

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/HB 609 Estates and Trusts
SPONSOR(S): Judiciary Committee, Diamond and others
TIED BILLS: IDEN./SIM. **BILLS:** CS/CS/SB 1070

FINAL HOUSE FLOOR ACTION: 117 Y's 0 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/HB 609 passed the House on April 28, 2021, as CS/CS/SB 1070.

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. A probate estate consists of the decedent's property that is the subject of a court's administration. A court may place estate assets with a designated financial institution during probate under specified circumstances, but some courts have used this option to require estate assets be placed with a designated financial institution in all probate proceedings. Additionally, at least one court has held that, under a current Florida statute, will provisions pertaining to a former spouse are void upon the dissolution of the testator's marriage only where the will was executed during the marriage; if the will was executed before the marriage, the provisions remain valid, and the former spouse can inherit under the will.

A trust is a relationship in which one party, the settlor, gives another party, the trustee, the right to hold title to the settlor's property or assets for a third party's benefit. The Florida Trust Code ("Trust Code") applies to express trusts, charitable and non-charitable trusts, and trusts created by law, judgment, or decree that requires the trust to be administered in the manner of an express trust. The Trust Code also contemplates the creation of a directed trust, which is a trust for which the terms grant a power of direction, but the Trust Code does not provide clear guidelines for their creation and administration. Moreover, the Trust Code leaves some ambiguity relating to the treatment of, and constitutional protections provided to, homestead property devised through a trust.

Federal tax liability for property held jointly by spouses may be higher for surviving spouses in a common law state, such as Florida, as compared to a community property state. Unlike some other common law states, Florida currently does not provide for the creation of a trust that would allow spouses to designate property as "community property."

The bill:

- Requires a court to vacate an order establishing the deposit of estate assets in a financial institution if the estate's personal representative posts and maintains a bond in a specified amount.
- Specifies that will provisions pertaining to a former spouse are void upon the dissolution of the testator's marriage to the spouse even if the will was executed before the marriage.
- Clarifies the treatment of homestead property when devised through a revocable or testamentary trust.
- Creates the Florida Uniform Directed Trust Act to provide guidance for the creation and administration of directed trusts.
- Modifies the Trust Code to incorporate or remove references to directed trusts, as necessary.
- Creates the Florida Community Property Trust Act, providing federal tax benefits upon the death of a settlor spouse if the property is in a community trust.

The bill does not appear to have a fiscal impact on local governments but may have a positive fiscal impact on state government and the private sector.

The bill was approved by the Governor on June 29, 2021, ch. 2021-183, L.O.F., and became effective on July 1, 2021, except as otherwise expressly provided.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Florida Probate Code

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.¹ A probate estate consists of the decedent’s property that is the subject of a court’s administration.² Probate proceedings are governed by The Florida Probate Code found in chs. 731 – 735, F.S., and the Florida Probate Rules of Court.³ The probate process ensures that the decedent’s debts are paid in an orderly fashion and that the rightful beneficiaries, whether determined according to a will (“testate succession”) or by default rules of succession (“intestate succession”), receive the property to which they are entitled.

Effect of Probate

Until admitted to probate in this state or in the state where the decedent was domiciled, a will is ineffective to prove title to, or the right to possession of, the testator’s property.⁴ The probate of a will in Florida is conclusive of the will’s due execution; that it was executed by a competent testator, free of fraud, duress, mistake, and undue influence; and that the will was unrevoked on the testator’s death.⁵

Personal Representatives

Generally, any person who has full legal capacity to act on his or her own behalf and is a Florida resident at the time of the death of the person whose estate is to be administered may act as the estate’s personal representative.⁶ A person may not serve in such capacity if the person:

- Has been convicted of a felony;
- Is mentally or physically unable to perform the duties; or
- Is a minor.⁷

A person who is not a Florida resident may serve in such capacity if the person is:

- The legally adopted child or adoptive parent of the decedent;
- Related to the decedent by lineal consanguinity;
- A spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent, or someone related by lineal consanguinity to any such person; or
- The spouse of a person otherwise so qualified.⁸

Additionally, the following entities may serve as personal representative:

- Trust companies incorporated under Florida law;
- State banking corporations;
- State savings associations authorized and qualified to exercise fiduciary powers under Florida law; and

¹ The Florida Bar, *Consumer Pamphlet: Probate in Florida*, <https://www.floridabar.org/public/consumer/pamphlet026/> (last visited May 4, 2021).

² S. 731.201(14), F.S.

³ Available at <https://www-media.floridabar.org/uploads/2020/01/Probate-Rules-01-01-20.pdf> (last visited May 4, 2021).

⁴ S. 733.103(1), F.S.

⁵ S. 733.103(2), F.S.

⁶ S. 733.302, F.S.

⁷ S. 733.303(1), F.S.

⁸ S. 733.304, F.S.

- National banking associations and federal savings and loan associations authorized and qualified to exercise fiduciary powers in Florida.⁹

Duties of Personal Representatives

A personal representative's duties and powers begin upon appointment.¹⁰ Generally, a personal representative is a fiduciary¹¹ who:

- Must observe the standards of care applicable to trustees;
- Has a duty to settle and distribute the estate in accordance with the terms of the decedent's will and the Probate Code in an expeditious and efficient manner; and
- Must use the authority conferred by the Probate Code, under the will, and by court order for the best interests of interested persons, including creditors.¹²

Letters of Administration and Fiduciary Bonds

Letters of administration authorize the estate's personal representative to do all things necessary in the estate's administration and distribution. Unless the bond requirement has been waived by a will or by the court, each personal representative to whom letters are granted, except for a bank or trust company authorized to act as personal representative, must execute and file a bond with surety to be approved by the clerk without a service fee.¹³ The bond must be:

- Payable to the Governor and the Governor's successors in office and conditioned on the performance of all duties as personal representative according to law.¹⁴
- In the sum the court deems sufficient after consideration of the estate's gross value, the relationship of the personal representative to the beneficiaries, exempt property and any family allowance, the type and nature of the estate's assets, known creditors, and liens and encumbrances on the assets.¹⁵

Designated Financial Institutions for Certain Assets

When a court with jurisdiction over an estate in the process of administration determines it is expedient, because the size of the bond required of the personal representative is burdensome or for other cause, the court may order part or all of the personal assets of the estate placed with a court-designated bank, trust company, or savings and loan association ("designated financial institution").¹⁶ When the assets are so placed, the institution must file a receipt for the assets received.¹⁷ All interest, dividends, principal, and other debts collected by the designated financial institution on account thereof must be held by the financial institution in safekeeping, subject to the instructions of the personal representative authorized by order of the court directed to the financial institution.¹⁸ Accountings must be made to the personal representative at reasonably frequent intervals.¹⁹ After the receipt for the original assets has been filed, the court shall waive the bond given or reduce it so that it applies only to the estate remaining in the personal representative's hands.²⁰

⁹ S. 733.305(1), F.S.

¹⁰ S. 733.601, F.S.

¹¹ "Fiduciary" means a person having duty, created by his or her undertaking, to act primarily for another's benefit in matters connected with such undertaking. The duties of a fiduciary involve good faith, trust, special confidence, and candor. Black's Law Dictionary 431 (6th ed. 1991).

¹² S. 733.602, F.S.

¹³ S. 733.402(1), (3), and (4), F.S.

¹⁴ *Id.*

¹⁵ S. 733.403, F.S.

¹⁶ S. 69.031(1), F.S.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ S. 69.031(2), F.S.

²⁰ *Id.*

Some courts have implemented a blanket policy of requiring that assets be placed with a designated financial institution in all probate cases.²¹ However, the use of a designated financial institution is arguably meant to be an extraordinary remedy used on a case-by-case basis and, thus, it is unclear whether a blanket policy is proper.²² Further, use of a designated financial institution obligates the personal representative to obtain court approval before making routine expenditures on behalf of the estate, which can result in a delay in administration, and may frustrate the decedent's intent to empower a personal representative to manage his or her assets in probate.²³

Effect of Subsequent Familial Status Changes on a Will

Neither a subsequent marriage, birth, nor adoption of descendants revokes a person's prior will, but the pretermitted²⁴ child or spouse inherits as set forth in ss. 732.301 and 732.302, F.S., regardless of the will.²⁵ However, any provision of a will executed by a married person that affects the person's spouse is void upon the divorce of that person or upon the dissolution or annulment of the marriage.²⁶ After the dissolution, divorce, or annulment, the will is administered and construed as if the former spouse died at the time of the dissolution, divorce, or annulment unless the will or the dissolution or divorce judgment expressly provides otherwise.²⁷

In 2018, a Florida court admitted to probate a will executed by an unmarried testator that included a devise to his then-fiancée.²⁸ Before his death, the testator married and subsequently divorced the fiancée but failed to change his will.²⁹ The court held that the provision voiding a will as to a former spouse after divorce did not apply to the testator's will because the will was not executed during the marriage as required by law.³⁰ Consequently, the testator's former spouse inherited under the will.³¹

Florida Trust Code

A trust is a relationship in which one party, the "settlor,"³² gives another party, the "trustee," the right to hold title to the settlor's property or assets for a third party's benefit. A trust may be created and take effect during a settlor's lifetime, known as an inter vivos trust or living trust; or a trust may be created by a will and take effect when the settlor dies.³³ An inter vivos trust may be revocable³⁴ or irrevocable.³⁵ The Florida Trust Code ("Trust Code"), set out in ch. 736, F.S., applies to express trusts,³⁶ charitable³⁷

²¹ Real Property, Probate, and Trust Law Section of the Florida Bar (RPPTL Section), *White Paper HB 609/SB 1070* (Feb. 18, 2021); see also Florida Office of State Courts Administrator, FY 2017-18 Statistical Reference Guide,

<https://www.flcourts.org/content/download/430407/4673785/Chapter-6-Probate-FY-2017-18.pdf> (last visited May 4, 2021).

²² See RPPTL Section, *supra* note 21; see also *Goodstein v. Goodstein*, 263 So. 3d 78, 80 (Fla. 4th DCA 2019).

²³ See RPPTL Section, *supra* note 21.

²⁴ See definition of pretermitted-heir statute, *infra* note 25.

²⁵ S. 732.507(1), F.S. A pretermitted-heir statute, such as ss. 732.301 and 732.302, F.S., "is a state law that, under certain circumstances grants an omitted heir the right to inherit a share of the testator's estate, [usually] by treating the heir as though the testator had died intestate." Black's Law Dictionary (11th ed. 2019).

²⁶ S. 732.507(2), F.S.

²⁷ *Id.*

²⁸ *Gordon v. Fishman*, 253 So. 3d 1218 (Fla. 2d DCA 2018).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² "Settlor" means a person, including a testator, who creates or contributes property to a trust. S. 736.0103(18), F.S.

³³ See "inter vivos trust" and "testamentary trust," Black's Law Dictionary (11th ed. 2019).

³⁴ A "revocable trust" is "[a] trust in which the settlor reserves the right to terminate the trust and recover the trust property and any undistributed income." Black's Law Dictionary (11th ed. 2019). Florida law specifically defines "revocable" as applied to a trust to mean "revocable by the settlor without the consent of the trustee or a person holding an adverse interest." S. 736.0103(17), F.S.

³⁵ An "irrevocable trust" is "[a] trust that cannot be terminated by the settlor once it is created." Black's Law Dictionary (11th ed. 2019).

³⁶ An express trust is "[a] trust created with the settlor's express intent, [usually] declared in writing." Black's Law Dictionary (11th ed. 2019).

³⁷ "Charitable trust" means a trust created for a charitable purpose, including the relief of poverty; the advancement of the arts, the sciences, education, or religion; and the promotion of health, governmental, or municipal purposes. If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one or more purposes or beneficiaries, which selection must be consistent with the settlor's intent to the extent it can be ascertained. S. 736.0405, F.S.

and non-charitable trusts, and trusts created by law, judgment, or decree that requires the trust to be administered in the manner of an express trust.³⁸

Trust Terms

Except as otherwise provided in a trust's terms, the Trust Code governs the duties and powers of a trustee, relations among trustees, and rights and interests of a beneficiary.³⁹ The trust's terms prevail over any Trust Code provision except:

- The requirements for creating a trust;
- The trustee's duty to act in good faith and in accordance with the trust's terms and purposes and the beneficiary's interests;
- The requirement that a trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;
- The limitations period for commencing a judicial proceeding; and
- The court's power to take such action and exercise such jurisdiction as may be necessary in the interests of justice.⁴⁰

The "terms of a trust," as used in the Trust Code, 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 admissible evidence.⁴¹

Governing Law

The meaning and effect of a trust's terms are determined by:

- The law of the jurisdiction designated in the trust at the time of its creation or during the trust administration; or
- In the absence of a controlling designation, the law of the jurisdiction where the settlor resides at the time of the trust's creation.⁴²

However, a jurisdictional designation in a trust's terms is not controlling as to any matter for which the designation would be contrary to the state's strong public policy.⁴³

Principal Place of Administration

Trust terms designating the principal place of trust administration are valid only if there is a sufficient connection with the designated jurisdiction.⁴⁴ A sufficient connection exists if:

- A trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction; or
- All or part of the administration occurs in the designated jurisdiction.⁴⁵

Where the trust's terms do not validly designate the principle place of trust administration, the principal place of trust administration is the trustee's usual place of business where the records pertaining to the trust are kept or, if the trustee has no place of business, the trustee's residence.⁴⁶

³⁸ Ss. 736.0101 and 736.0102(1), F.S.

³⁹ "Beneficiary" means a person who has a present or future beneficial interest in a trust, vested or contingent, or who holds a power of appointment over trust property in a capacity other than that of a trustee. Ss. 736.0103(4) and 736.0105(1), F.S.

⁴⁰ S. 736.0105(2), F.S.

⁴¹ S. 736.0103(21), F.S.

⁴² S. 736.0107, F.S.

⁴³ *Id.*

⁴⁴ S. 736.0108(1), F.S.

⁴⁵ *Id.*

⁴⁶ S. 736.0108(2), F.S.

A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes and its administration.⁴⁷ In keeping with this duty, a trustee may transfer the trust's principal place of administration to another state or outside the United States, subject to the court's right to order, approve, or disapprove a transfer.⁴⁸

Judicial Trust Proceedings

The circuit court has original jurisdiction in Florida of all proceedings arising under the Trust Code. Venue for trust proceedings may be in:

- Any county where the venue is proper under ch. 47, F.S.;
- Any county where the beneficiary suing or being sued resides or has its principal place of business; or
- The county where the trust has its principal place of administration.⁴⁹

Generally, judicial trust proceedings are commenced by filing a complaint with the court and are governed by the Florida Rules of Civil Procedure.⁵⁰ Judicial trust proceedings may relate to the trust's validity, administration, or distribution and may include proceedings to:

- Appoint or remove a trustee;
- Review a trustee's fees;
- Review and settle interim or final accounts;
- Ascertain beneficiaries;
- Determine any question arising in the administration or distribution of any trust, including questions of trust instrument⁵¹ construction;
- Instruct trustees;
- Determine the existence or non-existence of any immunity, power, privilege, duty, or right; and
- Determine any other matters involving trustees and beneficiaries.⁵²

The court may intervene in a trust's administration to the extent the court's jurisdiction is invoked by an interested person or as provided by law, but a trust is not subject to continuing judicial supervision except by court order.⁵³

⁴⁷ S. 736.0108(4), F.S.

⁴⁸ S. 736.0109(5), F.S.

⁴⁹ S. 736.0204, F.S.

⁵⁰ A proceeding for the construction of a testamentary trust may be filed in the probate proceeding for the testator's estate. S. 736.0201(1) and (5), F.S.

⁵¹ "Trust instrument" means an instrument executed by a settlor that contains trust terms, including any trust amendments. Except as required by law, a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms must be established by clear and convincing evidence. S. 736.0407, F.S.

⁵² S. 736.0201(4), F.S.

⁵³ S. 736.0201(2) and (3), F.S.

Trust Creation

A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve.⁵⁴ A trust may be created by:

- Transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect on the settlor's death;
- Declaration by the property owner that the owner holds identifiable property as trustee; or
- Exercise of a power of appointment⁵⁵ in favor of a trustee.⁵⁶

A trust is created only if:

- The settlor has capacity to create a trust;
- The settlor indicates an intent to create the trust;
- The trust has a definite beneficiary⁵⁷ or is a charitable trust; a trust for the care of an animal,⁵⁸ or a trust for a non-charitable purpose;⁵⁹
- The trustee has duties to perform; and
- The same person is not the sole trustee and the sole beneficiary.⁶⁰

Trusts Created in Other Jurisdictions

A trust not created by a will is valid if the trust's creation complies with the law of the jurisdiction in which the trust instrument was executed or the law of the jurisdiction in which, at the time of creation, the settlor was domiciled.⁶¹ However:

- No trust in any messauges,⁶² lands, tenements, or hereditaments⁶³ may arise or result unless the trust complies with s. 689.05, F.S.; and
- The testamentary aspects of a revocable trust, executed by a settlor who is a domiciliary of this state at the time of execution, are invalid unless the trust instrument is executed by the settlor with the formalities required for a will's execution in this state.⁶⁴

Trust Modification or Termination

A trust terminates to the extent the trust expires or is revoked or properly distributed under the trust's terms.⁶⁵ The court may, upon the application of a trustee or a qualified beneficiary, modify the terms of a trust that is not then revocable if:

⁵⁴ S. 736.0404, F.S.

⁵⁵ A power of appointment exists when a person has the discretion to determine what persons are to receive beneficial interests in property or to determine the amount of beneficial interest in property to be received by certain persons. Black's Law Dictionary (11th ed. 2019).

⁵⁶ S. 736.0401, F.S.

⁵⁷ A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities. S. 736.0402(2), F.S.

⁵⁸ A trust may provide for the care of an animal alive during the settlor's lifetime. The trust terminates on the animal's death, or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, on the death of the last surviving animal. S. 736.0408(1), F.S.

⁵⁹ A trust may be created for a non-charitable purpose without a definite or ascertainable beneficiary or for a non-charitable but otherwise valid purpose to be selected by the trustee. Such a trust may not be enforced for more than 21 years. S. 736.0409(1), F.S.

⁶⁰ S. 736.0402, F.S.

⁶¹ S. 736.0403(1), F.S.

⁶² "Message" means a dwelling house with its adjacent buildings and the lands appropriated to a household's use. Collins English Dictionary (2012 digital ed.), <https://www.dictionary.com/browse/message> (last visited May 4, 2021).

⁶³ "Hereditaments" means things capable of being directly inherited, whether corporeal or incorporeal, real, personal, or mixed, and includes not only lands and everything thereon but also heirlooms, and certain furniture which, by custom, may descend to the heir together with the land. Black's Law Dictionary 501 (6th ed. 1991).

⁶⁴ S. 736.0403(2), F.S.

⁶⁵ S. 736.0410(1), F.S.

- The trust's purposes have been fulfilled or have become illegal, impossible, wasteful, or impracticable to fulfill.⁶⁶
- Because of circumstances not anticipated by the settlor, compliance with the trust's terms would defeat or substantially impair the accomplishment of a material purpose of the trust; or
- A material purpose of the trust no longer exists.⁶⁷

Additionally, if compliance with a trust's terms is not in the best interests of the beneficiaries, upon the application of a trustee or any qualified beneficiary, a court may at any time modify a trust that is not then revocable.⁶⁸ In modifying a trust, a court may:

- Amend or change the trust's terms;
- Terminate the trust in whole or in part;
- Direct or allow the trustee to do acts that are not authorized or that are prohibited by the trust's terms; or
- Prohibit the trustee from performing acts that are authorized or required by the trust's terms.⁶⁹

Further, a trust may be modified:

- At any time after the settlor's death upon the unanimous agreement of the trustee and all qualified beneficiaries.⁷⁰
- By the court upon application of a settlor or any interested person to conform the trust's terms to the settlor's intent if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the trust's terms were affected by a mistake of fact or law.⁷¹
- By the court upon application of any interested person to achieve the settlor's tax objectives in a manner that is not contrary to the settlor's probable intent.⁷²

Settlor's Powers and Powers of Withdrawal

While a trust is revocable, the duties of the trustee are owed exclusively to the settlor.⁷³ During the period the settlor's power may be exercised, the holder of a power of withdrawal⁷⁴ has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.⁷⁵

Cotrustees

A trust may have more than one trustee, who are known collectively as cotrustees. Cotrustees who are unable to reach a unanimous decision may act by majority decision.⁷⁶ A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the cotrustee has properly delegated the function's performance to another cotrustee.⁷⁷ Except as otherwise provided in law, each cotrustee shall exercise reasonable care to:

- Prevent a cotrustee from committing a breach of trust; and

⁶⁶ If a particular charitable trust becomes unlawful, impracticable, impossible to achieve, or wasteful, the court may apply the doctrine of *cy pres* to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes. S. 736.0413, F.S.

⁶⁷ S. 736.04113(1), F.S.

⁶⁸ S. 736.04115(1), F.S.

⁶⁹ S. 736.04113(2), F.S.

⁷⁰ S. 736.0412(1), F.S.

⁷¹ S. 736.0415, F.S.

⁷² S. 736.0416, F.S.

⁷³ S. 736.0603(1), F.S.

⁷⁴ "Power of withdrawal" means a presently exercisable general power of appointment other than a power exercisable by a trustee and limited by an ascertainable standard or exercisable by another person only upon consent of the trustee or a person holding an adverse interest. S. 736.0103(14), F.S.

⁷⁵ S. 736.0603(2), F.S.

⁷⁶ S. 736.0703(1), F.S.

⁷⁷ S. 736.0703(3), F.S.

- Compel a cotrustee to redress a breach of trust.⁷⁸

If the terms of a trust provide for the appointment of more than one trustee but confer upon one or more of the trustees, to the exclusion of the others, the power to direct or prevent specified trustee actions, the excluded trustees must act in accordance with the exercise of that power.⁷⁹ Except in cases of willful misconduct on the part of the excluded trustee, an excluded trustee is not liable, individually or as a fiduciary, for any consequence that results from compliance with the exercise of that power.⁸⁰ An excluded trustee does not have a duty or an obligation to review, inquire, investigate, or make recommendations or evaluations respecting the exercise of that power.⁸¹ The trustee having the power to direct or prevent actions of the excluded trustees is liable to the beneficiaries with respect to the exercise of that power and has the exclusive obligation to account to and defend any action brought by the beneficiaries respecting the exercise of the power.⁸²

Powers to Direct

Generally, a trustee may follow a settlor's direction that is contrary to the terms of the trust while the trust is revocable.⁸³ If the terms of a trust confer on a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee must act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the trust's terms or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the trust's beneficiaries.⁸⁴ The terms of a trust may also confer on a trustee or other person a power to direct the trust's modification or termination.⁸⁵ A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, must act in good faith regarding the trust's purposes and the beneficiary's interests.⁸⁶

Limitations on Proceedings Against Trustees

Generally, all claims by a beneficiary against a trustee for breach of trust are barred as provided in ch. 95, F.S., as to all matters:

- Adequately disclosed in a trust disclosure document⁸⁷ issued by the trustee, with the limitations period beginning on the date of receipt of adequate disclosure; and
- Not adequately disclosed in a trust disclosure document if the trustee has issued a final trust accounting and has given written notice to the beneficiary of the availability of the trust records for examination and that any claims respecting matters not adequately disclosed may be barred unless an action is begun within the applicable limitations period provided in ch. 95, F.S., which begins on the date of receipt of the final trust accounting and notice.⁸⁸

Unless sooner barred by adjudication, consent, or limitations, a beneficiary is barred from bringing an action against a trustee for breach of trust respecting a matter that was adequately disclosed in a trust disclosure document unless a proceeding to assert the claim is begun within six months after receipt from the trustee of the trust disclosure document or a limitation notice applicable to the disclosure document, whichever is received later.⁸⁹

⁷⁸ S. 736.0703(7), F.S.

⁷⁹ S. 736.0703(9), F.S.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ S. 736.0808(1), F.S.

⁸⁴ S. 736.0808(2), F.S.

⁸⁵ S. 736.0808(3), F.S.

⁸⁶ S. 736.0808(4), F.S.

⁸⁷ "Trust disclosure document" means a trust accounting or any other written report of the trustee. A trust disclosure document adequately discloses a matter if the document provides sufficient information so that a beneficiary knows of a claim or reasonably should have inquired into the claim's existence. S. 736.1008(4)(a), F.S.

⁸⁸ S. 736.1008(1), F.S.

⁸⁹ S. 736.1008(2), F.S.

Courts have found that a trust officer, director, or other personnel employed by and acting on behalf of a corporate trustee may also be personally liable to the trust beneficiaries.⁹⁰ However, it is unclear whether the six-month statute of limitations period for bringing proceedings against a trustee extends to trust officers, directors, and other personnel employed by a corporate trustee.⁹¹

Trust Certification

Instead of furnishing a trust instrument copy to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing:

- A statement that the trust exists and the date the trust instrument was executed;
- The settlor's identity;
- The identity and address of the current acting trustee;
- The trustee's powers;
- The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
- The authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required to exercise the trustee's powers; and
- The manner of taking title to trust property.⁹²

A trust certification may be signed or otherwise authenticated by any trustee and must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained therein to be incorrect.⁹³

Effect of Marital Status Change on Revocable Trust

Unless the trust instrument or the judgment for dissolution of marriage or divorce expressly provides otherwise, if a revocable trust is executed by a husband or wife as settlor before annulment of the marriage or entry of a judgment for dissolution of marriage or divorce of the settlor from his or her spouse, any provision of the trust affecting the settlor's spouse is void upon annulment of the marriage or entry of the judgment of dissolution of marriage or divorce.⁹⁴ Any such trust must be administered and construed as if the settlor's spouse had died on the date of the annulment or entry of the judgment for dissolution of marriage.⁹⁵

Tax Implications for Marital Property

Spouses may jointly hold property, but the tax implications for the property vary depending on whether the property is held in a common law state, such as Florida, or in a community property state.⁹⁶ Under s. 1014(b)(6) of the Internal Revenue Code ("IRC"), the surviving spouse in a community property state receives a fair market value basis, determined as of the date of the deceased spouse's death, in all of the couple's property (referred to as a "step-up" in basis).⁹⁷ In contrast, the surviving spouse of a marriage in a common law state receives a step-up in basis only in the property owned by the deceased spouse; the tax basis of the property owned by the surviving spouse is unaffected by the spouse's death and does not receive a step-up in basis.⁹⁸

⁹⁰ See, e.g., *Beuabien v. Cambridge Consolidated, LTD*, 652 So. 2d 936 (Fla. 5th DCA 1995); *Raimi v. Furlong*, 702 So. 2d 1273 (Fla. 3d DCA 1997).

⁹¹ See RPPTL Section, *supra* note 21.

⁹² S. 736.1017(1), F.S.

⁹³ S. 736.1017(2) and (3), F.S.

⁹⁴ S. 736.1105, F.S.

⁹⁵ *Id.*

⁹⁶ See RPPTL Section, *supra* note 21.

⁹⁷ *Id.*

⁹⁸ An example of the disparate tax outcomes in common law states and community property states, is as follows: a married couple, Husband and Wife, own appreciated undeveloped real estate purchased some time ago with a current tax basis of \$100,000 and a \$1 million fair market value. Title to the property is held jointly by both Husband and Wife. Husband dies, and Wife sells the real estate at

Many Florida residents moved to Florida with community property, whether acquired in one of the community property states or in a foreign jurisdiction with a community property regime.⁹⁹ There are some indications that community property retains its character as community property when brought to Florida, but there is uncertainty as to whether the Internal Revenue Service (“IRS”) may challenge the status of community property for a Florida decedent for purposes of s. 1014(b)(6) of the IRC.¹⁰⁰ If the IRS does challenge the community property status of a Florida decedent in this way, Florida residents may be deprived of tax benefits afforded to residents of other states.¹⁰¹

Some states, including Alaska, Tennessee, and South Dakota, have adopted community property trust legislation allowing their residents to treat property, acquired by a marital couple as separate property, as community property.¹⁰² This allows persons who moved to the state with community property to preserve the property’s community property status.¹⁰³ Several states have considered such legislation.¹⁰⁴

Homestead Protections After Devise

The constitutional homestead exemption protects \$1,000 of personal property along with a person’s residence and the adjoining land from forced sale initiated by the owner’s creditors in most situations.¹⁰⁵ Homestead protections pass to a deceased property owner’s surviving spouse, dependent children, and heirs, protecting the property from forced sale to satisfy the deceased owner’s debts.¹⁰⁶ The homestead exemption also restricts a property owner’s ability to devise homestead property away from a surviving spouse or dependent children, even if the spouse or children have abandoned the property.¹⁰⁷

Although there is reasonable legal certainty about the rights of creditors and a decedent’s family when homestead property is devised by a will, there is less certainty when homestead property is devised by a revocable trust, as there is little statutory guidance for such scenario.¹⁰⁸ Florida law is clear that the constitutional restrictions on the devise of homestead property apply to homestead property held in a revocable trust.¹⁰⁹ However, it is unclear whether the protection from forced sale carries over to the property owner’s heirs when the heirs inherit the property through a revocable trust.¹¹⁰ In particular, there is uncertainty as to the homestead exemption’s application to the trustee’s right to sell real property subject to the trust’s terms and pay valid claims against the decedent’s estate out of trust assets.¹¹¹

Florida courts attempting to address this uncertainty have reached opposite results. The Third District Court of Appeal held that the devise of homestead property through a revocable trust’s residuary clause caused the homestead exemption to be lost, and thus to not pass to the trust’s beneficiaries; however, a footnote indicates that, had the property been specifically devised under the revocable trust, the

year’s end for its \$1 million fair market value. In a common law state, s. 1014(b)(6) of the IRC results in a \$550,000 income tax basis to Wife, because Husband’s basis in his half of the property increases from the original \$50,000 to \$500,000 (the value on his date of death), and Wife’s value remains \$50,000. The real estate’s sale produces a \$450,000 gain (the \$1 million fair market value minus the \$550,000 basis) and a tax liability of \$107,100 (\$450,000 x 23.8 percent). In contrast, in a community property state, s. 1014(b)(6) of the IRC results in a \$1 million income tax basis to Wife due to the step-up in basis of the property in its entirety. The real estate’s subsequent sale produces zero gain (\$1 million fair market value less \$1 million basis) and zero tax liability. *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Art. X, s. 4(a), Fla. Const.

¹⁰⁶ Art. X, s. 4(b), Fla. Const.; see *Public Health Trust v. Lopez*, 531 So. 2d 946, 951 (Fla. 1988).

¹⁰⁷ Art. X, s. (4)(c), Fla. Const.; ss. 732.702(1) and 732.401(1), F.S.; see also *In re Estate of Scholtz*, 543 So.2d 219, 221 (Fla. 1989).

¹⁰⁸ See RPPTL Section, *supra* note 21.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

exemption may have passed to the beneficiary.¹¹² The First District Court of Appeal looked to the devise's substance, rather than its form, to find that the homestead exemption for property devised through a trust for the benefit of the decedent's adult daughter passed to the daughter, as she would have otherwise been entitled to claim homestead protection had title passed to her by will or intestacy.¹¹³ Similarly, the Fourth District Court of Appeal found that a settlor's interest in homestead property held in a revocable trust was constitutionally protected homestead which could not be used to pay the estate's claims and expenses.¹¹⁴

Effect of the Bill

Florida Probate Code

Designated Financial Institutions for Certain Assets

The bill amends s. 69.031, F.S., to require the court, in situations where a probate court has ordered that estate assets be placed in a financial institution, to vacate or terminate any order establishing the depository if the estate's personal representative posts and maintains a bond for the value of the estate's assets or in some other reasonable amount determined by the court. The bill also changes the term "assets" to "property" in this section to conform to common statutory usage.

Effect of Subsequent Familial Status Changes on a Will

The bill amends s. 732.507, F.S., to specify that a devise to a former spouse under a will is void upon the dissolution of the marriage of the testator and his or her spouse, regardless of whether the testator was married to the former spouse at the time of the devise. The bill also specifies that dissolution of marriage occurs at the time the decedent's marriage is judicially dissolved or declared invalid by court order. However, the bill specifies that this section does not invalidate a will provision:

- Executed by the testator after the dissolution of marriage;
- If the will states a specific intent to the contrary; or
- If the dissolution of marriage judgment expressly provides otherwise.

This section applies to wills of decedents who die on or after the bill's effective date.

¹¹² *Elmowitz v. Estate of Zimmerman*, 647 So. 2d 1064 (Fla. 3d DCA 1994).

¹¹³ *HCA Gulf Coast Hospital v. Estate of Downing*, 594 So. 2d 774 (Fla. 1st DCA 1992).

¹¹⁴ *Engelke v. Engelke*, 921 So. 2d 693 (Fla. 4th DCA 2006).

Florida Trust Code

Trust Terms

In relation to directed trusts, the bill modifies current law, which prohibits a trust's terms from modifying a trustee's duty to act in good faith and in accordance with the trust's terms and purposes and the beneficiary's interests. Such modifications are set forth in the following sections created by the bill:

- 736.1409, F.S., establishing clear duties and liabilities of a directed trustee;
- 736.1411, F.S., establishing that the trustee has no duty to monitor, inform, or advise specified persons; and
- 736.1412, F.S., establishing the rights of excluded cotrustees and trustees with power to direct the trust to the exclusion of the other trustees.

The bill also amends s. 736.0103, F.S., to expand the definition of "terms of a trust" to include trust provisions as established, determined, or amended by:

- A trustee or trust director in accordance with applicable law;
- Court order; or
- A non-judicial settlement agreement under s. 736.0111, F.S.

Settlor's Powers and Powers of Withdrawal

The bill amends s. 736.0603, F.S., to authorize a trustee to follow a settlor's direction that is contrary to the trust's terms while a trust is revocable.

Cotrustees

The bill deletes from s. 736.0703, F.S., a provision relating to a cotrustee's right to direct a trust. Such a right is addressed in the Uniform Directed Trust Act, as created by the bill.

Powers to Direct

The bill deletes from s. 736.0808, F.S., a provision relating to a non-trustee's powers to direct. Such powers are addressed in the Uniform Directed Trust Act, as created by the bill.

Limitations on Proceedings Against Trustees

The bill amends s. 736.1008, F.S., to extend to a "trust director"¹¹⁵ the limitations on proceedings against a trustee. Further, the bill provides that a person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a trust beneficiary or settlor. The bill also specifies that any claim barred against a trustee or a trust director is also barred against the directors, officers, and other personnel acting for a trust; thus, the statute of limitations for bringing a proceeding against a trustee also applies to directors, officers, and other personnel employed by and acting for a corporate trustee.

Trust Certification

The bill amends s. 736.1017, F.S., to specify that the trust certification a trustee may furnish to a person, other than a beneficiary, must indicate whether the trust contains any powers of direction, and if so, must also indicate:

- The identity of the current trust directors;
- The trustee powers subject to a power of direction; and

¹¹⁵ "Trust director" means a person who is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee.

- Whether the trust directors have directed or authorized the trustee to engage in the proposed transaction for which the trust certification was issued.

The bill defines “powers of direction” as a power over a trust granted to a person by the trust’s terms to the extent the power is exercisable while the person is not serving as a trustee. The term includes a power over the investment, management, or distribution of trust property, a power to amend a trust instrument or terminate a trust, or a power over other matters of trust administration.

Homestead Protections After Devise

The bill creates s. 736.1109, F.S., to provide that, for a revocable or testamentary trust:

- If a devise of homestead property under a trust violates the homestead devise limitations in article X, section 4(c) of the Florida Constitution, title shall pass as provided under s. 732.401, F.S., at the moment of death. In other words, immediately upon the decedent’s death, title to the homestead property will pass to the decedent’s heirs, not the trustee, and the heirs that receive the property will be determined according to a slightly modified version of the intestate rules of succession. Thus, if there is no surviving descendant of the decedent, the decedent’s spouse receives the entire intestate estate, but if the decedent is survived by a spouse and at least one descendant, the surviving spouse takes a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent’s death.¹¹⁶
- A power of sale or general direction to pay debts, expenses, and claims within the trust instrument does not subject an interest in protected homestead property to the claims of a decedent’s creditors, administration expenses, or obligations of a decedent’s estate.
- If a trust directs the sale of property that would otherwise qualify as protected homestead, and the property is not subject to the constitutional limitations on the devise of homestead, title will remain vested in the trustee and subject to the trust’s provisions.

The bill also amends s. 736.0201, F.S., to authorize a proceeding to determine the homestead status of real property owned by a trust to be filed in the probate proceeding for the settlor’s estate if the settlor was treated as the owner of the interest held in the trust under s. 732.4015, F.S.,¹¹⁷ with such a proceeding to be governed by the Florida Probate Rules.

Florida Uniform Directed Trust Act

The bill creates the Florida Uniform Directed Trust¹¹⁸ Act (“FUDTA”) as Part XIV of the Trust Code, set out in new ss. 736.1401-736.1416, F.S., which applies to a directed trust with its principal place of administration in the state, subject to the following rules:

- If the trust was created before July 1, 2021, this part applies only to a decision or action occurring on or after July 1, 2021.
- If the principal place of trust administration is changed to this state on or after July 1, 2021, this part applies only to a decision or action occurring on or after the date of the change.

¹¹⁶ Ss. 732.102 and 732.401, F.S. In lieu of a life estate, the surviving spouse may choose to take an undivided one-half interest in the homestead as a tenant in common, with the remaining undivided one-half interest vesting in the decedent’s descendants in being at the time of the decedent’s death. S. 732.401(2), F.S.

¹¹⁷ “Owner” under s. 732.4015, F.S., includes the grantor of a trust that is evidenced by a written instrument which exists at the time of the grantor’s death as if the interest held in trust was owned by the grantor. S. 732.4015(2)(a), F.S.

¹¹⁸ “Directed trust” means a trust for which the terms of the trust grant a power of direction.

Specifically, the bill:

- Expands the concept of “principal place of administration” to include Florida if the trust terms so provide and a trust director’s principal place of business is located in or a trust director is a resident of Florida.
- Specifies that FUDTA does not apply to certain powers, including a power of appointment,¹¹⁹ a power to remove a trustee or trust director, and a power of a settlor over a revocable trust.
- Sets forth the powers of a trust director, which are generally limited to the powers granted in the trust instrument and further powers not expressly granted that are appropriate to the exercise or non-exercise of an expressly granted power.
- Establishes limitations on a trust director, specifying that a trust director with powers relating to Medicaid payback or a charitable interest is subject to the same rules to which a trustee would be subject when exercising such powers.
- Specifies that a trust director has the same fiduciary duties and liabilities as a trustee would have if the trustee had the trust director’s powers.
- Specifies that a directed trustee¹²⁰ must act to follow a trust director’s power of direction unless such action would be manifestly contrary to the trust’s terms or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes the trust’s beneficiaries.
- Sets forth the duties of a trustee and a trust director to provide specified information about the trust to the other to the extent the information relates to the other’s powers or duties and requires a trust director to provide specified information to a qualified beneficiary upon request.
- Specifies that a:
 - Trustee has no duty to monitor a trust director, nor to inform or advise a settlor, beneficiary, trustee, or trust director as to how the trustee might have acted differently from the trust director.
 - Trust director has no duty to monitor a trustee, nor to inform or advise a settlor, beneficiary, trustee, or trust director as to how the trust director might have acted differently from the trustee.
- Specifies that when a trust’s terms confer a power to direct or prevent actions of the other trustees on one or more trustee to the exclusion of another trustee, the excluded trustee has the same duties and liabilities under FUDTA as imposed on a directed trustee.
- Establishes limitations on actions against trust directors, including a six month statute of limitations.
- Authorizes a trust director to assert the same defenses in a breach of trust action as a trustee may assert.
- Specifies that a trust director is subject to the personal jurisdiction of Florida courts by accepting appointment.
- Specifies when a trust director is considered a trustee.
- Authorizes a trustee, settlor, or a qualified beneficiary, under specified circumstances, to make a written demand that a person designated to serve as a trust director accept or confirm prior acceptance of the trust directorship in writing.

Community Property Trust Act

The bill creates the Community Property Trust Act (“CPTA”) as Part XV of the Trust Code, set out in new ss. 736.1501-736.1512, F.S., which applies to an express trust that complies with s. 736.1503, F.S., and is created on or after July 1, 2021. Under the bill, “community property” means the property

¹¹⁹ “Power of appointment” means a power that enables a person acting in a non-fiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over trust property.

¹²⁰ “Directed trustee” means a trustee that is subject to a trust director’s power of direction.

and the appreciation of and income from the property owned by a qualified trustee¹²¹ of a community property trust during the marriage¹²² of the settlor spouses.

Specifically, the bill:

- Establishes the requirements for forming a community property trust, which include expressly declaring that the trust is a community property trust.
- Specifies the trust terms to which spouses may agree and describes the procedures for amending or revoking the trust agreement.
- Specifies that property can be classified as community property by transferring the property to a community property trust.
- Specifies that a community property trust is enforceable without consideration; that the right to manage and control trust property is determined by the trust agreement's terms; and that, when property is distributed from a community property trust, it is no longer community property unless it is classified as such by a jurisdiction other than Florida.
- Describes creditors' rights against a married couple who have established a community property trust.
- Describes the treatment of a surviving spouse's share and a deceased spouse's share under a community property trust.
- Provides that, upon the dissolution of the settlor spouse's marriage, a community property trust terminates and the trustee must distribute one-half of the trust assets to each spouse.
- Specifies that the initiation of an action to dissolve the settlor spouses' marriage does not automatically terminate a community property trust unless otherwise agreed to by the settlor spouses in writing or otherwise ordered by the court with jurisdiction over the dissolution proceedings, but that if a dissolution of marriage action remains pending for 180 days, the trust automatically terminates unless an exception applies.
- Specifies that a community property trust does not affect the rights of a child of either settlor who must be provided with child support.
- States that homestead property transferred to a community property trust continues to qualify as homestead property.
- Specifies that property transferred to a community property trust is community property within the meaning of s. 1014(b)(6) of the IRC and that community property transferred into a community property trust from another state retains its character while in the community property trust.
- States that a community property trust executed during a marriage may be unenforceable if one spouse proves that the community property trust was unconscionable when made, was not voluntarily created, was the product of fraud, duress, coercion, or overreaching, or that the spouse against whom enforcement is sought:
 - Was not given a fair and reasonable disclosure of the property and financial obligations of the other spouse;
 - Did not voluntarily sign a waiver expressly waiving such disclosure beyond what was provided; and
 - Did not have notice of the property or financial obligations of the other spouse.

The bill also makes conforming changes and provides for severability. The bill provides an effective date of July 1, 2021, except as otherwise expressly provided in the bill.

¹²¹ "Qualified trustee" means a natural person who is a Florida resident or a company authorized to act as a trustee in Florida.

¹²² "During the marriage" means a period beginning on the date of marriage and ending upon the dissolution of the marriage or the death of a spouse. "Dissolution" means either termination of a marriage by a decree of dissolution, divorce, annulment, or declaration of invalidity or entry of a decree of legal separation maintenance by a court of competent jurisdiction in another state that recognizes legal separation or maintenance under its laws.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill may have a positive fiscal impact on state government by allowing additional wealth to be managed by Florida corporate trustees, which may result in an increased number of fiduciary commissions subject to the state's corporate income tax. The bill may also encourage persons to keep their assets in Florida rather than transferring such assets outside the state, potentially resulting in a larger tax base.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a direct economic impact on the private sector by:

- Creating certainty regarding the extension of homestead protection after the devise of homestead property.
- Giving Florida residents an opportunity to avail themselves of a federal income tax benefit for community property.

D. FISCAL COMMENTS:

None.