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The New Florida Trust Code, Part 1

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An important event occurred this past legislative session. Ch. 736 was added to the Florida Statutes. For estate, family law, elder law, and tax practitioners; for clients, their beneficiaries, accountants, and trustees; for regulated trust companies and for Florida courts, this promises to be a *big deal!*

A long time in the making, new Ch. 736 and some conforming amendments made to the Probate Code and other Florida statutes are the product of a five-year effort by the Ad Hoc Trust Code Revision Committee¹ to codify Florida trust law. When it takes effect, the new Florida Trust Code (FTC or the Code) will replace Florida's existing statutory trust law, most of which is found in Ch. 737.

As will soon be apparent, the new Code contains numerous changes and additions. As a consequence, it has a delayed effective date of July 1, 2007. Between now and then, practitioners and other interested persons have a window of time in which to familiarize themselves with the new Code. This two-part article is intended to facilitate that process. Part 2 will be published in the October issue of *The Florida Bar Journal*.

Introduction

Florida's interest in a trust code coincides with a similar interest around the country in general. This interest has been fueled primarily by the promulgation of the Uniform Trust Code in 2000. Presently, the Uniform Trust Code (UTC) has been enacted in 15 jurisdictions;² it is under active consideration in several more.

Early on, the committee concluded that uniformity in the law of trusts was a desirable goal. Except where the committee came to a different policy conclusion or where the committee wished to avoid approaches that have proven to be controversial elsewhere, in areas of trust law for which there was no existing judicial or statutory law in Florida, the committee's operating principle was to adhere as much as possible to the language of the Uniform Trust Code. The committee took a somewhat different view of areas already covered in F.S. Ch. 737. Although the committee did not hesitate to simplify, restructure, and, on occasion, revise provisions it believed could be improved, the basic operating principle with many of the existing Florida statutes was the old saw — if it ain't broke, don't fix it! The end result is that the Florida Trust Code is comprised about 40 percent of provisions found in prior Florida law and about 60 percent of provisions based on the Uniform Trust Code. Of the provisions in this latter group, almost a third were revised in some substantive respect.

The Code consists of the 13 parts of new Ch. 736. In the interest of uniformity, these parts correspond in title and content to the 11 articles that make up the Uniform Code, plus two additional parts covering rules of construction and charitable trusts, respectively. Part IX, titled Trust Investments, consists of a single section that incorporates by reference the provisions of F.S. Ch. 518. It will not be discussed further. The remaining parts are discussed in seriatim, beginning with Part I dealing with General Provisions and Definitions. Parts I through VII are included here. Discussion of Parts VIII through XIII and some of the conforming amendments will appear in the October issue.

Part I: General Provisions and Definitions

The several sections of Part I address the scope and applicability of the Code; the meaning of important terms; and the relative weight to be given to the Code, common law, and the terms of a trust. Also covered are the rules defining when a person or an organization is considered to have knowledge of a fact; the methods of giving and waiving notice; the rules for determining and changing a trust's principal place of administration; and the validity and permissible scope of nonjudicial settlement agreements.

Scope and Applicability

The "scope" of the Code is identical to that of F.S. Ch. 737, which the Code will eventually replace. According to §736.0102, the Code applies to charitable and noncharitable express trusts and to trusts created by statute, judgment, or court decree. It does not apply to resulting trusts, constructive trusts, business trusts, land trusts, or any other arrangement that does not meet the definition of a trust under F.S. 731.201(34). Consistent with that, and except as otherwise provided in Part XIII of the Code or in a particular section, the provisions of the Code apply retroactively to all Florida trusts.

Important Terms

Section 736.0103 includes definitions for terms that are used in more than one section of the Code. These definitions are supplemented by other definitions in individual Code sections and by the definitions found in F.S. §731.201, which a conforming amendment makes applicable to new Ch. 736.

Most of the definitions in §736.0103 are sufficiently obvious or straightforward that there is no need to examine them directly. The terms "beneficiary" and "qualified beneficiary," however, are used so pervasively throughout the Code that extended examination of these terms is desirable.

The term "beneficiary" refers to the universe of persons who have a beneficial interest in a trust, as well as to any person who has a power of appointment over trust property in a capacity other than as trustee.³ It is immaterial for this purpose whether the beneficial interest is present or future, vested or contingent, or whether the person having the interest is ascertainable or even living. By contrast, the term "qualified beneficiary" encompasses only a limited subset of all trust beneficiaries. In effect, the class is limited to living persons who are current beneficiaries, intermediate beneficiaries, and firstline remainder beneficiaries, whether vested or contingent.⁴

Sources of Trust Law: Default and Mandatory Rules

Although it is more comprehensive than F.S. Ch. 737, the Code does not try to anticipate all possible issues that can arise with respect to trusts. Instead, for matters not addressed in the Code, §736.0106 provides that the Code is supplemented by the common law of trusts and by principles of equity.

As a general matter, a settlor is free to limit, expand, or override any Code provision.⁵ Thus, the Code can, and usually will, be supplemented by the terms of a trust. There are exceptions, of course, and all of the exceptions are listed in §736.0105(2). The exclusive list of exceptions found there can be organized into the following broad categories:

- Those relating to the requirements for the creation of a trust, including trust formalities and the requirement that the purpose of a trust be lawful, possible to achieve, and not contrary to public policy;
- Those containing public policy restrictions on the designation of a principal place of administration, and on the effect of penalty, spendthrift, and exculpatory clauses;
- Those covering procedural matters including jurisdiction, venue, and limitations on commencing judicial actions;
- Those dealing with court powers, including the power to adjust a trustee's compensation; to act in the interests of justice; to require, dispense with, modify, or terminate a trustee's bond; and, except as otherwise provided elsewhere in the Code, the power to modify or terminate a private or charitable trust;
- Those dealing with the duties of a trustee, specifically the duty to act in good faith and in accordance with the terms of the trust; the duty to notify, account to, and respond to requests for information by *qualified* beneficiaries; and with respect to a revocable trust, the duty to file a notice of trust at the death of the settlor and to pay the expenses and obligations of the settlor's estate; and
- Certain miscellaneous provisions, including one giving qualified beneficiaries and the trustee of a dynasty trust the power to amend or terminate the trust and another specifying the rights of third parties who interact with the trust, such as bona fide purchasers, tort or contractual claimants.

Principal Place of Administration

The Code imposes a duty on a trustee to administer the trust at a place that is appropriate to its purposes and administration. Subject to that duty, upon appropriate notice to the qualified beneficiaries, a trustee may move a trust's principal place of administration to another state or jurisdiction.⁶

Factual Knowledge

Section 736.0104 clarifies when a person is considered to have knowledge of a fact. That occurs if the person has actual knowledge of the fact, has received a notice or notification of it, or if under all of the facts and circumstances known to the person, he or she has reason to know it. With respect to an organization operating through employees, the organization has notice or knowledge of a fact involving a trust only from the earlier of the time the information was received by an employee having responsibility to act on matters involving the trust, or from the time the information would have been brought to the employee's attention if the organization had exercised reasonable diligence.⁷

Methods and Waiver of Notice

Notice of judicial proceedings under the Code is to be given as provided in the Florida Rules of Civil Procedure. Other notices and the sending of required documents must be accomplished in a reasonably suitable manner that is likely to result in receipt. Notice and the sending of documents are not required for persons whose identity or location is not reasonably ascertainable by the trustee or who have waived the sending of the notice or document.⁸

Nonjudicial Settlement Agreements

Under Code §736.0111, interested persons may enter into a binding nonjudicial settlement agreement with respect to any trust matter, provided the terms and conditions of the agreement could be properly approved by a court were court approval sought⁹ and the agreement does not produce a result that is not authorized under other provisions of the Code.

Part II: Judicial Proceedings

Part II of the Code covers judicial proceedings involving the validity, administration, and distribution of trusts. Among these are provisions that affirm that trusts are not subject to continuing judicial supervision; that proceedings involving the validity, administration, or distribution of trusts are commenced by complaint and are governed by the Florida Rules of Civil Procedure; and that the circuit court has original jurisdiction with respect to all matters arising under the Code.¹⁰

Sticking with the familiar, Part II also incorporates four provisions found in F.S. Ch. 737. Section 736.0204 dealing with venue for actions and proceedings concerning trusts is identical to F.S. §737.202.11 Section 736.0205 dealing with the dismissal of trust proceedings involving matters relating to foreign trusts is identical to F.S. §737.203. Section 736.0206 providing for notice and other rules relating to proceedings for the review of the employment of agents and the compensation of the trustee and trust employees is identical to F.S. §737.204. And §736.0207 preventing actions to contest the validity of a trust while it remains revocable is similar to F.S. §737.2065. The only substantive difference is that the Code version includes a new exception for court approved actions by the guardian of the property of an incompetent settlor.

Lastly, §736.0202 deals with personal jurisdiction over the trustee, beneficiaries, and recipients of trust distributions. The section should be considered new as there is no corresponding provision in F.S. Ch. 737.¹² With respect to a trust having its principal place of administration in Florida, §736.0202 provides that a trustee submits to the jurisdiction of Florida courts either by accepting the trusteeship or by moving the principal place of administration to this state. In addition, the section provides that trust beneficiaries are subject to the jurisdiction of Florida courts with respect to any matter involving the trust, and that persons who accept a distribution from a trust submit personally to the jurisdiction of Florida courts regarding any matter involving the distribution. The methods of obtaining jurisdiction detailed in the section are not exclusive.

Part III: Representation

With some important modifications, Part III of the Code includes all of the representation provisions of the Uniform Code. In the context in which it is used here, "representation" refers to the authority of one person to act on behalf of another. Under the Code, notice, information, accountings, and reports sent to a representative have the same effect as if sent to the person being represented. And actions taken by a representative bind the person being represented to the same extent as if those actions were taken by the person being represented.¹³

The Code recognizes several different categories of representation, including:

Fiduciary: This category includes those provisions which permit a guardian of the property to represent a ward; an attorney-in-fact to represent a principal; and a trustee or personal representative to represent the beneficiaries of a trust or estate, as the case may be. The Code also provides that a parent may represent an unborn or minor child if no guardian of the property has been appointed.¹⁴

Virtual: If not otherwise represented, a minor, incapacitated, unborn, unascertainable, or unlocatable person may be represented by another person having a substantially identical interest.¹⁵ The classic example of virtual representation involves the representation of minor beneficiaries of a class gift by other adult members of the class.

Court appointed: The court may appoint a representative for a person the court determines is not otherwise adequately represented. A court appointed guardian ad litem would be an example of this category of representation. Uniquely, in making decisions, a court appointed representative may take into consideration benefits accruing to living members of the family of the represented individual.¹⁶

In each of the above situations, representation is precluded in matters where the representative has a conflict of interest with the person being represented. This restriction, however, does not apply to either of the two remaining categories of representation discussed next.

Powers of appointment: Under Code §736.0302, a holder of either a general or a special power of appointment may represent and bind objects and takers in default of the power.¹⁷ While there is no conflict of interest restriction under this section, representation by a holder of a power of appointment is not permitted in matters involving fraud or bad faith by a trustee. Nor may a beneficiary with a power represent others while the beneficiary is serving as sole trustee.¹⁸

Settlor designated: Section 736.0306 provides the second category of representation to which a conflict of interest limitation does not apply. The type of representation permitted by this section is new. Within limits discussed below, the section allows a settlor to appoint or designate a person to represent

and bind a trust beneficiary or to receive notices, information, reports, and accounts on the beneficiary's behalf. There are two limits. The first is that a designated representative who is also a trustee may not represent or bind a trust beneficiary while serving in that capacity. The second applies to designated representatives who are also beneficiaries of the trust. Although there is no blanket prohibition on a beneficiary serving as a designated representative, the Code does restrict the situations where this is allowed. A beneficiary may serve as a designated representative only if the beneficiary is designated by the settlor by name (as opposed to by others pursuant to a process detailed in the trust instrument) or the designated representative/beneficiary is a spouse, grandparent, or descendant of a grandparent of either the beneficiary being represented or that beneficiary's spouse.

Part IV: Trust Creation, Validity, Modification, and Termination

The first several sections of Part IV of the Code gather together what would be considered by most to be the traditional common law of trusts. The balance of Part IV covers the important areas of trust modification, termination, and reformation.

Trust Creation and Validity

Code §736.0401 provides that a trust may be created by inter vivos or testamentary transfer, by a settlor's self-declaration of trust, or by the exercise of a power of appointment. In broad outline, to create a trust, a settlor having the capacity to do so must intend to create a trust for a purpose that is lawful, consistent with public policy and possible to achieve.¹⁹ The trust must not be passive, meaning the trustee must have enforceable duties to perform.²⁰ A trust or any portion of a trust is void to the extent the trust or trust portion is procured by fraud, duress, mistake, or undue influence.²¹

In addition to the above, a private trust must have ascertainable beneficiaries. This does not mean that the beneficiaries must be alive at the time the trust is created. It is sufficient if they can be ascertained at some point in the future within the period of the rule against perpetuities.²²

A trust may be created for a charitable purpose (e.g., the relief of poverty, the advancement of arts, sciences, education, or religion, or the promotion of health, governmental, or municipal purposes).²³ The ascertainable beneficiary requirement does not apply to such trusts²⁴ because the enforcement of charitable trusts is provided by other mechanisms, among which is a new provision giving settlors standing to enforce the charitable trusts they create. ²⁵

A trust also may be created to provide for the care of one or more animals alive during the settlor's lifetime. The settlor of an animal trust may designate someone to enforce the trust. In the absence of such a designation, the court will appoint a person to enforce the trust. In either case, the presence of a designated enforcer means that an animal trust does not need ascertainable beneficiaries.²⁶

In much the same way that the Code validates trusts for the care of animals, it also validates (for 21 years) trusts for a general or specific noncharitable purpose. Like animal trusts, trusts for a noncharitable purpose are enforced by a person designated by the settlor in the terms of the trust, or, in the absence of such a designee, by a person appointed by the court. Hence, this type of trust need not have ascertainable beneficiaries either.²⁷

A final requirement for a valid trust is that the trust be executed with appropriate formalities. Thus, a testamentary trust is valid only if the will in which it is contained is valid. With two important qualifications discussed next, an inter vivos trust is validly created under the Code if its creation complies either with the law of the place where it is executed or the law where the settlor is domiciled at the time of creation.²⁸

Now for the qualifications: Neither existing Florida law nor the Code require a writing to create a trust of personal property. Irrevocable oral trusts of personal property are enforceable provided only that their terms can be established by clear and convincing evidence.²⁹ Trusts containing Florida real property, however, must be evidenced by a signed writing.³⁰ Nominally, revocable trusts are subject to the same rules. Practically speaking, however, revocable trusts present special considerations. In the first place, most plans involving revocable trusts also involve wills with pourover clauses. Under F.S. §732.513(1), a pourover clause is invalid unless the recipient trust is evidenced by a written instrument. More importantly, since 1995, F.S. §737.111 has provided that the testamentary aspects of most trusts³¹ are void unless the trusts are executed with the formalities required for a will.³² Similar requirements are imposed by §736.0403(2)(b) of the Code, but only with respect to revocable trusts³³ and amendments thereto³⁴ created or executed by Florida domiciliaries³⁵ on or after the effective date of the Code.³⁶ The practical bottom line then is, under the Code, if revocable trusts are to serve the function they are intended to serve — to pass property at the death of the settlor to others — they must be executed with the formalities required for a will in Florida.³⁷

Trust Modification and Termination

Together with the provisions dealing with the requisites for a trust, Part IV of the Code includes important and useful provisions covering trust modification, termination, and reformation. The first three of these sections are reformulations of Florida's existing trust modification statutes. Section 736.04113 permits trust modifications in a manner consistent with the settlor's purposes for the trust. The section is identical in effect to F.S. §737.4031(1). Section 736.04115 permits judicial modifications in the best interest of the beneficiaries. The section is identical in effect to existing F.S. §737.4031(2).³⁸ Finally, §736.0412 permits nonjudicial modifications of trusts. This section is based on and is substantively identical to F.S. §737.4032.³⁹

Along with the three sections discussed above, the Code includes other modification/termination/reformation provisions that are derived from the Uniform Code. Section 736.0414 provides a mechanism for a trustee or a court to modify or terminate an uneconomic trust. A trustee of a trust with property worth less than \$50,000 may terminate the trust on its own initiative if the trustee concludes that the value of the trust property is insufficient to justify the cost of

administration. In addition, upon application of a trustee or any qualified beneficiary, a court may modify or terminate a trust, or remove or appoint a different trustee, if the court determines that the value of the trust property is insufficient to justify the cost of administration.

In another section derived from the Uniform Code, §736.0416 authorizes a court to modify a trust to achieve a settlor's tax objectives. It is important to note, however, that this section does not, and cannot, ensure that a modification will be recognized for tax purposes. In general, tax recognition requires either that the modification occur before the event giving rise to the tax⁴⁰ or that the modification be authorized by the Internal Revenue Code or Treasury Regulations promulgated thereunder.

Finally, the Code contains two sections permitting the reformation of a trust to better effectuate a settlor's intent. Section 736.4013 is a codification of the common law *cy pres* doctrine applicable to charitable trusts. Section 736.4015 permits reformations to cure mistakes. The latter section, in particular, is an expansion of existing law in that reformation under Code §736.4015 is available for both mistakes of law and of fact, whether in the expression or in the inducement, and whether or not the terms of the trust are ambiguous.

Trust Division and Combination

The final section of Part IV of the Code — §736.0417 — gives trustees the power to sever or combine trusts. Unlike current F.S. §737.403, with appropriate notice to qualified beneficiaries, §736.4017 permits a trustee to combine trusts even though their terms are not identical. And, a single trust can be severed even though the resulting trusts are dissimilar. Two caveats are in order, however. First, the authority of the trustee is circumscribed by a requirement that the severance or combination not impair any beneficiary's rights. Second, here again the types of actions permitted under the Code may exceed what are permissible from a tax standpoint. Trustees should exercise caution as tax law requirements for trust combinations and severances vary with the context.

Part V: Creditors Claims; Spendthrift and Discretionary Trusts

Part V of the Code contains the several provisions that bear on the rights of creditors vis-à-vis a beneficiary's interest in a trust. Areas covered include the ability to garnish present or future distributions; the validity, requisites, effect, and limits of spendthrift provisions; the impact on creditor's rights of discretionary distribution standards; the treatment of self-settled trusts; and the duty of trustees of revocable trusts to pay the expenses and obligations of a settlor's estate.

Third-party Trusts

With respect to third-party trusts, §736.0501 provides the basic statement of creditor remedy. As long as the trust does not contain a valid spendthrift provision, a court may "authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or by other means." Importantly, the rights given to creditors under this section are limited to those cases where a beneficiary has a *right* to distributions. If distributions are discretionary, a beneficiary has no "attachable" trust interest. Thus, §736.0504(1) provides that a creditor of a beneficiary may not compel a distribution that is subject to a trustee's discretion, whether or not the discretion is subject to a standard and whether or not the trustee has abused the discretion.⁴¹ In addition, §736.0504(2) ensures that the same rule applies even if the beneficiary is the trustee, provided the trustee's discretion to distribute for his or her own benefit is limited by an ascertainable standard.

Code §736.0502 gives statutory recognition to spendthrift provisions.⁴² To be effective, a spendthrift provision must restrain both voluntary and involuntary transfer of a beneficiary's interest.⁴³ Assuming that is the case, a beneficiary may not transfer his or her beneficial interest in the trust and, with two exceptions discussed next, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before it is received by the beneficiary.⁴⁴

The first exception applies to overdue mandatory distributions. Although a spendthrift provision prevents a beneficiary's creditor from attaching or garnishing the beneficiary's interest in a trust, it does not protect trust income or principal after it has been distributed to the beneficiary. For that reason, a sympathetic trustee might be tempted to delay required distributions to spendthrift beneficiaries to frustrate or impede the beneficiaries' creditors' efforts to reach the distributions. Code §736.0506 is intended to prevent this. Under the section, whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution that the trustee does not make within a reasonable time. For this purpose, a mandatory distribution is a distribution of income or principal that the trustee is required to make under the terms of the trust, including a distribution on termination of the trust. The term does not encompass discretionary distributions of any sort.⁴⁵

The second exception relates to so-called "exception creditors." When it comes to the effectiveness of spendthrift provisions, not all creditors are created equal. For public policy reasons, some creditors may proceed against a beneficiary's interest in a trust even though the trust includes a spendthrift clause. Thus, §736.0503(2) provides "last resort" exceptions⁴⁶ for claims by a beneficiary's child, spouse or former spouse for support or maintenance and for a judgment creditor (such as an attorney) who has provided services for the protection of a beneficiary's interest in the trust. In addition, §736.0503(2) provides an exception for claims by a state or the U.S., but only to the extent provided in a statute separate from the Code.

The fact that spendthrift clauses are unenforceable against these exception creditors means only that these creditors have remedies against a beneficiary's interest similar to those of creditors of beneficiaries with interests in a trust that does not include a spendthrift provision. That is, exception creditors may attach present or future distributions to or for the benefit of the beneficiary.⁴⁷ They cannot, however, compel distributions from or otherwise reach beneficial interests in discretionary trusts.

Self-settled Trusts

Traditionally, self-settled trusts have been treated harshly when it comes to creditors' rights. This follows from a widely accepted public policy maxim that one should not be permitted to put property in a trust for one's own benefit to escape creditors. This policy maxim informs the Code's treatment of self-settled trusts. Under Code §736.0505(1), whether or not a trust includes a spendthrift provision, while a trust is revocable, the trust property is subject to the claims of the settlor's creditors.⁴⁸ Moreover, in the case of an irrevocable trust, a settlor's creditor or assignee may reach the maximum amount that can be distributed to or for the benefit of the settlor.⁴⁹

The most straightforward application of the above rules involves the revocable living trust so commonly found in contemporary estate plans. But the rules can also apply to irrevocable trusts where someone other than titular settlor has a power of withdrawal. Under §736.0505(2)(a), during the period it may be exercised, a holder of a withdrawal power over trust property is treated the same as a settlor of a revocable trust with respect to the property subject to the power. Hence, the power holder's creditors may reach the property subject to the power.⁵⁰ Moreover, under §736.0505(2)(b), upon a lapse, release, or waiver of a withdrawal power, the power holder retains the status of trust settlor with respect to the value of the property subject to the lapse, etc.⁵¹ Accordingly, the power holder's creditors can reach the maximum amount of that property that could thereafter be distributed to the power holder.

The treatment of lapsed powers under the Code may be a change in Florida law. It should be emphasized, however, that the Code contains an important qualification to the rule discussed above dealing with the effect of lapses, releases, and waivers. The Code rule applies if and only to the extent the value affected by the lapse, release, or waiver exceeds the greater of the gift tax annual exclusion (currently \$12,000) or the safe harbor for lapses under the federal gift and estate tax laws (currently the greater of \$5,000 or five percent of the trust).⁵² For powers drafted not to exceed these limits, the property subject to the power will be subject to the power holder's creditors before the lapse, release, etc., but not thereafter.

Trustee's Discretion to Pay Taxes on Income of Grantor Trust

A grantor trust is a special category of trust, the income and deductions of which are taxed directly to the settlor as if the settlor owned the trust assets. Grantor trust status is frequently tax efficient because of the compressed brackets that apply to ordinary trusts. In crafting a grantor trust, it can be desirable to give the trustee discretion to pay the taxes imposed on the settlor under the Internal Revenue Code, either directly or indirectly by reimbursing the settlor for taxes paid by him or her. Section 736.0505(1)(c) of the FTC provides assurance that including such a discretion will not, in and of itself, subject the trust to the settlor's creditors under the maximum invasion principle discussed above.

Trustee's Duty to Pay Expenses and Obligations of Settlor's Estate

F.S. Ch. 737 includes provisions which establish a workable and important mechanism by which the assets of a deceased settlor's revocable trust must be applied in payment of the expenses of administration and the obligations of a settlor's estate. The Code incorporates these provisions without change.⁵³

Part VI: Revocable Trusts

Part VI of the Code gathers in one place most of the provisions relating to revocable trusts, which the Code defines to be a trust that may be revoked by the settlor without the consent of either a trustee or a person having an adverse interest.⁵⁴ Section 736.0601 clarifies that the capacity required to create a revocable trust is the same as that needed to execute a will. Section 736.0602 provides that trusts are revocable by default. Unless the trust instrument states that the trust is irrevocable, the trust may be amended or revoked by the settlor. As this is a change in existing Florida law, §736.0602 is prospective only.

Consequences of Revocability

Revocability has important consequences under the Code. In addition to the rights of the settlor's creditors discussed previously, while a trust is revocable, the trustee's duties are owed exclusively to the trust settlor.⁵⁵ As a consequence, no other person is entitled to notices, information, accountings, or reports, and a trustee may follow the directions of the settlor even when the directions are contrary to the trust instrument.⁵⁶

Methods of Amending or Revoking Trusts

Along with stating that it is revocable, a well-drafted revocable trust instrument will specify the method that is to be used to accomplish a revocation or amendment. If the trust instrument does this, the provision in the instrument is exclusive in the sense that the trust can be revoked or amended only by substantially complying with the method stated in the instrument. If the instrument does not specify a method, any clear and convincing manifestation of the settlor's intent to revoke is sufficient, including a provision in the settlor's later will or codicil expressly revoking the trust or specifically devising property that would otherwise pass according to the trust terms.⁵⁷

Liability of Trustee for Unknown Amendments or Revocations

If a trust is revoked, the trustee is to deliver the trust property as the settlor directs.⁵⁸ Of course, nothing ensures that directions from the settlor will be forthcoming and, particularly where no method is specified in the trust instrument, it is possible that a trust could be amended or revoked without the trustee's knowledge. In such cases, §736.0602(7) holds the unknowing trustee harmless for distributions made and other actions taken on the assumption that the trust has not been amended or revoked.

Limitations Period for Claims Against Trustee of Revocable Trust

Provisions relevant to trust contests appear in several places in the Code. Part VI's contribution to this area is §736.0604. This important new provision gives a trustee of a revocable trust the advantage of a short six-month limitations period after the settlor's death with respect to claims by a person to whom the trustee has sent a copy of the trust instrument and a notice informing the person of the trust's existence, the trustee's name and address, and

the time allowed for commencing a proceeding. As is true across the entire Code, the representation provisions of Part III are available to a trustee who wishes to comply with the requirements of §736.0604.

Part VII: Office of Trustee

Part VII of the Code contains the various rules relating to the office of trustee. This includes provisions covering acceptance, resignation, removal, succession, and compensation of trustees. Also covered are the duties and powers of cotrustees and the right of trustees to reimbursement for expenses incurred in the administration of the trust.

Accepting or Declining the Office

A person designated as trustee in a trust instrument is deemed to decline the trusteeship if the person does not accept the designation within a reasonable time. A person accepts the trusteeship by substantially complying with the method of acceptance provided in the terms of the trust or by otherwise indicating acceptance, such as by accepting delivery of the trust property or by exercising powers or performing duties as trustee. Without accepting the trusteeship, however, a person designated as trustee may act to preserve trust property or inspect or investigate trust property for any purpose including to determine potential liability under environmental or other law.⁵⁹

Resignations and Removals

A trustee may resign with court approval or, in lieu thereof, by giving at least 30 days notice to the settlor (if living), the cotrustees (if any) and all qualified beneficiaries. In either case, a trustee's resignation does not discharge any liability of the resigning trustee or any sureties on the trustee's bond.⁶⁰

According to §736.0706, court removal of a trustee may be sought by the settlor, a cotrustee, or any beneficiary. In addition, a court may remove a trustee on its own initiative. Statutory grounds for removal include a serious breach of trust, lack of cooperation among cotrustees, and unfitness, unwillingness, or persistent failure to effectively administer the trust.⁶¹

Section 736.0706 also permits removal of a trustee at the request of all of the qualified beneficiaries or upon a showing of a substantial change in circumstances. Removal on these grounds does not require a showing of malfeasance. It requires only that the removal best serve the interests of all beneficiaries, that it not be inconsistent with a material purpose of the trust, and that a suitable cotrustee or successor trustee be available.

Subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes, a removed or resigning trustee must, within a reasonable time, deliver any trust property within the trustee's possession to the cotrustee, successor trustee, or other person entitled to it. Pending delivery, a sole trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect trust property.⁶²

Vacancies and Appointment of Successor Trustees

A vacancy in a trusteeship can occur for a number of reasons including declination, incapacity, resignation, disqualification, removal, or death. In each instance, except when the terms of the trust provide otherwise, a vacancy need not be filled unless there is no remaining trustee to serve. Where a vacancy is required to be filled, it must be filled first by a person designated pursuant to the terms of the trust, then by a person appointed by unanimous agreement of the qualified beneficiaries, and lastly, if necessary, by a person appointed by the court. ⁶³

Cotrustees

Code §736.0703 contains rules relating to the duties and liabilities of cotrustees. With some exceptions, all cotrustees have a duty to participate in the administration of the trust.⁶⁴ The expectation is that they will act unanimously, although if they are unable to reach a unanimous decision, they may act by majority agreement.

In general, a trustee who does not join in an action by another trustee is not liable for the action.⁶⁵ However, this rule is subject to the overriding duty of each trustee to exercise reasonable care to prevent a cotrustee from committing a breach of trust and to compel a cotrustee to redress a breach that does occur.⁶⁶

Because the Code permits a majority of trustees to act for the trust, it is possible that one or more trustees could be outvoted as to some particular course of action. A dissenting trustee who joins in an action at the direction of a majority of trustees is not liable for actions taken by the majority provided notice of the dissent is given to any cotrustee at or before the time of the action.⁶⁷

Compensation and Reimbursement of Trustees

A trustee is entitled to reasonable compensation, including reasonable additional compensation for other services the trustee renders in connection with the administration of the trust. If the trustee's compensation is specified in the terms of the trust, the trustee is entitled to be compensated as specified, subject to the court's authority to allow more or less compensation if the trustee's duties are substantially different from those originally contemplated or the specified compensation is unreasonably low or high.⁶⁸

A trustee is also entitled to be reimbursed out of the trust property, with appropriate interest, for reasonable expenses properly incurred in the administration of the trust. A trustee has a lien against trust property to secure reimbursement for advances (plus interest) made by the trustee for the protection of the trust.

¹ The committee was comprised of members of the Real Property Probate & Trust Law, Elder Law, and Tax Law sections of the Bar. It also included

liaisons to the Probate and Trust Litigation Committee, the Probate Law Committee, and representatives of the Florida Bankers Association and the Florida Institute of Certified Public Accountants. The committee was co-chaired by Brian J. Felcoski and Laird A. Lile. This author served as committee scrivener. Sen. David Aronberg, D-Greenacres, and Rep. Mark Mahon, R-Jacksonville, sponsored the legislation.

2 Arkansas, District of Columbia, Kansas, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah, Maine, Virginia, and Wyoming.

3 See §736.0103(3).

4 See §736.0103(14). Charitable trusts are created to benefit the community at large rather than for the benefit of ascertainable beneficiaries. As a consequence, charitable trusts have no qualified beneficiaries. To address this concern, the Code extends the rights of a qualified beneficiary to any charitable organization expressly designated to receive distributions from a charitable trust if the organization would otherwise meet the definition of a qualified beneficiary. In addition, the Code authorizes the attorney general to assert the rights of a qualified beneficiary with respect to charitable trusts. See §736.0110(1) and (3).

A similar problem exists with trusts for the care of animals or for a specific noncharitable purpose, neither of which have ascertainable beneficiaries, but both of which are validated by other provisions of the Code. See §736.0408 (trust for animal) and §736.0409 (noncharitable trust without ascertainable beneficiary). The Code addresses this issue by extending the rights of a qualified beneficiary to any person appointed to enforce an animal or noncharitable purpose trust. See §736.0110(2).

5 See §736.0105(1).

6 See §736.0108(4)–(6). In the absence of a valid designation in the trust instrument, §736.0108 retains existing Florida statutory law which provides that a trust's principal place of administration is the trustee's usual place of business, if any; otherwise the trustee's residence. See §736.0108(2). In addition, the section validates trust provisions designating a principal place of administration, provided the designated jurisdiction has a sufficient nexus to the trust or its beneficiaries. The nexus requirement is satisfied if the designated jurisdiction is the trustee's residence or principal place of business or a jurisdiction where all or part of the administration occurs. Other jurisdictions are judged on a case by case basis. See §736.0108(1).

7 This may be a change in Florida law as there are some cases that suggest a stricter standard for organizations acting through employees. See, e.g., *St. Petersburg Coca-Cola Bottling Co. v. Cuccinello*, 44 So. 2d 670 (Fla. 1950); *Harris v. Lewis State Bank*, 436 So. 2d 338 (Fla. 1st D.C.A. 1983).

8 See §736.0109.

9 Court approval may be requested by any interested person. §736.0111(5).

10 See generally §§736.0201 and 736.0203.

11 Venue lies in any county where it is proper under **Fla. Stat.** Ch. 47, where the plaintiff or defendant beneficiary resides or has its principal place of business, or where the trust has its principal place of administration.

12 Jurisdiction under existing law is obtained under the general long-arm statutes found in **Fla. Stat.** Ch. 48.

13 **Fla. Stat.** §736.0301.

14 See §736.0303.

15 See §736.0304.

16 See §736.0305.

17 Section 736.0305 does not apply to the distribution powers of a trustee. §736.0302(2)(b).

18 In a conforming amendment, similar restrictions have been added to **Fla. Stat.** §731.301(1).

19 See §§736.0402 and .0404.

20 **Fla. Stat.** §736.0402(1)(d). *Accord, Elvins v. Seestedt*, 141 Fla. 266, 193 So. 54, 126 A.L.R. 1001 (1940); *Watson v. St. Petersburg Bank and Trust Company*, 146 So. 2d 383 (Fla. 2d D.C.A. 1962); *Baum v. Corn*, 167 So. 2d 740 (Fla. 2d D.C.A. 1964). The requirement that the trustee's duties be enforceable means that the same person may not be the sole trustee and sole beneficiary of the trust. §736.0402(1)(e). *Accord, Wiley v. Hoggson*, 90 Fla. 343, 106 So. 408 (1925).

21 **Fla. Stat.** §736.0406.

22 **Fla. Stat.** §736.0402(2). In a departure from orthodox common law, a power of a trustee to select from a class of indefinite beneficiaries (such as friends) is not invalid under the Code. Instead, the trustee is given a reasonable time to make a selection. If the trustee fails to do so, the trustee's power fails and the property passes to those who would have taken it had the power never been conferred. §736.0402(3). In this regard, the Code overrules *Kunce v. Robinson*, 469 So. 2d 874 (Fla. 3d D.C.A. 1985).

23 **Fla. Stat.** §736.0405(1). Where the intent to create a charitable trust is present but the terms of the trust do not indicate a particular purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries. §736.0405(3).

24 **Fla. Stat.** §736.0402(1)(c)1.

25 **Fla. Stat.** §736.0405(3). The Code provides other mechanisms for enforcing charitable trusts as well. Although not stated explicitly, the Code continues the common law rule that charitable trusts are enforced by the state attorney general. See §736.0110(3) under which the attorney general may assert the rights of a qualified beneficiary with respect to charitable trusts. In addition, the rights of a qualified beneficiary are given to charitable organizations expressly designated to receive distributions under the terms of a charitable trust. §736.0110(1).

26 The trust lasts until the death of the last surviving animal at which time any remaining trust property is distributed as provided in the terms of the trust, or in the absence of such a provision, to the settlor, if living; otherwise as part of the settlor's estate. See generally §736.0408. This provision is similar to §737.116.

27 See generally §736.0409.

28 **Fla. Stat.** §736.0403(1).

29 **Fla. Stat.** §736.0407. *Accord, Bay Biscayne Co. v. Baile*, 73 Fla. 1120, 75 So. 860 (1917); *In re Estate of Pearce*, 481 So. 2d 69 (Fla. 4th D.C.A. 1986).

30 See §736.0403(2)(a) providing that trusts containing land must comply with §689.05.

31 **Fla. Stat.** §737.111 applies to trusts created by Florida residents, and perhaps trusts created in Florida by nonresidents. Certain trusts involved with deferred compensation arrangements are explicitly excluded from the requirements of **Fla. Stat.** §737.111. See §737.111(5). An identical exclusion is included in §736.0402(3).

32 See Fla. Stat. §737.111(1). This section does not apply to trusts created before October 1, 1995. **Fla. Stat.** §737.111(6).

33 A trust is revocable if it is revocable by the settlor without the consent of either the trustee or a person holding an adverse interest. §736.0103(15).

34 The decision to restrict §736.0403(2) to revocable trusts follows from the committee's belief that compliance with testamentary formalities is justifiable as a matter of principle only for that class of trusts that operate as will substitutes. Revocable trusts serve that purpose, irrevocable trusts do not. Stated differently, irrevocable outright transfers need not comply with testamentary formalities and the committee could find no convincing justification for treating irrevocable transfers in trust any differently.

35 Section 736.0403(2)(b) has no applicability to trusts created by non-Florida domiciliaries whether or not the trust was executed in Florida. Compare **Fla. Stat.** §737.111(2) which seems to imply that trusts executed by nonresidents are subject to the section if the settlor executes the trust in Florida. Conversely, §736.0403(2)(b) does not contain an "out" for trusts executed in other states. The section applies to revocable trusts created by Florida domiciliaries regardless of the place of execution and regardless of the location of the property held in the trust.

The change from "resident" in §737.111 to "domiciliary" in §736.0403(2) has no substantive effect as the two terms are defined to be synonymous in §731.201(11).

36 **Fla. Stat.** §737.111 continues to apply to trusts created before that date. **Fla. Stat.** §736.0402(4).

37 The formalities required are those for a will in Florida. Complying with the formalities for a will in some other state is not enough.

A failure to comply with the requirements of §736.0403(2)(b) does not result in the initial invalidity of a revocable trust. Rather, only the testamentary aspects of the trust are void. As under existing law, testamentary aspects means "those provisions of the trust that dispose of the trust property on or after the settlor's death other to the settlor's estate." See §736.0403(2), final sentence.

38 Like **Fla. Stat.** §737.4031(2), §736.04155 does not apply to any trust created prior to January 1, 2001. §736.04115(3)(a). For this purpose, a revocable trust is deemed to be created on the date the trust becomes irrevocable. §736.04115(4).

39 Like **Fla. Stat.** §737.4032, §736.0412 does not apply to any trust created prior to January 1, 2001. §736.0412(4)(a). For this purpose, a revocable trust is deemed to be created on the date the trust becomes irrevocable. §736.0412(5).

40 See Rev. Rul. 73-142, 1973-1 C.B. 405.

41 Section 736.0504 applies only with respect to the rights of creditors to compel distributions from discretionary trusts. It does not limit the right of a beneficiary to sue for an abuse of discretion or a failure to comply with a distribution standard. §736.0504(3).

42 No special language is necessary to create a spendthrift trust. A trust term to the effect that beneficial interests are subject to a spendthrift trust or words of similar import is sufficient to do the trick. §736.0502(2).

43 **Fla. Stat.** §736.0502(1). This requirement may be a departure from current law. As such, it applies only to trusts created after the effective date of the Code.

44 **Fla. Stat.** §736.0502(3).

45 It is immaterial for this purpose that the discretion is subject to a standard or that it is coupled with language of direction. §736.0506(1).

46 The Code's "last resort" requirement differs from that established by the Florida Supreme Court in its 1985 decision, *Bacardi v. White*, 463 So. 2d 218 (Fla. 1985), in that the Code requires only a single initial showing that traditional remedies are inadequate.

47 See §736.0503(3). This subsection also preserves the existing procedures available under the Uniform Interstate Family Support Act. See **Fla. Stat.** Ch. 88.

48 **Fla. Stat.** §736.0505(1)(a). This rule applies only to property in the trust that would not otherwise be exempt by law if owned directly by the settlor. Hence the exemption for protected homestead is not jeopardized by its transfer to a revocable trust.

49 **Fla. Stat.** §736.0505(1)(b). *Accord* U.T.C. §505(a)(2); Restatement (Third) of Trusts §58(2) and comment e (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §156 (1959).

50 The term "power of withdrawal" does not include powers held by a trustee which are limited by an ascertainable standard or powers which require the consent of the trustee or an adverse person. See §736.0103(12). Hence, the rule in §736.0505(2)(a) appears consistent with the Supreme Court's decision in *Croom v. Ocala Plumbing & Electric Co.*, 62 Fla. 460 (1911), which subjected trust property to the reach of creditors when the trust beneficiaries had an unrestricted right to access trust property.

51 See §736.0505(2)(b).

52 See §736.0505(b)(1) and (2).

53 See §§736.05053 and 736.05055.

54 **Fla. Stat.** §736.0103(15).

55 **Fla. Stat.** §736.0603(1). The situations where a trustee's duties are restricted by §736.0603 are not limited to traditional revocable trusts. Under §736.0603(2), during the period the power may be exercised, a holder of a power of withdrawal is given the rights of a settlor of a revocable trust with respect to the property subject to the power. Hence, if upon attaining a specified age, a beneficiary is given a continuing right to withdraw all trust property, the trustee has no duty to send notices, information, accountings, or reports to any other beneficiary.

56 See §736.0808(1).

57 See generally §736.0602(3)(b). The “substantial compliance” test in this section may be more lenient than existing Florida law, which appears to require strict compliance. See *Euart v. Yoakley*, 456 So. 2d 1327 (Fla. 4th D.C.A. 1984).

As defined in the Code, “settlor” includes anyone who transfers property to a new or existing trust. §736.0103(16). Under this definition, a trust can have more than one settlor. In such cases, §736.0602(2) specifies default rules for how the trust may be revoked or amended. As a general principle, each settlor may unilaterally revoke or amend his or her trust portion. But an exception applies if a trust consists of community property. To that extent, either spouse may revoke the trust, but amendments require the joinder of both. In all cases, if a trust is revoked or amended by fewer than all settlors, the trustee must promptly notify the other settlors of that fact.

58 Fla. Stat. §736.0602(4).

59 See generally §736.0701. A trustee need not give bond unless required by the terms of the trust or the court finds that a bond is needed to protect the interests of the beneficiaries. See §736.0702.

60 See §736.0705.

61 The Code’s provision giving a settlor the right to seek removal of a trustee is probably an expansion of existing law. See *Sanders v. Citizens Nat. Bank of Leesburg*, 585 So. 2d 1064 (Fla. 5th D.C.A. 1991). So too is the “unfitness” criteria at least if and to the extent it permits removal in anticipation of an actual breach.

62 See §736.0706(2) and (3).

63 See §736.0704. The ability of qualified beneficiaries to designate a successor trustee is an expansion of existing Florida law. See *Van Roy v. Hunter*, 96 Fla. 194, 117 So. 887 (1928).

64 A cotrustee’s participation is excused if the cotrustee is unavailable because of absence, illness, disqualification, or other temporary incapacity. In addition, a cotrustee’s participation is not required if the trustee has properly delegated performance of a function to another trustee.

65 Fla. Stat. §736.0703(6).

66 Fla. Stat. §736.0703(7)(a) and (b).

67 Fla. Stat. §736.0703(8). Unlike the similar provision in existing law, section 736.0703(8) does not require the notice of the dissent to be in writing. Compare Fla. Stat. §737.404.

68 See generally §736.0708. The authority of the court to adjust a trustee’s compensation in this manner under existing law is unsettled.

69 Fla. Stat. §736.0709(1) and (2).

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