

Insurance & Banking Subcommittee

Tuesday, March 30, 2021
1:00 PM – 3:30 PM
Morris Hall (17 HOB)

Meeting Packet

Chris Sprowls
Speaker

Nick DiCeglie
Chair

The Florida House of Representatives

Commerce Committee

Insurance & Banking Subcommittee

Chris Sprowls
Speaker

Nick DiCeglie
Chair

Meeting Agenda

Tuesday, March 30, 2021
1:00 PM – 3:30 PM
Morris Hall (17 HOB)

I. Call to Order

II. Roll Call

III. Welcome and Opening Remarks

IV. Consideration of the following bill(s):

- HB 609 Estates and Trusts by Diamond
- HB 7037 OGSR/State-funded Infrastructure Bank by Government Operations Subcommittee, McClure

V. Closing Remarks

VI. Adjournment

303 House Office Building, 402 South Monroe Street, Tallahassee, FL 32399-1300
(850) 717-4870

HB 609

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	18 Y, 0 N	Mawn	Jones
2) Insurance & Banking Subcommittee		Hinshelwood	Luczynski
3) Judiciary Committee			

SUMMARY ANALYSIS

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 as a blanket policy 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 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. Additionally, the Trust Code leaves some ambiguity relating to the treatment of, and constitutional protections provided to, homestead property when such property is 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 has no provision for creation of a trust that would allow spouses to designate property as "community property".

HB 609:

- 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 has no fiscal impact on local governments and may have a positive fiscal impact on state government and the private sector.

The bill provides an effective date of July 1, 2021, except as otherwise expressly provided in the bill.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

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

---

[1] The Florida Bar, *Consumer Pamphlet: Probate in Florida*, https://www.floridabar.org/public/consumer/pamphlet026/ (last visited Mar. 26, 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 Mar. 26, 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.
[9] S. 733.305(1), F.S.

Duties of Personal Representatives

A personal representative's duties and powers begin upon appointment.[10] Generally, a personal representative is a fiduciary[11] 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 the 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]

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 meant to be determined 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

---

[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.*
[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 Mar. 10, 2021).
[22] *See* RPPTL Section, *supra* note 21; *see also Goodstein v. Goodstein*, 263 So. 3d 78, 80 (Fla. 4th DCA 2019).

approval before making even 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 pretermitted[24] 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, which is called an inter vivos trust or living trust, or a trust may be created by a will and take effect when the settlor (testator[33]) dies.[34] An inter vivos trust may be revocable[35] or irrevocable.[36] The Florida Trust Code ("Trust Code"), set out in ch. 736, F.S., applies to express trusts,[37] charitable[38] 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.[39]

Trust Terms

[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] A "testator" is "[s]omeone who has made a will; [especially] a person who dies leaving a will." Black's Law Dictionary (11th ed. 2019).
[34] *See* "inter vivos trust" and "testamentary trust", Black's Law Dictionary (11th ed. 2019).
[35] 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.
[36] An "irrevocable trust" is "[a] trust that cannot be terminated by the settlor once it is created." Black's Law Dictionary (11th ed. 2019).
[37] An express trust is "[a] trust created with the settlor's express intent, [usually] declared in writing." Black's Law Dictionary (11th ed. 2019).
[38] "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.
[39] Ss. 736.0101 and 736.0102(1), F.S.

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.[40] 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.[41]

The trust's terms, or, as used in the Trust Code, 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 admissible in a judicial proceeding.[42]

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.[43]

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.[44]

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.[45] 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.[46]

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.[47]

A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes and its administration.[48] 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.[49]

Judicial Trust Proceedings

---

[40] "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.
[41] S. 736.0105(2), F.S.
[42] S. 736.0103(21), F.S.
[43] S. 736.0107, F.S.
[44] *Id.*
[45] S. 736.0108(1), F.S.
[46] *Id.*
[47] S. 736.0108(2), F.S.
[48] S. 736.0108(4), F.S.
[49] S. 736.0109(5), F.S.

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.[50]

Generally, judicial trust proceedings are commenced by filing a complaint with the court and are governed by the Florida Rules of Civil Procedure.[51] 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 instrument[52] 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.[53]

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.[54]

Trust Creation

A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve.[55] 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 appointment[56] in favor of a trustee.[57]

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 beneficiary[58] or is a charitable trust; a trust for the care of an animal;[59] or a trust for a non-charitable purpose;[60]

---

[50] S. 736.0204, F.S.
[51] 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.
[52] "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.
[53] S. 736.0201(4), F.S.
[54] S. 736.0201(2) and (3), F.S.
[55] S. 736.0404, F.S.
[56] A power of appointment exists *whenever 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.* Obviously, one who is the complete and unqualified beneficial owner of property has such discretion but we do not regard him as having, in addition to such ownership, a power of appointment. Thus the term, power of appointment, is reserved for those situations where the discretion is not an incident of the beneficial rights one may otherwise have in the property. Black's Law Dictionary (11th ed. 2019) (citation omitted).
[57] S. 736.0401, F.S.
[58] 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.
[59] 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.

- The trustee has duties to perform; and
- The same person is not the sole trustee and the sole beneficiary.[61]

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.[62] However:

- No trust in any messauges,[63] lands, tenements, or hereditaments[64] shall 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.[65]

Trust Modification or Termination

A trust terminates to the extent the trust expires or is revoked or properly distributed under the trust's terms.[66] 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:

- The trust's purposes have been fulfilled or have become illegal, impossible, wasteful, or impracticable to fulfill;[67]
- 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.[68]

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.[69] 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.[70]

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.[71]
- 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

---

[60] A trust may be created for a non-charitable purpose without a definite or definitely 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.
[61] S. 736.0402, F.S.
[62] S. 736.0403(1), F.S.
[63] "Messauge" 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/messuage (last visited Mar. 10, 2021).
[64] "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).
[65] S. 736.0403(2), F.S.
[66] S. 736.0410(1), F.S.
[67] 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.
[68] S. 736.04113(1), F.S.
[69] S. 736.04115(1), F.S.
[70] S. 736.04113(2), F.S.
[71] S. 736.0412(1), F.S.

accomplishment of the settlor's intent and the trust's terms were affected by a mistake of fact or law.[72]
- 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.[73]

Settlor's Powers and Powers of Withdrawal

While a trust is revocable, the duties of the trustee are owed exclusively to the settlor.[74] During the period the settlor's power may be exercised, the holder of a power of withdrawal[75] has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.[76]

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.[77] A cotrustree 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.[78] Except as otherwise provided in law, each cotrustee shall exercise reasonable care to:
- Prevent a cotrustee from committing a breach of trust; and
- Compel a cotrustee to redress a breach of trust.[79]

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.[80] 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.[81] 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.[82] 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.[83]

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.[84] 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.[85] The terms of a trust may also confer on a trustee or other person a power to direct the trust's modification or termination.[86] A person, other than a beneficiary,

[72] S. 736.0415, F.S.
[73] S. 736.0416, F.S.
[74] S. 736.0603(1), F.S.
[75] "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.
[76] S. 736.0603(2), F.S.
[77] S. 736.0703(1), F.S.
[78] S. 736.0703(3), F.S.
[79] S. 736.0703(7), F.S.
[80] S. 736.0703(9), F.S.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] S. 736.0808(1), F.S.
[85] S. 736.0808(2), F.S.
[86] S. 736.0808(3), F.S.

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.[87]

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 document[88] 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.[89]

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.[90]

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.[91] 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.[92]

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.[93]

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.[94]

Effect of Marital Status Change on Revocable Trust

---

[87] S. 736.0808(4), F.S.
[88] "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.
[89] S. 736.1008(1), F.S.
[90] S. 736.1008(2), F.S.
[91] *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).
[92] *See* RPPTL Section, *supra* note 21.
[93] S. 736.1017(1), F.S.
[94] S. 736.1017(2) and (3), F.S.

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.[95] Any such trust shall 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.[96]

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.[97] 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).[98] In contrast, the surviving spouse of a marriage in a common law state will receive 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.[99]

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.[100] 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.[101] 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.[102]

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.[103] This allows persons who moved to the state with community property to preserve the property's community property status.[104] Ohio, Michigan, and North Carolina are currently considering such legislation.[105]

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.[106] 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.[107] The

[95] S. 736.1105, F.S.
[96] *Id.*
[97] *See* RPPTL Section, *supra* note 21.
[98] *Id.*
[99] As an example of the disparate tax outcomes in common law states and community property states, suppose 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 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.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] Art. X, s. 4(a), Fla. Const.
[107] Art. X, s. 4(b), Fla. Const.*; see Public Health Trust v. Lopez*, 531 So. 2d 946, 951 (Fla. 1988).

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.[108]

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 this scenario.[109] Florida law is clear that the constitutional restrictions on the devise of homestead property apply to homestead property held in a revocable trust.[110] 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.[111] 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.[112]

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 exemption may have passed to the beneficiary.[113] 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.[114] 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.[115]

Effect of Proposed Changes

Florida Probate Code

Designated Financial Institutions for Certain Assets

In circumstances where a probate court has ordered that assets of the estate be placed in a financial institution, the bill requires that the court 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" to conform to common statutory usage.

Effect of Subsequent Familial Status Changes on a Will

The bill specifies 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.

[108] 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).
[109] *See* RPPTL Section, *supra* note 21.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Elmowitz v. Estate of Zimmerman*, 647 So. 2d 1064 (Fla. 3d DCA 1994).
[114] *HCA Gulf Coast Hospital v. Estate of Downing*, 594 So. 2d 774 (Fla. 1st DCA 1992).
[115] *Engelke v. Engelke*, 921 So. 2d 693 (Fla. 4th DCA 2006).

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

Florida Trust Code

Trust Terms

In relation to directed trusts, the bill modifies current law prohibiting 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., setting forth the 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., setting forth the rights of excluded cotrustees and trustees with power to direct the trust to the exclusion of the other trustees.

The bill also expands 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 authorizes 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 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 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 extends to a "trust director"[116] the limitations on proceedings against a trustee. The 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 beneficiary or settlor of the trust. 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 specifies 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
- Whether the trust directors have directed or authorized the trustee to engage in the proposed transaction for which the trust certification was issued.

[116] "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.

The bill provides that "powers of direction" means 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 provides 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: 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.[117]
- 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 authorizes 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.,[118] with such a proceeding to be governed by the Florida Probate Rules.

Florida Uniform Directed Trust Act

The bill creates the Florida Uniform Directed Trust[119] Act ("FUDTA") as Part XIV of the Trust Code, set out in 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.

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,[120] 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.

[117] 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.

[118] "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.

[119] "Directed trust" means a trust for which the terms of the trust grant a power of direction.

[120] "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.

- 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 as a trustee would be subject to 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 trustee[121] 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, 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 and the appreciation of and income from the property owned by a qualified trustee[122] of a community property trust during the marriage[123] 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 that spouses may agree to 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

[121] "Directed trustee" means a trustee that is subject to a trust director's power of direction.
[122] "Qualified trustee" means either a natural person who is a Florida resident or a company authorized to act as a trustee in Florida.
[123] "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.

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 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.
- Explains 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, 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.

B. SECTION DIRECTORY:

Section 1: Amends s. 69.031, F.S., relating to designate financial institutions for assets in hands of guardians, curators, administrators, trustees, receivers, or other officers.
Section 2: Amends s. 732.507, F.S., relating to effect of subsequent marriage, birth, adoption, or dissolution of marriage.
Section 3: Amends s. 736.0103, F.S., relating to definitions.
Section 4: Amends s. 736.0105, F.S., relating to default and mandatory rules.
Section 5: Amends s. 736.0201, F.S., relating to role of court in trust proceedings.
Section 6: Amends s. 736.0603, F.S., relating to settlor's powers; powers of withdrawal.
Section 7: Amends s. 736.0703, F.S., relating to cotrustees.
Section 8: Repeals s. 736.0808, F.S., relating to powers to direct.
Section 9: Amends s. 736.1008, F.S., relating to limitations on proceedings against trustees.
Section 10: Amends s. 736.1017, F.S., relating to certification of trust.
Section 11: Amends s. 736.1105, F.S., relating to dissolution of marriage; effect on revocable trust.
Section 12: Creates s. 736.1109, F.S., relating to testamentary and revocable trusts; homestead protections.
Section 13: Creates Part XIV of ch. 736, F.S., entitled "Florida Uniform Directed Trust Act".
Section 14: Creates s. 736.1401, F.S., relating to short title.
Section 15: Creates s. 736.1403, F.S., relating to application; principal place of administration.
Section 16: Creates s. 736.1405, F.S., relating to exclusions.
Section 17: Creates s. 736.1406, F.S., relating to power of trust director.
Section 18: Creates s. 736.1407, F.S., relating to limitations on trust director.
Section 19: Creates s. 736.1408, F.S., relating to duty and liability of trust director.
Section 20: Creates s. 736.1409, F.S., relating to duty and liability of directed trustee.
Section 21: Creates s. 736.141, F.S., relating to duty to provide information.
Section 22: Creates s. 736.1411, F.S., relating to no duty to monitor, inform, or advise.
Section 23: Creates s. 736.1412, F.S., relating to application to cotrustee.
Section 24: Creates s. 736.1413, F.S., relating to limitation of action against trust director.

Section 25: Creates s. 736.1414, F.S., relating to defenses in action against trust director.
Section 26: Creates s. 736.1415, F.S., relating to jurisdiction over trust director.
Section 27: Creates s. 736.1416, F.S., relating to office of trust director.
Section 28: Creates Part XV of ch. 736, F.S., entitled "Community Property Trust Act".
Section 29: Creates s. 736.1501, F.S., relating to short title.
Section 30: Creates s. 736.1502, F.S., relating to definitions.
Section 31: Creates s. 736.1503, F.S., relating to requirements for community property trust.
Section 32: Creates s. 736.1504, F.S., relating to agreement establishing community property trust; amendments and revocation.
Section 33: Creates s. 736.1505, F.S., relating to classification of property as community property; enforcement; duration; management and control; effect of distributions.
Section 34: Creates s. 736.1506, F.S., relating to satisfaction of obligations.
Section 35: Creates s. 736.1507, F.S., relating to death of a spouse.
Section 36: Creates s. 736.1508, F.S., relating to dissolution of marriage.
Section 37: Creates s. 736.1509, F.S., relating to right of child to support.
Section 38: Creates s. 736.151, F.S., relating to homestead property.
Section 39: Creates s. 736.1511, F.S., relating to application of Internal Revenue Code; community property classified by another jurisdiction.
Section 40: Creates s. 736.1512, F.S., relating to unenforceable trusts.
Section 41: Amends s. 736.0802, F.S., relating to duty of loyalty.
Section 42: Amends s. 736.08125, F.S., relating to protection of successor trustees.
Section 43: Amends s. 738.104, F.S., relating to trustee's power to adjust.
Section 44: Amends s. 744.3679, F.S., relating to simplified accounting procedures in certain cases.
Section 45: Directs the Division of Law Revision to replace the phrase "the effective date of this section" wherever it occurs in this act with the date those sections become law.
Section 46: Provides for severability.
Section 47: Provides an effective date of July 1, 2021, except as otherwise expressly provided.

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.

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.

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

A bill to be entitled

An act relating to estates and trusts; amending s. 69.031, F.S.; providing that a court may order that certain property be placed with a financial institution during the administration of an estate; providing that a court shall allow certain officers to post and maintain a bond for the value of certain property; amending s. 732.507, F.S.; providing that certain provisions of a will are void upon dissolution of marriage; specifying when dissolution of marriage occurs; providing applicability; amending s. 736.0103, F.S.; providing and revising definitions; amending s. 736.0105, F.S.; providing that terms of a trust prevail over the Florida Probate Code except for certain duties of a trustee which are subject to certain provisions; amending s. 736.0201, F.S.; providing that certain proceedings to determine the homestead status of real property owned by a trust may be filed in the probate proceeding for the settlor's estate and shall be governed by the Florida Probate Rules; amending s. 736.0603, F.S.; providing that a trustee may follow a direction of a settlor that is contrary to the terms of the trust in certain circumstances; amending s. 736.0703, F.S.; revising provisions relating to duties and liabilities of

cotrustees; repealing s. 736.0808, F.S., relating to powers to direct; amending s. 736.1008, F.S.; providing that certain claims relating to trust disclosure documents are barred; amending s. 736.1017, F.S.; providing that a trustee may furnish to a person other than a beneficiary a certificate of trust containing certain information; amending s. 736.1105, F.S.; providing that the occurrence of certain conditions does not revoke a revocable trust; providing that certain provisions of a revocable trust are void upon dissolution of marriage; specifying when dissolution of marriage occurs; providing applicability; creating s. 736.1109, F.S.; providing for the descent of homestead property if a devise of homestead under a trust violates the State Constitution; providing that certain powers or directions within a trust instrument do not subject an interest in a protected homestead to certain claims, expenses, or obligations; providing that title to property that would otherwise qualify as protected homestead shall remain vested in the trustee in certain circumstances; providing applicability; creating part XIV of chapter 736, F.S., entitled the "Florida Uniform Directed Trust Act"; creating s. 736.1401, F.S.; providing a short title; creating s.

736.1403, F.S.; providing applicability; providing that terms of a directed trust that designate the state as the principal place of administration are valid and controlling in certain circumstances; creating s. 736.1405, F.S.; providing a definition; providing that this part does not apply to certain powers except in certain circumstances; creating s. 736.1406, F.S.; providing for certain powers of a trust director; creating s. 736.1407, F.S.; providing that a trust director is subject to the same rules as a trustee in a like position under similar circumstances in the exercise of certain powers; creating 736.1408, F.S.; providing duties and liabilities of a trust director with respect to certain powers and in certain circumstances; authorizing the imposition of additional duties and liabilities; creating s. 736.1409, F.S.; providing duties and liabilities of a directed trustee with respect to compliance with a trust director's exercise or nonexercise of certain powers; authorizing a directed trustee to apply to a court for directions and pay attorney costs and fees from trust assets in certain circumstances; authorizing the imposition of additional duties and liabilities; creating s. 736.141, F.S.; requiring a trustee to provide certain

information to a trust director; requiring a trust director to provide certain information to a trustee or another trust director and a qualified beneficiary; providing that a trustee or a trust director acting in reliance on certain information is not liable for a breach of trust in certain circumstances; creating s. 736.1411, F.S.; providing that a trustee and a trust director do not have certain duties unless the terms of a trust provide otherwise; creating s. 736.1412, F.S.; authorizing the terms of a trust to provide for the appointment of more than one trustee with certain powers; providing that trustees excluded from certain powers shall act as directed trustees in certain respects; providing liability and obligations of a trustee or trustees with certain powers; creating s. 736.1413, F.S.; providing a limitations period for certain actions commenced against a trust director; creating s. 736.1414, F.S.; providing that a trust director may assert the same defenses in an action as a trustee in certain circumstances; creating s. 736.1415, F.S.; providing for personal jurisdiction in the state over a trust director; creating s. 736.1416, F.S.; providing that a trust director shall be considered a trustee for the purposes of certain provisions unless the terms of a trust provide

otherwise; authorizing certain persons to make a written demand on a person designated to serve as a trust director in certain circumstances; requiring the designated trust director to respond in writing within a certain period; creating part XV of chapter 736, F.S., entitled the "Community Property Trust Act"; creating s. 736.1501, F.S.; providing a short title; creating s. 736.1502, F.S.: providing definitions; creating s. 736.1503, F.S.; providing that an arrangement is a community property trust in certain circumstances; creating s. 736.1504, F.S.; authorizing settlor spouses to agree upon certain conditions in an agreement establishing a community property trust; providing that a community property trust may be amended in certain circumstances; providing that the settlor spouses are the only qualified beneficiaries of a community property trust; creating s. 736.1505, F.S.; providing that settlor spouses may classify any property as community property by transferring that property to a community property trust regardless of domicile; providing for enforceability and duration of a community property trust; providing that the right to manage and control certain property is determined by the terms of the trust agreement; providing the effect of distributions from a community property

trust; creating s. 736.1506, F.S.; providing for the satisfaction of obligations incurred by one or both spouses from a community property trust; creating s. 736.1507, F.S.; providing for the disposition or distribution of certain property upon the death of a spouse; creating s. 736.1508, F.S.; providing for the termination of a community property trust upon dissolution of marriage; creating s. 736.1509, F.S.; providing that a community property trust may not adversely affect certain rights of a child; creating s. 736.151, F.S.; providing that certain property held in a community property trust qualifies as homestead property; creating s. 736.1511, F.S.; providing for the application of the Internal Revenue Code to a community property trust; creating s. 736.1512, F.S.; providing that a community property trust is not enforceable in certain circumstances; amending ss. 736.0802, 736.08125, and 738.104, F.S.; conforming cross-references; amending s. 744.3679, F.S.; conforming a provision to changes made by the act; providing a directive to the Division of Law Revision; providing for severability; providing effective dates.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Effective upon this act becoming a law, section 69.031, Florida Statutes, is amended to read:

69.031 Designated financial institutions for property ~~assets~~ in hands of guardians, curators, administrators, trustees, receivers, or other officers.—

(1) When it is expedient in the judgment of any court having jurisdiction of any estate in process of administration by any guardian, curator, executor, administrator, trustee, receiver, or other officer, because the size of the bond required of the officer is burdensome or for other cause, the court may order part or all of the personal property ~~assets~~ of the estate placed with a bank, trust company, or savings and loan association (which savings and loan association is a member of the Federal Savings and Loan Insurance Corporation and doing business in this state) designated by the court, consideration being given to any bank, trust company or savings and loan association proposed by the officer. Notwithstanding the foregoing, in probate proceedings and in accordance with s. 733.402, the court shall allow the officer at any time to elect to post and maintain bond for the value of the personal property, or such other reasonable amount determined by the court, whereupon the court shall vacate or terminate any order establishing the depository. When the property is ~~assets are~~ placed with the designated financial institution, it shall file a receipt therefor in the name of the estate and give the

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

officer a copy. Such receipt shall acknowledge the property ~~assets~~ received by the financial institution. All interest, dividends, principal and other debts collected by the financial institution on account thereof shall be held by the financial institution in safekeeping, subject to the instructions of the officer authorized by order of the court directed to the financial institution.

(2) Accountings shall be made to the officer at reasonably frequent intervals. After the receipt for the original property ~~assets~~ has been filed by the financial institution, the court shall waive the bond given or to be given or reduce it so that it shall apply only to the estate remaining in the hands of the officer, whichever the court deems proper.

(3) When the court has ordered any property ~~assets~~ of an estate to be placed with a designated financial institution, any person or corporation having possession or control of any of the property ~~assets~~, or owing interest, dividends, principal or other debts on account thereof, shall pay and deliver such property ~~assets~~, interest, dividends, principal and other debts to the financial institution on its demand whether the officer has duly qualified or not, and the receipt of the financial institution relieves the person or corporation from further responsibility therefor.

(4) Any bank, trust company, or savings and loan association which is designated under this section, may accept

or reject the designation in any instance, and shall file its acceptance or rejection with the court making the designation within 15 days after actual knowledge of the designation comes to the attention of the financial institution, and if the financial institution accepts, it shall be allowed a reasonable amount for its services and expenses which the court may allow as a charge against the property ~~assets~~ placed with the financial institution.

Section 2. Effective upon this act becoming a law, section 732.507, Florida Statutes, is amended to read:

732.507 Effect of subsequent marriage, birth, adoption, or dissolution of marriage.—

(1) Neither subsequent marriage, birth, nor adoption of descendants shall revoke the prior will of any person, but the pretermitted child or spouse shall inherit as set forth in ss. 732.301 and 732.302, regardless of the prior will.

(2) Any provision of a will ~~executed by a married person~~ that affects the testator's spouse is ~~of that person shall become~~ void upon dissolution of the marriage of the testator and the spouse, whether the marriage occurred before or after the execution of such will. Upon dissolution of marriage ~~the divorce of that person or upon the dissolution or annulment of the marriage. After the dissolution, divorce, or annulment~~, the will shall be ~~administered and~~ construed as if the ~~former~~ spouse ~~had~~ died at the time of the dissolution of marriage~~, divorce, or~~

~~annulment of the marriage, unless the will or the dissolution or divorce judgment expressly provides otherwise~~.

(a) Dissolution of marriage occurs at the time the decedent's marriage is judicially dissolved or declared invalid by court order.

(b) This subsection does not invalidate a provision of a will:

1. Executed by the testator after the dissolution of the marriage;

2. If there is a specific intention to the contrary stated in the will; or

3. If the dissolution of marriage judgment expressly provides otherwise.

(3) This section applies to wills of decedents who die on or after the effective date of this section.

Section 3. Subsections (6) through (13), (14) through (20), and (22) and (23) of section 736.0103, Florida Statutes, are renumbered as subsections (8) through (15), (17) through (23), and (26) and (27), respectively, present subsection (21) is amended, and new subsections (6), (7), (16), and (25) are added to that section, to read:

736.0103 Definitions.—Unless the context otherwise requires, in this code:

(6) "Directed trust" means a trust for which the terms of the trust grant a power of direction.

(7) "Directed trustee" means a trustee that is subject to a trust director's power of direction.

(16) "Power of direction" means a power over a trust granted to a person by the terms of the trust 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. The term excludes the powers listed in s. 736.1405(2).

(24) ~~(21)~~ "Terms of a trust" means:

(a) Except as otherwise provided in paragraph (b), the manifestation of the settlor's intent regarding a trust's provisions as:

1. Expressed in the trust instrument; or

2. Established by other evidence that would be admissible in a judicial proceeding; or

(b) The trust's provisions as established, determined, or amended by:

1. A trustee or trust director in accordance with applicable law;

2. Court order; or

3. A nonjudicial settlement agreement under s. 736.0111

~~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~~.

(25) "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. The 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 beneficiary or settlor of the trust.

Section 4. Paragraph (b) of subsection (2) of section 736.0105, Florida Statutes, is amended to read:

736.0105 Default and mandatory rules.—

(2) The terms of a trust prevail over any provision of this code except:

(b) Subject to ss. 736.1409, 736.1411, and 736.1412, the duty of the trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

Section 5. Subsection (1) of section 736.0201, Florida Statutes, is amended and subsection (7) is added to that section to read:

736.0201 Role of court in trust proceedings.—

(1) Except as provided in subsections (5), ~~and~~ (6), and (7) and s. 736.0206, judicial proceedings concerning trusts shall be commenced by filing a complaint and shall be governed by the Florida Rules of Civil Procedure.

(7) A proceeding to determine the homestead status of real property owned by a trust may 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. The proceeding shall be governed by the Florida Probate Rules.

Section 6. Subsection (3) is added to section 736.0603, Florida Statutes, to read:

736.0603 Settlor's powers; powers of withdrawal.—

(3) Subject to ss. 736.0403(2) and 736.0602(3)(a), the trustee may follow a direction of the settlor that is contrary to the terms of the trust while a trust is revocable.

Section 7. Subsections (3), (7), and (9) of section 736.0703, Florida Statutes, are amended to read:

736.0703 Cotrustees.—

(3) Subject to s. 736.1412, 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 provision of law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another cotrustee.

(7) Except as otherwise provided in s. 736.1412 ~~subsection (9)~~, each cotrustee shall exercise reasonable care to:

(a) Prevent a cotrustee from committing a breach of trust.

(b) Compel a cotrustee to redress a breach of trust.

~~(9) 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 actions of the trustees, the excluded trustees shall act in accordance with the exercise of the power. 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 the power. An excluded trustee does not have a duty or an obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of the power. The trustee or trustees having the power to direct or prevent actions of the excluded trustees shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power. The provisions of s. 736.0808(2) do not apply if the person entrusted with the power to direct the actions of the excluded trustee is also a cotrustee.~~

Section 8. Section 736.0808, Florida Statutes, is repealed.

Section 9. Subsection (7) of section 736.1008, Florida Statutes, is renumbered as subsection (8), paragraph (a) of subsection (1), subsection (2), and paragraphs (a) and (c) of subsection (4) are amended, and new subsection (7) is added to

that section, to read:

736.1008 Limitations on proceedings against trustees.—

(1) Except as provided in subsection (2), all claims by a beneficiary against a trustee for breach of trust are barred as provided in chapter 95 as to:

(a) All matters adequately disclosed in a trust disclosure document issued by the trustee or a trust director, with the limitations period beginning on the date of receipt of adequate disclosure.

(2) Unless sooner barred by adjudication, consent, or limitations, a beneficiary is barred from bringing an action against a trustee for breach of trust with respect to a matter that was adequately disclosed in a trust disclosure document unless a proceeding to assert the claim is commenced within 6 months after receipt from the trustee or a trust director of the trust disclosure document or a limitation notice that applies to that disclosure document, whichever is received later.

(4) As used in this section, the term:

(a) "Trust disclosure document" means a trust accounting or any other written report of the trustee or a trust director. 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 existence of a claim with respect to that matter.

(c) "Limitation notice" means a written statement of the

trustee or a trust director that an action by a beneficiary ~~against the trustee~~ for breach of trust based on any matter adequately disclosed in a trust disclosure document may be barred unless the action is commenced within 6 months after receipt of the trust disclosure document or receipt of a limitation notice that applies to that trust disclosure document, whichever is later. A limitation notice may but is not required to be in the following form: "An action for breach of trust based on matters disclosed in a trust accounting or other written report of the trustee or a trust director may be subject to a 6-month statute of limitations from the receipt of the trust accounting or other written report. If you have questions, please consult your attorney."

(7) Any claim barred against a trustee or trust director under this section is also barred against the directors, officers, and employees acting for the trustee.

Section 10. Paragraphs (e), (f), and (g) of subsection (1) of section 736.1017, Florida Statutes, are redesignated as paragraphs (f), (g), and (h), respectively, and new paragraph (e) is added to that subsection, to read:

736.1017 Certification of trust.—

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

(e) Whether the trust contains any powers of direction, and if so, the identity of the current trust directors, the trustee powers subject to a power of direction, and whether the trust directors have directed or authorized the trustee to engage in the proposed transaction for which the certification of trust was issued.

Section 11. Effective upon this act becoming a law, section 736.1105, Florida Statutes, is amended to read:

(Substantial rewording of section. See s. 736.1105, F.S., for present text.)

736.1105 Effect of subsequent marriage, birth, adoption, or dissolution of marriage.—

(1) Neither subsequent marriage, birth, nor adoption of descendants shall revoke the revocable trust of any person.

(2) Any provision of a revocable trust that affects the settlor's spouse is void upon dissolution of the marriage of the settlor and the spouse, whether the marriage occurred before or after the execution of such revocable trust. Upon dissolution of marriage, the revocable trust shall be construed as if the spouse had died at the time of the dissolution of marriage.

(a) Dissolution of marriage occurs at the time the decedent's marriage is judicially dissolved or declared invalid by court order.

(b) This subsection does not invalidate a provision of a revocable trust:

1. Executed by the settlor after the dissolution of the marriage;

2. If there is a specific intention to the contrary stated in the revocable trust; or

3. If the dissolution of marriage judgment expressly provides otherwise.

(3) This section applies to revocable trusts of decedents who die on or after the effective date of this section.

Section 12. Section 736.1109, Florida Statutes, is created to read:

736.1109 Testamentary and revocable trusts; homestead protections.—

(1) If a devise of homestead under a trust violates the limitations on the devise of homestead in s. 4(c), Art. X of the State Constitution, title shall pass as provided in s. 732.401 at the moment of death.

(2) A power of sale or general direction to pay debts, expenses and claims within the trust instrument does not subject an interest in the protected homestead to the claims of decedent's creditors, expenses of administration, and obligations of the decedent's estate as provided in s. 736.05053.

(3) 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 under the Florida Constitution, title shall remain vested in the trustee and subject to the provisions of the trust.

(4) This section applies only to trusts described in s. 733.707(3) and to testamentary trusts.

(5) This section is intended to clarify existing law and applies to the administration of trusts and estates of decedents who die before, on, or after July 1, 2021.

Section 13. Part XIV of chapter 736, Florida Statutes, consisting of ss. 736.1401-736.1416, Florida Statutes, is created and entitled the "Florida Uniform Directed Trust Act."

Section 14. Section 736.1401, Florida Statutes, is created to read:

736.1401 Short title.—This part may be cited as the "Florida Uniform Directed Trust Act."

Section 15. Section 736.1403, Florida Statutes, is created to read:

736.1403 Application; principal place of administration.—

(1) This part applies to a trust subject to this chapter, whenever created, that has its principal place of administration in the state, subject to the following rules:

(a) 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.

(b) If the principal place of administration of the trust

is changed to the 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.

(2) In addition to the provisions of s. 736.0108, in a directed trust, terms of the trust that designate the principal place of administration of the trust in the state are valid and controlling if a trust director's principal place of business is located in or a trust director is a resident of the state.

Section 16. Section 736.1405, Florida Statutes, is created to read:

736.1405 Exclusions.—

(1) As used in this section, the term "power of appointment" means a power that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over trust property.

(2) Unless the terms of a trust expressly provide otherwise by specific reference to this part, section, or paragraph, this part does not apply to:

(a) A power of appointment;

(b) A power to appoint or remove a trustee or trust director;

(c) A power of a settlor over a trust while the trust is revocable by that settlor;

(d) A power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects the beneficial

interest of:

1. The beneficiary; or

2. Another beneficiary represented by the beneficiary under ss. 736.0301-736.0305 with respect to the exercise or nonexercise of the power;

(e) A power over a trust if the terms of the trust provide that the power is held in a nonfiduciary capacity; and

1. The power must be held in a nonfiduciary capacity to achieve the settlor's tax objectives under the United States Internal Revenue Code of 1986, as amended, and regulations issued thereunder, as amended; or

2. It is a power to reimburse the settlor for all or a part of the settlor's income tax liabilities attributable to the income of the trust; or

(f) A power to add or to release a power under the trust instrument if the power subject to addition or release causes the settlor to be treated as the owner of all or any portion of the trust for federal income tax purposes.

(3) Unless the terms of a trust provide otherwise, a power granted to a person other than a trustee:

(a) To designate a recipient of an ownership interest in trust property, including a power to terminate a trust, is a power of appointment and not a power of direction.

(b) To create, modify, or terminate a power of appointment, is a power of direction and not a power of

appointment, except a power to create a power of appointment that is an element of a broader power to affect an ownership interest in trust property beyond the mere creation of a power of appointment, such as a power to appoint trust property in further trust, is a power of appointment and not a power of direction.

Section 17. Section 736.1406, Florida Statutes, is created to read:

736.1406 Power of trust director.—

(1) Subject to s. 736.1407, the terms of a trust may grant a power of direction to a trust director.

(2) A power of direction includes only those powers granted by the terms of the trust.

(3) Unless the terms of a trust provide otherwise:

(a) A trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the trust director under subsection (1); and

(b) Trust directors with joint powers must act by majority decision.

Section 18. Section 736.1407, Florida Statutes, is created to read:

736.1407 Limitations on trust director.—A trust director is subject to the same rules as a trustee in a like position and under similar circumstances in the exercise or nonexercise of a

power of direction or further power under s. 736.1406(3)(a) regarding:

(1) A payback provision in the terms of a trust necessary to comply with the reimbursement requirements of s. 1917 of the Social Security Act, 42 U.S.C. s. 1396p(d)(4)(A), as amended, and regulations issued thereunder, as amended.

(2) A charitable interest in the trust, including notice regarding the interest to the Attorney General.

Section 19. Section 736.1408, Florida Statutes, is created to read:

736.1408 Duty and liability of trust director.—

(1) Subject to subsection (2), with respect to a power of direction or further power under s. 736.1406(3)(a):

(a) A trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power:

1. If the power is held individually, as a sole trustee in a like position and under similar circumstances; or

2. If the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances.

(b) The terms of the trust may vary the trust director's duty or liability to the same extent the terms of the trust may vary the duty or liability of a trustee in a like position and under similar circumstances.

(2) Unless the terms of a trust provide otherwise, if a

trust director is licensed, certified, or otherwise authorized or permitted by law other than this part to provide health care in the ordinary course of the trust director's business or practice of a profession, to the extent the trust director acts in that capacity the trust director has no duty or liability under this part.

(3) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this section.

Section 20. Section 736.1409, Florida Statutes, is created to read:

736.1409 Duty and liability of directed trustee.—

(1) Subject to subsection (2), a directed trustee shall take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or further power under s. 736.1406(3)(a) and the trustee is not liable for such reasonable action.

(2) A directed trustee may not comply with a trust director's exercise or nonexercise of a power of direction or further power under s. 736.1406(3)(a) to the extent that by complying the trustee would engage in willful misconduct.

(3) Before complying with a trust director's exercise of a power of direction, the directed trustee shall determine whether or not the exercise is within the scope of the trust director's power of direction. The exercise of a power of direction is not

outside the scope of a trust director's power of direction merely because the exercise constitutes or may constitute a breach of trust.

(4) An exercise of a power of direction under which a trust director may release a trustee or another trust director from liability for breach of trust is not effective if:

(a) The breach involved the trustee's or other director's willful misconduct;

(b) The release was induced by improper conduct of the trustee or other director in procuring the release; or

(c) At the time of the release, the trust director did not know the material facts relating to the breach.

(5) A directed trustee that has reasonable doubt about its duty under this section may apply to the court for instructions, with attorney fees and costs to be paid from assets of the trust as provided in this code.

(6) The terms of a trust may impose a duty or liability on a directed trustee in addition to the duties and liabilities under this part.

Section 21. Section 736.141, Florida Statutes, is created to read:

736.141 Duty to provide information.—

(1) Subject to s. 736.1411, a trustee shall provide information to a trust director to the extent the information is reasonably related to the powers or duties of the trust

director.

(2) Subject to s. 736.1411, a trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related to the powers or duties of the trustee or other trust director.

(3) A trustee that acts in reliance on information provided by a trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trustee engages in willful misconduct.

(4) A trust director that acts in reliance on information provided by a trustee or another trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trust director engages in willful misconduct.

(5) A trust director shall provide information within the trust director's knowledge or control to a qualified beneficiary upon a written request of a qualified beneficiary to the extent the information is reasonably related to the powers or duties of the trust director.

Section 22. Section 736.1411, Florida Statutes, is created to read:

736.1411 No duty to monitor, inform, or advise.—

(1) Notwithstanding s. 736.1409(1), unless the terms of a trust provide otherwise:

(a) A trustee does not have a duty to:

1. Monitor a trust director; or

2. Inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the trust director.

(b) By taking an action described in paragraph (a), a trustee does not assume the duty excluded by paragraph (a).

(2) Notwithstanding s. 736.1408(1), unless the terms of a trust provide otherwise:

(a) A trust director does not have a duty to:

1. Monitor a trustee or another trust director; or

2. Inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an instance in which the trust director might have acted differently than a trustee or another trust director.

(b) By taking an action described in paragraph (a), a trust director does not assume the duty excluded by paragraph (a).

Section 23. Section 736.1412, Florida Statutes, is created to read:

736.1412 Application to cotrustee.—

(1) The terms of a trust may 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 actions of the trustees.

(2) The excluded trustees shall act in accordance with the

exercise of the power in the manner, and with the same duty and liability, as directed trustees with respect to a trust director's power of direction under ss. 736.1409, 736.141, and 736.1411.

(3) The trustee or trustees having the power to direct or prevent actions of the excluded trustees shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power.

Section 24. Section 736.1413, Florida Statutes, is created to read:

736.1413 Limitation of action against trust director.—

(1) An action against a trust director for breach of trust must be commenced within the same limitation period as under s. 736.1008 in an action for breach of trust against a trustee in a like position and under similar circumstances.

(2) A trust accounting or any other written report of a trustee or a trust director has the same effect on the limitation period for an action against a trust director for breach of trust that such trust accounting or written report would have under s. 736.1008 in an action for breach of trust against a trustee in a like position and under similar circumstances.

Section 25. Section 736.1414, Florida Statutes, is created to read:

736.1414 Defenses in action against trust director.—In an action against a trust director for breach of trust, the trust director may assert the same defenses a trustee in a like position and under similar circumstances could assert in an action for breach of trust against the trustee.

Section 26. Section 736.1415, Florida Statutes, is created to read:

736.1415 Jurisdiction over trust director.—

(1) By accepting appointment as a trust director of a trust subject to this part, the trust director submits to the personal jurisdiction of the courts of the state regarding any matter related to a power or duty of the trust director.

(2) This section does not preclude other methods of obtaining jurisdiction over a trust director.

Section 27. Section 736.1416, Florida Statutes, is created to read:

736.1416 Office of trust director.—

(1) Unless the terms of a trust provide otherwise, a trust director shall be considered a trustee for purposes of the following:

(a) Role of court under s. 736.0201.

(b) Proceedings for review of employment of agents and review of compensation of trustee and employees of a trust under

s. 736.0206.

(c) Representation by holder of power of appointment under s. 736.0302(4).

(d) Designated representative under s. 736.0306(2).

(e) Requirements for creation of a trust under s. 736.0402(3).

(f) As to allowing application by the trust director for judicial modification, construction, or termination under s. 736.04113, s. 736.04114, s. 736.04115, or s. 736.0414(2) if the trust director is so authorized by the terms of the trust.

(g) Discretionary trusts and the effect of a standard under s. 736.0504.

(h) Creditors' claims against settlor under s. 736.0505(1)(c).

(i) Trustee's duty to pay expenses and obligations of a settlor's estate under s. 736.05053(4).

(j) Acceptance or declination under s. 736.0701.

(k) Giving of bond to secure performance under s. 736.0702.

(l) Vacancy and appointment of successor under s. 736.0704.

(m) Resignation under s. 736.0705.

(n) Removal under s. 736.0706, but not to give the trust director the power to request removal of a trustee.

(o) Reasonable compensation under s. 736.0708.

(p) Reimbursement of expenses under s. 736.0709.

(q) Payment of costs or attorney fees under s. 736.0802(10), if the trust director has a power of direction, or a further power to direct, the payment of such costs or attorney fees under s. 736.1406(2) or (3)(a).

(r) Discretionary power and tax savings provisions under s. 736.0814.

(s) Administration pending outcome of contest or other proceeding under s. 736.08165.

(t) Applicability of chapter 518 under s. 736.0901.

(u) Nonapplication of prudent investor rule under s. 736.0902.

(v) Remedies for breach of trust under s. 736.1001.

(w) Damages for breach of trust under s. 736.1002.

(x) Damages in absence of breach under s. 736.1003.

(y) Attorney's fees and costs under s. 736.1004.

(z) Trustee's attorney fees under s. 736.1007(5), (6), and (7).

(aa) Reliance on a trust instrument under s. 736.1009.

(bb) Events affecting administration under s. 736.1010.

(cc) Exculpation under s. 736.1011.

(dd) Beneficiary's consent, release, or ratification under s. 736.1012.

(ee) Limitations on actions against certain trusts under s. 736.1014.

(2) If a person has not accepted a trust directorship under the terms of the trust or under s. 736.0701 or a trustee, settlor, or a qualified beneficiary of the trust is uncertain whether such acceptance has occurred, a trustee, settlor, or a qualified beneficiary of the trust may make a written demand on a person designated to serve as a trust director, with a written copy to the trustees, to accept or confirm prior acceptance of the trust directorship in writing. A written acceptance, written acknowledgment of prior acceptance, or written declination of the trust directorship shall be delivered by the designated trust director within 60 days after receipt of such demand to all trustees, qualified beneficiaries, and the settlor if living.

Section 28. Part XV of chapter 736, Florida Statutes, consisting of ss. 736.1501-736.1512, Florida Statutes, is created and entitled the "Community Property Trust Act."

Section 29. Section 736.1501, Florida Statutes, is created to read:

736.1501 Short title.—This part may be cited as the "Community Property Trust Act."

Section 30. Section 736.1502, Florida Statutes, is created to read:

736.1502 Definitions.—Unless the context otherwise requires, as used in this part:

(1) "Community property" means the property and the

appreciation of and income from the property owned by a qualified trustee of a community property trust during the marriage of the settlor spouses. The property owned by a community property trust pursuant to this part and the appreciation of and income from such property shall be deemed to be community property for purposes of general law.

(2) "Community property trust" means an express trust that complies with s. 736.1503 and is created on or after July 1, 2021.

(3) "Decree" means a judgment or other order of a court of competent jurisdiction.

(4) "Dissolution" means either:

(a) Termination of a marriage by a decree of dissolution, divorce, annulment or declaration of invalidity; or

(b) Entry of a decree of legal separation maintenance.

(5) "During marriage" means a period that begins at marriage and ends upon the dissolution of marriage or upon the death of a spouse.

(6) "Qualified trustee" means either:

(a) A natural person who is a resident of the state; or

(b) A company authorized to act as a trustee in the state.

A qualified trustee's powers include, but are not limited to, maintaining records for the trust on an exclusive or a nonexclusive basis and preparing or arranging for the

preparation of, on an exclusive or a nonexclusive basis, any income tax returns that must be filed by the trust.

(7) "Settlor spouses" means a married couple who establish a community property trust pursuant to this part.

Section 31. Section 736.1503, Florida Statutes, is created to read:

736.1503 Requirements for community property trust.—An arrangement is a community property trust if one or both settlor spouses transfer property to a trust that:

(1) Expressly declares that the trust is a community property trust within the meaning of this part.

(2) Has at least one trustee who is a qualified trustee, provided that both spouses or either spouse also may be a trustee.

(3) Is signed by both settlor spouses consistent with the formalities required for the execution of a trust under this chapter.

(4) Contains substantially the following language in capital letters at the beginning of the community property trust agreement:

THE CONSEQUENCES OF THIS COMMUNITY PROPERTY TRUST MAY BE VERY EXTENSIVE, INCLUDING, BUT NOT LIMITED TO, YOUR RIGHTS WITH RESPECT TO CREDITORS AND OTHER THIRD PARTIES, AND YOUR RIGHTS WITH YOUR SPOUSE DURING THE

COURSE OF YOUR MARRIAGE, AT THE TIME OF A DIVORCE, AND UPON THE DEATH OF YOU OR YOUR SPOUSE. ACCORDINGLY, THIS TRUST AGREEMENT SHOULD ONLY BE SIGNED AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS TRUST AGREEMENT, YOU SHOULD SEEK COMPETENT AND INDEPENDENT LEGAL ADVICE.

Section 32. Section 736.1504, Florida Statutes, is created to read:

736.1504 Agreement establishing community property trust; amendments and revocation.—

(1) In the agreement establishing a community property trust, the settlor spouses may agree upon:

(a) The rights and obligations in the property transferred to the trust, notwithstanding when and where the property is acquired or located.

(b) The management and control of the property transferred into the trust.

(c) The disposition of the property transferred to the trust on dissolution, death, or the occurrence or nonoccurrence of another event, subject to ss. 736.1507 and 736.1508.

(d) Whether the trust is revocable or irrevocable.

(e) Any other matter that affects the property transferred to the trust and does not violate public policy or general law imposing a criminal penalty, or result in the property not being treated as community property under the laws of any

jurisdiction.

(2) In the event of the death of a settlor spouse, the surviving spouse may amend a community property trust regarding the disposition of that spouse's one-half share of the community property, regardless of whether the agreement provides that the community property trust is irrevocable.

(3) A community property trust may be amended or revoked by the settlor spouses unless the agreement itself specifically provides that the community property trust is irrevocable.

(4) Notwithstanding any other provision of this code, the settlor spouses shall be deemed to be the only qualified beneficiaries of a community property trust until the death of one of the settlor spouses, regardless of whether the trust is revocable or irrevocable. After the death of one of the settlor spouses, the surviving spouse shall be deemed to be the only qualified beneficiary as to his or her share of the community property trust.

Section 33. Section 736.1505, Florida Statutes, is created to read:

736.1505 Classification of property as community property; enforcement; duration; management and control; effect of distributions.—

(1) Whether both, one, or neither is domiciled in the state, settlor spouses may classify any or all of their property as community property by transferring that property to a

community property trust and providing in the trust that the property is community property pursuant to this part.

(2) A community property trust is enforceable without consideration.

(3) All property owned by a community property trust will be community property under the laws of the state during the marriage of the settlor spouses.

(4) The right to manage and control property that is transferred to a community property trust is determined by the terms of the trust agreement.

(5) When property is distributed from a community property trust, the property shall no longer constitute community property within the meaning of this part, provided that community property as classified by a jurisdiction other than the state retains its character as community property to the extent otherwise provided by ss. 732.216-732.228.

Section 34. Section 736.1506, Florida Statutes, is created to read:

736.1506 Satisfaction of obligations.—Except as provided in s. 4, Art. X of the State Constitution:

(1) An obligation incurred by only one spouse before or during the marriage may be satisfied from that spouse's one-half share of a community property trust.

(2) An obligation incurred by both spouses during the marriage may be satisfied from a community property trust of the

settlor spouses.

Section 35. Section 736.1507, Florida Statutes, is created to read:

736.1507 Death of a spouse.—Upon the death of a spouse, one-half of the aggregate value of the property held in a community property trust established by the settlor spouses reflects the share of the surviving spouse and is not subject to testamentary disposition by the decedent spouse or distribution under the laws of succession of the state. The other one-half of the value of that property reflects the share of the decedent spouse and is subject to testamentary disposition or distribution under the laws of succession of the state. Unless provided otherwise in the community property trust agreement, the trustee has the power to distribute assets of the trust in divided or undivided interests and to adjust resulting differences in valuation. A distribution in kind may be made on the basis of a non-pro rata division of the aggregate value of the trust assets, on the basis of a pro rata division of each individual asset, or by using both methods. The decedent's spouse's one-half share shall not be included in the elective estate.

Section 36. Section 736.1508, Florida Statutes, is created to read:

736.1508 Dissolution of marriage.—Upon the dissolution of the marriage of the settlor spouses, the community property

trust shall terminate and the trustee shall distribute one-half of the trust assets to each spouse, with each spouse receiving one-half of each asset, unless otherwise agreed to in writing by both spouses. For purposes of this act, s. 61.075 does not apply to the disposition of the assets and liabilities held in a community property trust.

Section 37. Section 736.1509, Florida Statutes, is created to read:

736.1509 Right of child to support.—A community property trust does not adversely affect the right of a child of the settlor spouses to support that either spouse would be required to give under the applicable laws of the settlor spouses' state of domicile.

Section 38. Section 736.151, Florida Statutes, is created to read:

736.151 Homestead property.—

(1) Property that is transferred to or acquired subject to a community property trust may continue to qualify or may initially qualify as the settlor spouses' homestead within the meaning of s. 4(a)(1), Art. X of the State Constitution and for all purposes of general law, provided that the property would qualify as the settlor spouses' homestead if title was held in one or both of the settlor spouses' individual names.

(2) The settlor spouses shall be deemed to have beneficial title in equity to the homestead property held subject to a

community property trust for all purposes, including for purposes of s. 196.031.

Section 39. Section 736.1511, Florida Statutes, is created to read:

736.1511 Application of Internal Revenue Code; community property classified by another jurisdiction.—For purposes of the application of s. 1014(b)(6) of the Internal Revenue Code of 1986, 26 U.S.C. s. 1014(b)(6), as of January 1, 2021, a community property trust is considered a trust established under the community property laws of the state. Community property as classified by a jurisdiction other than the state which is transferred to a community property trust retains its character as community property while in the trust. If the trust is revoked and property is transferred on revocation of the trust, the community property as classified by a jurisdiction other than the state retains its character as community property to the extent otherwise provided by ss. 732.216-732.228.

Section 40. Section 736.1512, Florida Statutes, is created to read:

736.1512 Unenforceable trusts.—

(1) A community property trust executed during marriage is not enforceable if the spouse against whom enforcement is sought proves that:

(a) The trust was unconscionable when made;

(b) The spouse against whom enforcement is sought did not

execute the community property trust agreement voluntarily; or

(c) Before execution of the community property trust agreement, the spouse against whom enforcement is sought:

1. Was not given a fair and reasonable disclosure of the property and financial obligations of the other spouse.

2. Did not voluntarily sign a written waiver expressly waiving right to disclosure of the property and financial obligations of the other spouse beyond the disclosure provided.

3. Did not have notice of the property or financial obligations of the other spouse.

(2) Whether a community property trust is unconscionable shall be determined by a court as a matter of law.

(3) A community property trust may not be deemed unenforceable because the settlor spouses did not have separate legal representation when executing the trust.

Section 41. Paragraph (f) of subsection (5) of section 736.0802, Florida Statutes, is amended to read:

736.0802 Duty of loyalty.—

(5)

(f)1. The trustee of a trust as defined in s. 731.201 may request authority to invest in investment instruments described in this subsection other than a qualified investment instrument, by providing to all qualified beneficiaries a written request containing the following:

a. The name, telephone number, street address, and mailing

address of the trustee and of any individuals who may be contacted for further information.

b. A statement that the investment or investments cannot be made without the consent of a majority of each class of the qualified beneficiaries.

c. A statement that, if a majority of each class of qualified beneficiaries consent, the trustee will have the right to make investments in investment instruments, as defined in s. 660.25(6), which are owned or controlled by the trustee or its affiliate, or from which the trustee or its affiliate receives compensation for providing services in a capacity other than as trustee, that such investment instruments may include investment instruments sold primarily to trust accounts, and that the trustee or its affiliate may receive fees in addition to the trustee's compensation for administering the trust.

d. A statement that the consent may be withdrawn prospectively at any time by written notice given by a majority of any class of the qualified beneficiaries.

A statement by the trustee is not delivered if the statement is accompanied by another written communication other than a written communication by the trustee that refers only to the statement.

2. For purposes of paragraph (e) and this paragraph:

a. "Majority of the qualified beneficiaries" means:

(I) If at the time the determination is made there are one or more beneficiaries as described in s. 736.0103(19)(c) ~~s. 736.0103(16)(c)~~, at least a majority in interest of the beneficiaries described in s. 736.0103(19)(a) ~~s. 736.0103(16)(a)~~, at least a majority in interest of the beneficiaries described in s. 736.0103(19)(b) ~~s. 736.0103(16)(b)~~, and at least a majority in interest of the beneficiaries described in s. 736.0103(19)(c) ~~s. 736.0103(16)(c)~~, if the interests of the beneficiaries are reasonably ascertainable; otherwise, a majority in number of each such class; or

(II) If there is no beneficiary as described in s. 736.0103(19)(c) ~~s. 736.0103(16)(c)~~, at least a majority in interest of the beneficiaries described in s. 736.0103(19)(a) ~~s. 736.0103(16)(a)~~ and at least a majority in interest of the beneficiaries described in s. 736.0103(19)(b) ~~s. 736.0103(16)(b)~~, if the interests of the beneficiaries are reasonably ascertainable; otherwise, a majority in number of each such class.

b. "Qualified investment instrument" means a mutual fund, common trust fund, or money market fund described in and governed by s. 736.0816(3).

c. An irrevocable trust is created upon execution of the trust instrument. If a trust that was revocable when created thereafter becomes irrevocable, the irrevocable trust is created

when the right of revocation terminates.

Section 42. Paragraph (a) of subsection (2) of section 736.08125, Florida Statutes, is amended to read:

736.08125 Protection of successor trustees.—

(2) For the purposes of this section, the term:

(a) "Eligible beneficiaries" means:

1. At the time the determination is made, if there are one or more beneficiaries as described in s. 736.0103(19)(c) ~~s. 736.0103(16)(c)~~, the beneficiaries described in s. 736.0103(19)(a) and (c) ~~s. 736.0103(16)(a) and (c)~~; or

2. If there is no beneficiary as described in s. 736.0103(19)(c) ~~s. 736.0103(16)(c)~~, the beneficiaries described in s. 736.0103(19)(a) and (b) ~~s. 736.0103(16)(a) and (b)~~.

Section 43. Paragraph (d) of subsection (9) of section 738.104, Florida Statutes, is amended to read:

738.104 Trustee's power to adjust.—

(9)

(d) For purposes of subsection (8) and this subsection, the term:

1. "Eligible beneficiaries" means:

a. If at the time the determination is made there are one or more beneficiaries described in s. 736.0103(19)(c) ~~s. 736.0103(16)(c)~~, the beneficiaries described in s. 736.0103(19)(a) and (c) ~~s. 736.0103(16)(a) and (c)~~; or

b. If there is no beneficiary described in s.

736.0103(19)(c) ~~s. 736.0103(16)(c)~~, the beneficiaries described in s. 736.0103(19)(a) and (b) ~~s. 736.0103(16)(a) and (b)~~.

2. "Super majority of the eligible beneficiaries" means:

a. If at the time the determination is made there are one or more beneficiaries described in s. 736.0103(19)(c) ~~s. 736.0103(16)(c)~~, at least two-thirds in interest of the beneficiaries described in s. 736.0103(19)(a) ~~s. 736.0103(16)(a)~~ or two-thirds in interest of the beneficiaries described in s. 736.0103(19)(c) ~~s. 736.0103(16)(c)~~, if the interests of the beneficiaries are reasonably ascertainable; otherwise, it means two-thirds in number of either such class; or

b. If there is no beneficiary described in s. 736.0103(19)(c) ~~s. 736.0103(16)(c)~~, at least two-thirds in interest of the beneficiaries described in s. 736.0103(19)(a) ~~s. 736.0103(16)(a)~~ or two-thirds in interest of the beneficiaries described in s. 736.0103(19)(b) ~~s. 736.0103(16)(b)~~, if the interests of the beneficiaries are reasonably ascertainable, otherwise, two-thirds in number of either such class.

Section 44. Subsection (1) of section 744.3679, Florida Statutes, is amended to read:

744.3679 Simplified accounting procedures in certain cases.—

(1) In a guardianship of property, when all property ~~assets~~ of the estate is ~~are~~ in designated depositories under s. 69.031 and the only transactions that occur in that account are

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

interest accrual, deposits from a settlement, or financial institution service charges, the guardian may elect to file an accounting consisting of:

(a) The original or a certified copy of the year-end statement of the ward's account from the financial institution; and

(b) A statement by the guardian under penalty of perjury that the guardian has custody and control of the ward's property as shown in the year-end statement.

Section 45. The Division of Law Revision is directed to replace the phrase "the effective date of this section" wherever it occurs in this act with the date those sections become law.

Section 46. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Section 47. Except as otherwise expressly provided in this act and except for this section, which shall take effect upon becoming a law, this act shall take effect July 1, 2021.

HB 7037

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7037 PCB GOS 21-05 OGSR/State-funded Infrastructure Bank
SPONSOR(S): Government Operations Subcommittee, McClure
TIED BILLS: **IDEN./SIM. BILLS:** SB 7004

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Government Operations Subcommittee	15 Y, 0 N	Roth	Smith
1) Insurance & Banking Subcommittee		Hinshelwood	Luczynski
2) State Affairs Committee			

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

The State-funded Infrastructure Bank (SIB) administered by the Department of Transportation is a revolving loan and credit enhancement program to help fund transportation projects that otherwise might be delayed or not built. Current law provides a public record exemption for financial information submitted by a private entity as part of the SIB application process.

The bill reenacts and expands the public record exemption for financial information submitted by a private entity as part of the SIB application process to include financial information of the private entity applicant's guarantor. As a result of the public record expansion, the bill extends the repeal date from October 2, 2021, to October 2, 2026. It also provides a public necessity statement as required by the State Constitution.

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

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill expands a public record exemption; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Open Government Sunset Review Act

The Open Government Sunset Review Act[1] sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.[2]

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protect trade or business secrets.[3]

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.[4] If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created then a public necessity statement and a two-thirds vote for passage are not required.

State-funded Infrastructure Bank

The State-funded Infrastructure Bank (SIB)[5] administered by the Department of Transportation (DOT) is a revolving loan and credit enhancement program to help fund transportation projects that otherwise might be delayed or not built. The SIB is composed of two separate accounts, a federally-funded account that is capitalized by federal money and matching state money, and a state-funded account that is capitalized by state money and bond proceeds. Projects eligible for assistance from the former account include those which meet all federal requirements under the Transportation Equity Act for the 21st Century and are eligible for assistance under Title 23, U.S.C.,[6] or capital projects as defined in s. 5302 of Title 49, U.S.C.[7] and other applicable federal guidelines.[8] Public and private entities that are carrying out, or propose to carry out, eligible projects can apply to the SIB for a loan or other assistance.

The federally-funded account is limited to projects which meet federal requirements. The state-funded account is authorized to lend capital costs or provide credit enhancements for:

- A transportation facility project that is on the State Highway System;
- A project that provides for increased mobility on the state's transportation system;
- A project that provides for intermodal connectivity with airports, seaports, rail facilities, and other transportation terminals for the movement of people, cargo and freight;

[1] Section 119.15, F.S.
[2] Section 119.15(3), F.S.
[3] Section 119.15(6)(b), F.S.
[4] Section 24(c), Art. I, FLA. CONST.
[5] Section 339.55, F.S.
[6] See 23 U.S.C. s. 119. Generally, projects on the National Highway System.
[7] Generally, public transportation projects.
[8] 23 U.S.C. s. 610.

- Transportation Regional Incentive Program[9] projects, provided the project receives at least a 25 percent match from non-SIB loan funds;[10] and
- Emergency loans for damages incurred to public-use commercial deepwater seaports, public-use airports, and other public-use transit and intermodal facilities that are within an area that is part of an official state declaration of emergency.[11]

Additionally, projects identified under the Transportation Regional Incentive Program are eligible for assistance from the state-funded account. DOT is authorized to match up to 50% of the cost for projects that, at a minimum:

- Serve national, statewide, or regional functions and function as part of an integrated regional transportation system;
- Are identified in the capital improvements element of a comprehensive plan and are in compliance with local government plan policies relative to corridor management;
- Are consistent with the Strategic Intermodal System Plan developed under s. 339.64, F.S.; and
- Have a commitment for local, regional, or private financial matching funds as a percentage of the overall project cost.[12]

A public or private entity seeking financial assistance from the SIB is required to submit an application,[13] based on published advertisement periods via DOT's on-line advertised process, which DOT reviews to ensure any potential project meets eligibility, financial, and production criteria.[14] If the criteria are met, DOT will determine an indicative interest rate for the application based on current market conditions, financial strength of the borrower, term, and risk of loan.[15]

Examples of financial information items required in an SIB loan application include, but are not limited to, providing details of the proposed finance plan, funding sources, information regarding any anticipated bond issue or other debt instrument, loan term and amount, and primary and secondary repayment sources.

Loans from the SIB may bear interest at or below market interest rates, as determined by DOT. Repayment of any SIB loan must begin no later than five years after the project has been completed or, in the case of a highway project, the facility has opened to traffic, whichever is later, and must be repaid in 30 years.[16]

Public Record Exemption under Review

In 2016, the Legislature created a public record exemption for certain information submitted by a private entity as part of the SIB application.[17] Specifically, financial information of a private entity applicant that DOT requires as part of the application process for loans or credit enhancements from the SIB is exempt.[18] However, the public record exemption does not apply to records of an applicant

[9] *See* s. 339.2819, F.S.
[10] *See* s. 339.55(6), F.S.
[11] Section 339.55(2), F.S.
[12] Section 339.55(2)(b) and see s. 339.2819, F.S.
[13] To review an application form, *see* DOT, *SIB Application and Awards*, available at https://www.fdot.gov/comptroller/pfo/sib-application-and-awards.shtm (last visited January 26, 2021).
[14] *See* DOT's *SIB Guidelines for Federal/State,* available at https://fdotwww.blob.core.windows.net/sitefinity/docs/default-source/comptroller/pfo/sib/sib---guidelines-federal-state_07-12-18_final.pdf?sfvrsn=56f7082f_2 (last visited January 26, 2021).
[15] DOT, *State Infrastructure Bank*, available at https://www.fdot.gov/comptroller/pfo/sib.shtm (last visited January 26, 2021).
[16] Section 339.55(4), F.S.
[17] Chapter 2016-38, L.O.F., codified as s. 339.55(10), F.S.
[18] There is a difference between records the Legislature designates exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (*See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in statute. (*See* Attorney General Opinion 85-62, Aug. 1, 1985).

who is in default of a loan issued by the SIB. The 2016 public necessity statement[19] for the exemption provides that the Legislature finds that:

> The disclosure of such information could harm a private entity in the marketplace by giving the private entity's competitors insights into its financial status and business plan, thereby putting the private entity at a competitive disadvantage. Additionally, the disclosure of sensitive financial information regarding a private entity could create the opportunity for theft, fraud, and other illegal activity, thereby jeopardizing the financial security of the private entity and placing it at risk for substantial financial harm. If an individual is required to provide his or her personal financial information to the department as part of the application process for his or her business, the individual could be subject to identity theft and other criminal activity. Without an exemption from public records requirements under s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution, some private entities might be unwilling to submit an application to the state-funded infrastructure bank. This unwillingness to submit applications could, in turn, limit opportunities the department might otherwise have for providing loans or credit enhancements to private entities who could propose cost-effective or strategic solutions for constructing and improving transportation facilities. The Legislature finds that the benefit to the public of more private entities applying for loans or credit enhancements outweighs any public benefit that may be derived from the disclosure of the financial information of a private entity.[20]

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2021, unless reenacted by the Legislature.[21]

During the 2020 interim, subcommittee staff sent a questionnaire to DOT regarding the public records exemption.[22] As of the date of the questionnaire, the number of projects approved by SIB were 107 transportation facility projects, 36 regional incentive program projects, and seven emergency loan projects.[23] DOT recommends that the public record exemption be expanded to include the financial information of the applicant's guarantor.[24]

Effect of the Bill

The bill reenacts and expands the public record exemption for financial information submitted by a private entity as part of the SIB application process required by DOT to include financial information of the private entity applicant's guarantor. However, the public record exemption does not apply to records of an applicant or an applicant's guarantor who is in default of a loan issued by the SIB.

The bill expands the current public record exemption; therefore, the repeal date is extended. The expanded exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2026, unless the Legislature reviews and reenacts the exemption by that date.

The bill provides a public necessity statement as required by the State Constitution.

B. SECTION DIRECTORY:

[19] Article I, s. 24(c), FLA. CONST., requires each public record exemption to "state with specificity the public necessity justifying the exemption."
[20] Section 2, ch. 2016-38, L.O.F.
[21] Section 119.071(5)(k)4., F.S.
[22] Open Government Sunset Review Questionnaire, DOT Response, September 10, 2020, on file with the House Government Operations Subcommittee.
[23] *Id.* at p. 2.
[24] *Id.* at p. 5-6.

Section 1: Amends s. 339.55, F.S., relating to the public records exemption for applicants of the State-funded Infrastructure Bank.

Section 2: Provides a public necessity statement.

Section 3: Provides an effective date of July 1, 2021.

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:

   Vote Requirement
   Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record exemption. The bill expands a public record exemption; thus, it requires a two-thirds vote for final passage.

   Public Necessity Statement
   Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record exemption. The bill expands a public record exemption; therefore, it includes a public necessity statement.

   Breadth of Exemption
   Article I, s. 24(c) of the Florida Constitution requires a newly created or expanded public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill expands a public record exemption for financial information of a private entity applicant

for loans and credit enhancements from the SIB to include the financial information of the applicant's guarantor. As such, the bill appears to be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

The bill does not provide a grant of rulemaking authority, nor does it require rulemaking.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 339.55, F.S.; expanding the exemption from public records requirements for financial information of a private entity applicant for loans or credit enhancements from the state-funded infrastructure bank to include the financial information of the private entity applicant's guarantor; providing for application of the exemption; revising the definition of the term "financial information" to include the financial information of the private entity applicant's guarantor; providing for future legislative review and repeal of the exemption; providing a statement of public necessity; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (10) of section 339.55, Florida Statutes, is amended to read:

339.55 State-funded infrastructure bank.—

(10)(a) Financial information of a private entity applicant or an applicant's guarantor which the department requires as part of the application process for loans or credit enhancements from the state-funded infrastructure bank is exempt

CODING: Words stricken are deletions; words underlined are additions.

from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. This exemption does not apply to records of an applicant or an applicant's guarantor who is in default of a loan issued under this section. As used in this subsection, the term "financial information" means any business plan, pro forma statement, account balance, operating income or revenue, asset value, or debt of the applicant or the applicant's guarantor.

(b) This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2026 ~~2021~~, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that financial information of the guarantor of a private entity applicant which the Department of Transportation requires as part of the application process for a loan or credit enhancement from the state-funded infrastructure bank be made exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. The disclosure of such information could harm a guarantor in the marketplace by giving the guarantor's competitors insights into its financial status and business plan, thereby putting the guarantor at a competitive disadvantage. Additionally, the disclosure of the guarantor's financial information could create the opportunity for theft, fraud, and other illegal activity, thereby jeopardizing the financial security of the guarantor and placing

it at risk for substantial financial harm. Without an exemption from public records requirements, some guarantors might be unwilling to provide guarantees for private entity applicants who submit an application to the state-funded infrastructure bank. This unwillingness to provide guarantees for private entity applicants could limit the ability of private entity applicants to submit applications for assistance from the state-funded infrastructure bank, which could limit opportunities the department might otherwise have for providing loans or credit enhancements to private entities who could propose cost-effective or strategic solutions for constructing and improving transportation facilities. The Legislature finds that the benefit to the public of increased opportunities for the provision of such facilities facilitated by private entity applicants' guarantors outweighs any public benefit that may be derived from the disclosure of the financial information of a private entity applicant's guarantor. For this reason, the Legislature declares that financial information that the department requires of a guarantor as part of a private entity's application process for a loan or credit enhancement from the state-funded infrastructure bank is exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution.

Section 3. This act shall take effect July 1, 2021.