.

In addition to these major changes, the bill amends current law on decanting in the following ways:

- Provides definitions for purposes of interpreting and applying the provisions of s. 736.04117, F.S. Specifically, the bill defines the terms absolute power, authorized trustee, beneficiary with a disability, current beneficiary, government benefits, internal revenue code, power of appointment, presently exercisable general power of appointment, substantially similar, supplemental needs trust, and vested interest.
- Provides that, with respect to permissible or impermissible modification of certain trust provisions, the second trust may omit, create or modify a power of appointment.
- Expands the existing prohibition on reducing certain fixed interests to include vested interests.
- Provides that the second trust may extend the term of the first trust, regardless of whether the authorized trustee has an absolute discretionary power or discretionary power limited to an ascertainable standard.
- Adds additional tax benefits associated with the first trust that must be maintained in the second trust to include the gift tax annual exclusion, and any and all other tax benefits for income, gift, estate or generation-skipping transfer for tax purposes.
- Incorporates provisions regarding "grantor" trust status and the trustee's ability to decant from a grantor trust to a non-grantor trust.
- Provides that a second trust may be created under the laws of any jurisdiction and institutes certain safeguards to prohibit an authorized trustee from decanting to a second trust which provides the authorized trustee with increased compensation or greater protection under an exculpatory or indemnification provision.
- Provides that a trustee may decant to a second trust that divides trustee responsibilities among various parties, including one or more trustees and others.

Notice for Charitable Trusts

Under s. 736.0110(3), F.S., the Attorney General may assert the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in the State of Florida. Section 736.0103(16), F.S., defines a "qualified beneficiary" as a living beneficiary who, on the date of the beneficiary's qualification is determined:

(a) Is a distributee or permissible distributee of trust income or principal;

[30] CS/HB 481, lines 332-337.
[31] CS/HB 481, lines 348-351.

(b) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributes described in paragraph (a) terminated on that date without causing the trust to terminate; or

(c) Would be a distribute or permissible distribute of trust income or principal if the trust terminated in accordance with its terms on that date.

A "charitable trust" for purposes of s. 736.0110, F.S., means a trust, or portion of a trust, created for a charitable purpose as described in s. 736.0405(1), F.S.. Charitable purposes include, but are not limited to, "the relief of poverty; the advancement of arts, sciences, education, or religion; and the promotion of health, governmental, or municipal purposes."[32] Part XII of ch. 736, F.S., governs all charitable trusts. Specifically, and in relevant part:

- s. 736.1205, F.S., requires that the trustee of a charitable trust notify the state attorney for the judicial circuit of the principal place of administration of the trust if the power to make distributions are more restrictive than s. 736.1204(2), F.S., or if the trustee's powers are inconsistent with s. 736.1204(3), F.S.
- s. 736.1206(2), F.S., provides that the trustee of a charitable trust may amend the governing instrument with consent of the state attorney to comply with the requirements of a private foundation trust as provided in s. 736.1204(2), F.S.
- s. 736.1207, F.S., specifies that Part XII of the Code does not affect the power of a court to relieve a trustee from restrictions on that trustee's powers and duties for cause shown and upon complaint of the state attorney, among others.
- s. 736.1208(4)(b), F.S., requires that a trustee who has released a power to select charitable donees accomplished by reducing the class of permissible charitable organizations must deliver a copy of the release to the state attorney.
- s. 736.1209, F.S., allows the trustee to file an election with the state attorney to bring the trust under s. 736.1208(5), F.S., relating to public charitable organization(s) as the exclusive beneficiary of a trust.

As such, there is some disconnect between s. 736.0110(3), F.S., and Part XII of the Code; they can be read to require that notice be given to the Attorney General for certain charitable trusts and to the state attorney of the proper judicial circuit for the same or other trusts.

The bill grants these powers and responsibilities regarding charitable trusts solely to the Attorney General.

The bill amends s. 736.0110(3), F.S., to provide the Attorney General with standing to assert the rights of a qualified beneficiary in any judicial proceeding and amends the provisions in Part XII of the Code concerning the state attorney's office. The amendments provide that the Attorney General, rather than the state attorney, receive notifications, releases, and elections for charitable trusts under ss. 736.1205, 736.1207, 736.1208, and 736.1209, F.S., and the Attorney General, rather than the state attorney, must consent to a charitable trust amendment effectuated under s. 736.1206, F.S. Lastly, the bill defines how the Attorney General is to be given notifications, releases, and elections in s. 736.1201(2), F.S., and removes the state attorney from the definitions section of Part XII of the Code.

Recognizing Electronic Wills in the Trust Code

In general, the testamentary aspects of a trust are invalid unless the trust was executed with the same formalities as a will. The bill amends the trust law at s. 736.0403, F.S., to recognize that execution in compliance with the requirements for a self-proved electronic will, as created by this bill, is sufficient to give testamentary effect to a trust. However, a qualified custodian may not also be a trustee of the trust.

[32] s. 736.0405(1), F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state government revenues.

2. Expenditures:

The bill does not appear to have any impact on state government expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.