

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 413 Trusts  
**SPONSOR(S):** Moraitis, Jr.  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 478

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee	9 Y, 0 N	MacNamara	Bond
2) Judiciary Committee	19 Y, 0 N	MacNamara	Poche

### SUMMARY ANALYSIS

The Florida Trust Code (Code) governs express trusts and trusts that are required to be administered in the manner of an express trust. An express trust is created by the intent of a settlor (the individual creating the trust), and is generally evidenced by a written instrument that details the terms of the trust. A trust is administered by a trustee, with the terms of a trust providing benefits for individuals known as beneficiaries. Except as otherwise provided, the terms of a trust prevail over any provision of the Code; the Code is used to fill in gaps and provides for the operation of the trust for issues not addressed in the terms of a trust.

Historically, a trust was administered with the primary intent of accomplishing the intent of the settlor. Recent changes to trust law may be interpreted to require the administration of a trust for the benefit of the beneficiaries instead. HB 413 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 address 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 limits the application of the portion of the Code relating to posting documents electronically, revises procedural requirements for such postings, and provides consequences for failing to maintain receipts of electronic postings.

The bill also expands the state's decanting statute. Decanting is a trustee's power to cure or avoid issues with a trust by distributing trust property from one trust to a different trust. 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.

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

The effective date for the bill is July 1, 2018. The sections related to the period for which beneficiaries may compel trust accounting apply retroactively to all cases pending or commenced on or after July 1, 2018.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### Overview of the Florida Trust Code

Chapter 736, F.S., contains the Florida Trust Code (Code). The Code applies to express trusts, charitable or noncharitable, and to 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 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.

The "terms of a trust" means 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.<sup>1</sup> Under the Code, "settlor" is defined as a person who creates or contributes property to a trust.<sup>2</sup> A "beneficiary" of a trust is a person who has a present or future beneficial interest in the trust.<sup>3</sup> A trustee is the person who holds the legal title to the property of the trust.

A trustee is essential to the creation and validity of a trust; however, in the absence of a trustee, whether by failure of appointment, nonacceptance, disqualification, or other cause, a court will ordinarily appoint a trustee.

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. To be able to enforce the trustee's duties, the beneficiary must know of the existence of the trust and be informed about its' administration. Accordingly, s. 736.0813, F.S., imposes a duty on a Florida trustee to keep qualified beneficiaries of an irrevocable trust reasonably informed. 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 Code.<sup>4</sup>

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<sup>1</sup> S. 736.0103(21), F.S.

<sup>2</sup> S. 736.0103(18), F.S.

<sup>3</sup> S. 736.0103(4), F.S.

<sup>4</sup> 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).

A trustee derives his or her rules of conduct, extent and limit of authority, and measure of obligation from the trust instrument. 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 owed to a beneficiary is a breach of trust. A breach of trust makes the trustee liable 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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 of beneficiaries. The terms of a trust prevail over any provision of the Code, except as provided in s. 736.0105(2), F.S, which provides 23 terms that are solely governed by the Code and cannot be changed, waived, or otherwise altered by the terms of the trust.<sup>8</sup>

### **Effect of Proposed Changes**

HB 413 amends portions of the Code related to settlor intent and interest of the beneficiaries, trustee duties and powers, and the method of electronic notice.

### **Settlor Intent and Interest of the Beneficiaries**

To create an express trust, the settlor must intend to create it. This requirement 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, indicates that the trustee is to hold the trust property in trust, and designates the beneficial interests of the trust.<sup>9</sup> 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.<sup>10</sup> 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 is required to be administered for the benefit 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. A trust must have a lawful purpose that does

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<sup>5</sup> S. 763.1008(2), F.S.

<sup>6</sup> S. 736.0813, F.S.

<sup>7</sup> S. 736.0109, F.S.

<sup>8</sup> S. 736.0105(2)(a-w), F.S.

<sup>9</sup> 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.

<sup>10</sup> S. 736.0407, F.S.

not contravene public policy, that is possible to achieve, and its terms must be for the "benefit of its beneficiaries."<sup>11</sup>

The bill amends ss. 736.0103(11), 736.0105(2)(c), and 736.0404, F.S., to remove current language 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 the 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

A 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. Current law provides standards for the form and content of the accounting.<sup>12</sup> Subsection (3) of s. 736.08135, F.S., provides the standards for the accounting and includes the language:

(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 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. Any claim against the trustee for a breach of trust based on a matter not adequately disclosed in a trust disclosure document is an intentional tort, subject to the four-year statute of limitations under s. 95.11(3)(o), 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.<sup>13</sup>

In *Corya v. Sanders*,<sup>14</sup> the Fourth District Court of Appeal used 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.

<sup>11</sup> S. 736.0404, F.S.

<sup>12</sup> S. 736.08135(1-2), F.S.

<sup>13</sup> S. 736.1008(3), F.S.

<sup>14</sup> 155 So.3d 1279 (Fla. 4th DCA 2015).

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.,<sup>15</sup> 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.<sup>16</sup>

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. This method is only acceptable if the recipient provides written authorization, which must:

- Be limited solely to posting documents on the electronic account or website.
- Enumerate the documents that may be posted.
- 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.
- Advise that authorization may be amended or revoked at any time and provide instructions to amend or revoke authorization.
- Advise that the posting may commence a limitations period as short as 6 months, even if the recipient never accesses 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. 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.

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.

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<sup>15</sup> Related to "Laches."

<sup>16</sup> 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).

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 is only effective if done in compliance with the requirements of the new provisions, and the trustee has the burden of demonstrating compliance.

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., and 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 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 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:

- 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 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

The terms of a trust may grant the trustee "absolute power" to perform certain duties and responsibilities. One absolute power is 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 different trust (as opposed to distributing principal directly to the beneficiary).<sup>17</sup>

Decanting is generally used by trustees 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. 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 different 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

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<sup>17</sup> *Phipps v. Palm Beach Trust Co.*, 196 So. 299 (1940).

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.<sup>18</sup> Moreover, a trustee may only decant principal to a supplemental needs trust<sup>19</sup> 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. 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. The bill:

1. 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 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 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."<sup>20</sup>
2. Authorizes a trustee to decant principal to a supplemental needs trust where a beneficiary is disabled. The trustee may take this action regardless of 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.<sup>21</sup>
3. 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 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:

- Provides definitions for purposes of interpreting and applying the provisions of s. 736.04117, F.S., including 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.<sup>22</sup>
- 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.

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<sup>18</sup> S. 736.04117(1)(b), F.S.

<sup>19</sup> The assets in a supplemental needs trust are excluded in the determination of entitlements to government benefits.

<sup>20</sup> HB 413, lines 326-333.

<sup>21</sup> HB 413, lines 342-345.

<sup>22</sup> HB 413, lines 290-357.

- 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.

**B. SECTION DIRECTORY:**

**Section 1:** Amends s. 736.0103, F.S., relating to definitions.

**Section 2:** Amends s. 736.0105, F.S., relating to default and mandatory rules.

**Section 3:** Amends s. 736.0109, F.S. relating to methods and waiver of notice.

**Section 4:** Amends s. 736.0404, F.S., relating to trust purposes.

**Section 5:** Amends s. 736.04117, F.S., relating to trustee's power to invade principal in trust.

**Section 6:** Amends s. 736.08135, F.S., relating to trust accountings.

**Section 7:** Amends s. 736.1008, F.S., relating to limitations on proceedings against trustees.

**Section 8:** Provides for the effect of ss. 736.08135 and 736.1008, F.S., to all cases pending or commenced on or after July 1, 2018.

**Section 9:** Provides an effective date of July 1, 2018.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

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.



### **III. COMMENTS**

#### **A. CONSTITUTIONAL ISSUES:**

##### **1. Applicability of Municipality/County Mandates Provision:**

Not applicable. The bill does not appear to affect county or municipal governments.

##### **2. Other:**

None.

#### **B. RULE-MAKING AUTHORITY:**

Not applicable.

#### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**