

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1001 Trusts
SPONSOR(S): Beltran
TIED BILLS: **IDEN./SIM. BILLS:** SB 1368

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	11 Y, 4 N	Mawn	Jones
2) Insurance & Banking Subcommittee		Hinshelwood	Luczynski
3) Judiciary Committee			

SUMMARY ANALYSIS

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. A trust may be created and take effect during a settlor’s lifetime (“a living trust”) or a trust may be created by a will and take effect when the settlor dies. A living trust may be revocable or irrevocable. The Florida Trust Code (“Trust Code”) applies to express trusts, charitable and non-charitable trusts, and trusts created by a law, judgment, or decree that requires the trust to be administered like an express trust. The Trust Code:

- Contains a rule against perpetuities which provides that a trust is invalid unless it vests within 90 or 360 years, depending on the trust’s creation date.
- States that a trust’s terms control over the Trust Code, with exceptions including the trustee’s duty to provide a:
 - Complete copy of the trust instrument to a qualified beneficiary upon reasonable request.
 - Trust accounting containing specified information at least annually and upon trust termination or trustee change.
- Specifies acceptable methods for serving notices and documents, which includes posting notices and documents on an electronic account or website or service by “other electronic methods.”
- Authorizes a parent to represent or bind his or her unborn or minor child in specified circumstances.
- Permits a trustee to elect to reimburse a grantor trust’s grantor for tax payments made by the grantor in certain situations.
- Establishes a 21-year enforcement period for a purpose trust.

The bill:

- Amends Florida’s rule against perpetuities for a trust created on or after July 1, 2022 by extending to 1,000 years the time in which the trust must vest.
- Authorizes a specified financial statement in lieu of an annual trust accounting when not otherwise prohibited by the trust’s terms.
- Expressly authorizes service of a notice or document by e-mail, which may include use of a hyperlink or an attached document.
- Extends the right of a parent to represent or bind his or her unborn or minor child to such child’s unborn or minor children in specified circumstances.
- Clarifies the applicability of a statute relating to a trustee’s reimbursement to a grantor trust’s grantor for tax payments made by the grantor.
- Extends the enforcement period for a purpose trust from 21 years to 1,000 years.

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

The bill provides an effective date of July 1, 2022.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

A trust is a relationship in which one party, the “settlor,”¹ gives another party, the “trustee,” the right to hold title to the settlor’s property or assets for a third party’s benefit (“beneficiary”). A trust may be created and take effect during a settlor’s lifetime (“a living trust”) or a trust may be created by a will and take effect when the settlor dies.² A living trust may be revocable³ or irrevocable.⁴ The Florida Trust Code (“Trust Code”), set out in ch. 736, F.S., applies to express trusts,⁵ charitable⁶ and non-charitable trusts, and trusts created by a law, judgment, or decree requiring the trust to be administered like an express trust.⁷

Rule Against Perpetuities

Background

The Florida Uniform Statutory Rule Against Perpetuities (“FUSRAP”) is a rule designed to prevent remoteness in vesting.⁸ Under FUSRAP, a non-vested property interest in real or personal property, including an interest in a trust, is invalid unless:

- When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or
- The interest either vests or terminates within 90 years after its creation.⁹

Similar parameters apply to the maximum permissible period for exercising a power of appointment.¹⁰

However, as to any trust created after December 31, 2000, the maximum trust duration and power of appointment exercise period is extended from 90 years to 360 years unless the trust’s terms require that all beneficial interests in the trust vest or terminate within a lesser time period.¹¹ Further, some states, including Alaska, Colorado, Utah, and Wyoming, have increased the maximum trust vesting period to 1,000 years, while other states, including Delaware, allow a trust to extend in perpetuity.¹²

¹ “Settlor” means a person, including a testator, who creates or contributes property to a trust. S. 736.0103(18), F.S.

² See “inter vivos trust” and “testamentary trust,” Black’s Law Dictionary (11th ed. 2019).

³ 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.

⁴ An “irrevocable trust” is “[a] trust that cannot be terminated by the settlor once it is created.” Black’s Law Dictionary (11th ed. 2019).

⁵ An “express trust” is “[a] trust created with the settlor’s express intent, [usually] declared in writing.” Black’s Law Dictionary (11th ed. 2019).

⁶ “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.

⁷ Ss. 736.0101 and 736.0102(1), F.S.

⁸ David F. Powell, *Florida’s Statutory Rule Against Perpetuities*, 11 Fla. St. U. L. Rev. 767 (1984), <https://ir.law.fsu.edu/cgi/viewcontent.cgi?article=2147&context=lr> (last visited Jan. 19, 2022).

⁹ S. 689.225(2)(a), F.S.

¹⁰ “Power of appointment” is the legal authority to direct where an interest in a trust or estate may go. In the case of a trust, the beneficiary may hold such power, and the trust instrument typically instructs the beneficiary as to the ways in which he or she may exercise the power. S. 689.225(2)(b) and (c), F.S.

¹¹ S. 689.225(2)(f), F.S.

¹² Other states that allow a trust to extend in perpetuity include Idaho, Illinois, Kentucky, Missouri, New Hampshire, New Jersey, North Carolina, Pennsylvania, Rhode Island, South Dakota, and Virginia. See Alaska Statute s. 34.27.051; Colo. Rev. Stat. s. 15-11-1102.5(1)(a); 25 Del. Code S. 503(e); Utah Code s. 75-2-1203; Wyo. Statute s. 34-1-139(a).

Effect of Proposed Changes

The bill amends s. 689.225, F.S., to provide that, under FUSRAP, unless the trust's terms require that all beneficial interests in the trust vest or terminate within a shorter time period, the maximum trust vesting period for any trust created:

- After December 31, 2000, through June 30, 2022, is 360 years.
- On or after July 1, 2022, is 1,000 years.

Practically speaking, a trust that fails to vest within these times, or a shorter time period specified in the trust instrument, would be invalid and unenforceable.

Trust Instruments and Trust Accounting

Background

The Trust Code governs the duties and powers of a trustee, relations among trustees, and a beneficiary's rights and interests except as otherwise provided in a trust's terms.¹³ A trust's terms prevail over any Trust Code provision except those specified in statute, which includes the trustee's duty to keep the qualified beneficiaries reasonably informed of the trust and its administration¹⁴ by:

- Providing a complete copy of the trust instrument to a qualified beneficiary upon reasonable request.¹⁵
- Providing a trust accounting from the date of the last accounting or, if none, from the date on which the trustee became accountable, to each qualified beneficiary of an irrevocable trust at least annually and on trust termination or a trustee change.¹⁶
- Responding to a beneficiary's reasonable request for relevant information about the trust's assets and liabilities and trust administration particulars.¹⁷

In other words, these duties are mandatory and cannot be waived or altered by a trust's terms. However, a qualified beneficiary may waive the trustee's duty to account.¹⁸

A trust accounting must be a reasonably understandable report that adequately discloses the following information:

- A statement identifying the trust, the trustee furnishing the accounting, and the accounting period;
- A list of all cash and property transactions and all significant transactions affecting trust administration during the accounting period, including compensation paid to the trustee and the trustee's agents;
- The identity and value of trust assets on hand at the accounting period's close and each known noncontingent liability with an estimated current liability amount;
- A list of significant transactions that do not affect the amount for which the trustee is accountable;
- The allocation of receipts, disbursements, accruals, or allowances between income and principal when the allocation affects the interest of any trust beneficiary; and
- A distribution plan for any undistributed assets shown on the final accounting.¹⁹

Effect of Proposed Changes

The bill amends ss. 736.0105 and 736.08135, F.S., to create an alternative to the annual trust accounting requirement. Specifically, the bill provides that the trustee of an irrevocable trust may elect, for any accounting period beginning on or after January 1, 2021, to provide a financial statement in lieu

¹³ S. 736.0105(1), F.S.

¹⁴ S. 736.0813, F.S.

¹⁵ Ss. 736.0105(2) and 736.0813(1)(c), F.S.

¹⁶ Ss. 736.0105(2) and 736.0813(1)(d), F.S.

¹⁷ S. 736.0813(1)(e), F.S.

¹⁸ S. 736.0813(2), F.S.

¹⁹ S. 736.08135(1)-(3), F.S.

of a trust accounting to any beneficiary, though a trustee must still provide a trust accounting upon trust termination. The financial statement must indicate that the trustee has made such election for that period and include:

- Information identifying the trust, the trustee furnishing the accounting, and the accounting period and, if applicable, a distribution plan for any undistributed assets shown on the final accounting.
- A financial statement for the trust, prepared by a certified public accountant, summarizing the information normally required in a trust accounting and containing sufficient information to put the beneficiary on notice of the trust's comprehensive assets and liabilities and the transactions occurring during the accounting period.

Under the bill:

- A financial statement reporting the aggregate amounts of all cash and property transactions, gains, losses, receipts, expenses, disbursements, accruals, or allowances occurring within the accounting period for each category is an authorized financial statement.
- Such a financial statement is deemed to be a trust accounting that adequately discloses all the information required by statute to be disclosed in a trust accounting.
- A trustee that elects to provide such a financial statement must, upon a beneficiary's request made within six months of the beneficiary's receipt of the statement, make available the detailed information necessary for the statement's preparation within 30 days of the request.

The bill does not:

- Prevent a trustee from voluntarily providing a trust accounting to the qualified beneficiaries annually or at other times of the trustee's choosing;
- Relieve a trustee from the duty to provide a trust accounting to the qualified beneficiaries upon demand of such beneficiaries annually, or at less frequent intervals;
- Relieve a trustee from the duty to respond to a beneficiary's reasonable request for relevant information about the trust's assets and liabilities and trust administration particulars; or
- Prevent a settlor from requiring in the trust's terms that a trustee provide a trust accounting rather than a financial statement.

Methods and Waivers of Notice

Background

Notice to a person or the sending of a document under the Trust Code must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document.²⁰ Permissible methods of notice or for sending a document include first-class mail; personal delivery; delivery to the person's last known place of residence or business; a properly directed facsimile or other electronic message; or posting on a secure electronic account or website in accordance with statutory requirements.²¹ Any such notice or document sent by electronic message is complete when the document is sent, and an electronic message is presumed received on the date it is sent.²² However, if the sender has knowledge that an electronic message did not reach the recipient, the electronic message is deemed to have not been received, and the sender has the burden to prove that another copy of the notice or document was sent by electronic message or other authorized means.²³

Further, a document sent solely by posting on an electronic account or website is not deemed sent under the Trust Code unless:

- The recipient signed a separate written authorization solely to authorize the sender to post documents to an electronic account or website before such posting, which authorization contains specific information and advisements.²⁴

²⁰ S. 736.0109(1), F.S.

²¹ *Id.*

²² S. 736.0109(4), F.S.

²³ *Id.*

²⁴ S. 736.0109(3)(a), F.S.

- The sender provides a separate notice to the recipient that the authorization may be amended or revoked at any time and includes specific instructions for doing so.²⁵
- At least annually after a recipient signs a written authorization, the sender sends a notice in a statutorily-prescribed form advising recipients who have authorized documents to be posted on an electronic account or website that:
 - Such posting may commence a limitations period as short as six months even if the recipient never accesses the electronic account or website; and
 - Authority to receive documents by electronic posting may be amended or revoked at any time.²⁶

A sender may rely on the recipient's authorization to receive documents by electronic posting until the recipient amends or revokes the authorization by sending notice of its revocation or amendment.²⁷

Further, if a document is provided to a recipient solely through electronic posting, the recipient must be able to access and print or download the document until the earlier of four years after the date the document is deemed received or when the recipient's access to the electronic account or website is terminated.²⁸ If a recipient's access to the electronic account or website is terminated by the sender sooner than four years after the date the document is deemed received, any applicable limitations period is tolled for any information adequately disclosed in a document sent solely by electronic posting from the date of access termination until 45 days after the date on which the sender provides, by means other than electronic posting, notice to the recipient of such termination and that:

- The recipient may request that any documents sent during the prior four years solely through electronic posting be provided to him or her by alternative means at no costs; or
- The recipient's access to the electronic account or website has been restored.²⁹

However, current law does not expressly address what happens if a notice or document is contained in an attachment or hyperlink sent by e-mail but the information provided in the notice or document is not conveyed in the body of the e-mail itself. Thus, it is unclear whether such attachment or hyperlink would be treated as a notice or document sent by electronic message or solely by electronic posting.

Effect of Proposed Changes

The bill amends s. 736.0109, F.S., to clarify that "other electronic message" includes, but is not limited to, e-mail. The bill also specifies that, notwithstanding the requirements for sending a document solely through electronic posting:

- A properly directed e-mail message with an attached notice, document, or hyperlink through which the recipient can view a notice or document is a permissible method of notice under the Trust Code if any username, password, or other specific instructions needed to access the document or notice are communicated to the recipient either contemporaneously or on request.
- Notice to a person under the Trust Code by electronic message, including e-mail with an attached notice, document, or hyperlink, is complete when the notice or document is sent.

In other words, the bill:

- Authorizes the sender of a notice or document to embed the information in a secure attachment or hyperlink rather than requiring that such information be contained in the body of the e-mail itself.
- Clarifies that a person sending a notice, document, or hyperlink through e-mail is not required to comply with the additional requirements for sending a document solely through electronic posting.

Representations by Fiduciaries and Parents

²⁵ S. 736.0109(3)(b), F.S.

²⁶ S. 736.0109(3)(d) and (e), F.S.

²⁷ S. 736.0109(3)(f), F.S.

²⁸ S. 736.0109(3)(g), F.S.

²⁹ *Id.*

Background

Under Florida's guardianship laws, parents jointly are the natural guardians of their own children, during minority, unless the parents' parental rights have been lawfully terminated.³⁰ Although natural guardians have all the rights and authority over their minor child's person, natural guardians do not have all the rights and authority over their minor child's property; instead, natural guardians are only authorized to settle, collect, receive, and manage real or personal property distributed from an estate or trust to their minor child when the amounts received, in the aggregate, do not exceed \$15,000.³¹ Where property distributed from an estate or trust to a minor child exceeds \$15,000, the court may appoint a property guardian to administer the property on the minor child's behalf.³²

Under the Trust Code, certain parties may be authorized to represent and bind other parties. Specifically, to the extent that there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

- A property guardian may represent and bind the estate that the guardian controls.³³
- A parent may represent and bind the parent's unborn or minor child if a property guardian for the child has not been appointed.³⁴

However, the Trust Code only binds one generation of minors and unborn children, even though subsequent generations also lack legal competence to represent their own interests in a trust proceeding. Thus, a trustee seeking the consent of, or a release by, the beneficiaries of a multi-generational trust³⁵ can only obtain such consent or release from living adult beneficiaries and of minor or unborn children with living adult parents.

Effect of Proposed Changes

The bill amends s. 736.0303, F.S., to extend the right of parents to represent and bind their unborn and minor children to:

- The unborn descendants of any such unborn or minor children; and
- The minor children of any such minor children.

Such right would only apply where a property guardian has not been appointed for such persons and only to the extent that there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute. Practically speaking, this would expand the number of beneficiaries of a multi-generational trust from which a trustee could seek consent or a release through the trust's living adult beneficiaries.

Noncharitable Trust Without Ascertainable Beneficiary

Background

Except as otherwise provided by law, a trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary; this type of trust, commonly referred to as a "purpose trust," is enforceable for a period of 21 years unless the trust's terms provide for a shorter enforcement period.³⁶ A purpose trust's property may be applied only to its intended use, except to the extent the court determines that the trust property's value exceeds the amount required for the intended use.³⁷

³⁰ S. 744.301(1), F.S.

³¹ S. 744.301(2), F.S.

³² S. 736.0103(12), F.S.

³³ S. 736.0303(1), F.S.

³⁴ S. 736.0303(5), F.S.

³⁵ A "multi-generational trust," sometimes referred to as a dynasty trust, is a long-term trust created to pass wealth from generation to generation within a family without incurring transfer taxes (such as the gift or estate tax) for as long as the trust has assets. Investopedia, *Dynasty Trust*, <https://www.investopedia.com/terms/d/dynasty-trust.asp> (last visited Jan. 19, 2022).

³⁶ A purpose trust is enforceable by a person appointed in the trust's terms or, if no person is so appointed, by a court-appointed person. Contrast the enforceability period of a purpose trust with that of a charitable trust, which may be enforced in perpetuity. Ss. 689.225(5)(e) and 736.0409(1) and (2), F.S.

³⁷ S. 736.0409(3), F.S.

Property determined to not be required for the trust's intended use must be distributed to the settlor, if then living, and otherwise as part of the settlor's estate, unless the trust's terms provide otherwise.³⁸

Effect of Proposed Changes

The bill amends s. 736.0409, F.S., to increase a purpose trust's maximum enforceability period from 21 years to 1,000 years, consistent with the changes made to FUSRAP under the bill. However, a purpose trust's terms may still provide for a shorter enforceability period.

Grantor Trust Reimbursement

Background

A settlor may be treated as the trust's owner for federal income tax purposes under certain circumstances.³⁹ A settlor so treated is referred to as the "grantor" and the trust is referred to as a "grantor trust."⁴⁰ A grantor must report all of the grantor trust's income, losses, deductions, and credits on his or her individual income tax return and must pay any taxes on the grantor trust's income even if the grantor has no beneficial interest⁴¹ in the trust.⁴² Where a grantor is unable or unwilling to bear the grantor trust's income tax burden, the trust may be converted into a non-grantor trust so that the trust or its beneficiaries bear the tax burden.⁴³ However, a conversion is not always desirable, as the conversion may make the trust ineligible to own stock in an S corporation⁴⁴ or to qualify for a federal capital gains tax exclusion⁴⁵ on the sale of the grantor's primary residence.⁴⁶

Alternatively, except as otherwise provided under a trust's terms or as prohibited by law, if all or any portion of a trust is being treated as a grantor trust, the trustee may, in the trustee's sole discretion, reimburse the grantor for any amount of the person's federal, state, or other income tax liability attributable to the inclusion of the trust's income, capital gains, deductions, or credits in the calculation of the grantor's taxable income ("reimbursement provision").⁴⁷ The reimbursement provision applies to all trusts, whether created on, before, or after July 1, 2020, unless:

- The trustee provides written notification that the trustee intends to irrevocably elect out of the reimbursement provisions, at least 60 days before the effective date of such election, to the grantor and all persons who have the ability to remove and replace the trustee.⁴⁸
- Applying the provisions would prevent a contribution to the trust from qualifying for, or would reduce, a federal tax benefit, which was originally claimed or could have been claimed for the contribution.⁴⁹

Effect of Proposed Changes

The bill amends s. 736.08145, F.S., to limit the application of the reimbursement provision to trusts that are governed by Florida law or have a principal place of administration in Florida, whether created on,

³⁸ S. 736.0409(1) and (2), F.S.

³⁹ 26 U.S.C. §§ 673a, 674a, 675, 676a, and 677a (2022).

⁴⁰ The Florida Coalition for Modern Laws ("FCML"), *White Paper* (2019).

⁴¹ A "beneficial interest" is the right of a party to some profit, distribution, or benefit from a contract or trust. Legal Information Institute, *Beneficial Interest*, https://www.law.cornell.edu/wex/beneficial_interest (last visited Jan. 19, 2022).

⁴² 26 U.S.C. § 671 (2020).

⁴³ FCML, *supra* note 40.

⁴⁴ An "S corporation" is a corporation that qualifies and elects to be an S corporation under the Internal Revenue Code. S Corporations typically do not pay taxes to the federal government. Instead, most S corporations are taxed indirectly through their shareholders. An S corporation must have a limited number of shareholders, giving rise to the statutory term "small business" or "S" corporation. Legal Information Institute, *S Corporation*, https://www.law.cornell.edu/wex/s_corporation (last visited Jan. 19, 2022).

⁴⁵ Capital gains are the profit on the sale of a capital asset, such as stock or real estate. If a person sells a primary residence, current tax law lets the seller exclude \$250,000 in profit from capital gains tax. A couple can exclude \$500,000. Legal Information Institute, *Capital Gains*, https://www.law.cornell.edu/wex/capital_gains (last visited Jan. 19, 2022).

⁴⁶ FCML, *supra* note 40.

⁴⁷ A trustee may not exercise the reimbursement provision right if the trustee is: treated as the grantor; a trust beneficiary; or a related or subordinate party with respect to the grantor. Further, if a trust's terms require the trustee to act at the direction or with the consent of a trust advisor, the reimbursement right must instead or also be granted to the trust advisor. S. 736.08145(1), (3), and (4), F.S.

⁴⁸ S. 736.08145(2)(a), F.S.

⁴⁹ S. 736.08145(2)(b), F.S.

before, or after July 1, 2020, unless a pre-existing exception, noted above, applies. This clarifies for a trust the circumstances under which the trustee's reimbursement provision authority applies.

Effective Date

The bill provides an effective date of July 1, 2022.

B. SECTION DIRECTORY:

Section 1: Amends s. 689.225, F.S., relating to statutory rule against perpetuities.

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. 736.0303, F.S., relating to representation by fiduciaries and parents.

Section 5: Amends s. 736.0409, F.S., relating to noncharitable trust without ascertainable beneficiary.

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

Section 7: Amends s. 736.08145, F.S., relating to grantor trust reimbursement.

Section 8: Provides an effective date of July 1, 2022.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill may have a positive indeterminate fiscal impact on state government by attracting additional trusts to Florida and helping to retain trust assets and related business. This may result in an increased number of trusts and related business subject to taxation in this state.

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:

- Providing additional time in which a trust may vest or be enforced before it is rendered invalid.
- Reducing costs associated with providing trust information to qualified trust beneficiaries where the election to provide a financial statement in lieu of a trust accounting is made.
- Allowing the parents of a minor or unborn child to bind such child's minor or unborn children in certain circumstances, thereby facilitating trust administration without the need for court intervention.
- Reducing the potential for litigation over the application of a trustee's reimbursement provision authority to a particular trust.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This 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