

Committee on Constitution & Civil Law

**Wednesday, March 5, 2008
9:00AM - 9:45AM
24 HOB**

**Marco Rubio
Speaker**

**Marcelo Llorente
Chair**

Committee Meeting Notice
HOUSE OF REPRESENTATIVES

Speaker Marco Rubio

Committee on Constitution & Civil Law

Start Date and Time: Wednesday, March 05, 2008 09:00 am
End Date and Time: Wednesday, March 05, 2008 09:45 am
Location: 24 HOB
Duration: 0.75 hrs

Consideration of the following bill(s):

HB 435 Trust Administration by Hukill
HB 453 Alimony by Gibbons


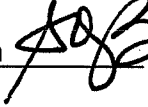
NOTICE FINALIZED on 03/03/2008 16:11 by Ingram.Michele

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 435 Trust Administration

SPONSOR(S): Hukill

TIED BILLS: IDEN./SIM. BILLS: SB 2164

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Constitution & Civil Law</u>	_____	Thomas 	Birtman 
2) <u>Safety & Security Council</u>	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

The Trust Code is the portion of the Florida Statutes that pertains to the administration of trusts.

The bill provides that when a grantor appoints trustees for particular purposes, the trustees excluded from those purposes are not liable for any consequence that results from compliance with the exercise of those purposes, regardless of the information available to the excluded trustees. The trustees having the power for a particular purpose shall be liable to the beneficiaries with respect to the exercise of that purpose.

The bill permits a trustee to use trust assets, without prior court approval, to pay costs or attorney's fees in any trust proceeding, including to defend against an allegation of breach of trust. However, when a claim or defense is made against the trustee based upon a breach of trust, if the party making the allegation shows a reasonable basis for the court to conclude that a breach of trust has in fact occurred, the court may enter an order prohibiting the trustee from using trust assets to pay costs or attorney's fees, and may order a refund.

The bill revises time limitations for the bringing of legal claims by a beneficiary against a trustee for breach of trust. The bill provides that all claims by a beneficiary against a trustee are barred upon the later of:

- Ten years from the date that the trust terminates, the trustee resigns or the fiduciary relationship between the trustee and the beneficiary otherwise ends; or
- Twenty years after the date of the act or omission of the trustee that is complained of.

This bill does not appear to have a fiscal impact on state or local government.

The bill takes effect on July 1, 2008.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Empower families -- This bill may affect families who use trust instruments in dealing with personal property.

Safeguard individual liberty -- This bill affects the options of an individual, organization or association regarding the conduct of his/her own affairs using trust instruments.

B. EFFECT OF PROPOSED CHANGES:

Background

The Trust Code is the portion of the Florida Statutes that pertains to the administration of trusts. Florida's body of statutory law specific to trusts is found in ch. 736, F.S., and encompasses: trust registration; the jurisdiction of the courts; the duties and liabilities of trustees; the powers of the trustee; charitable trusts; and rules of construction for trusts. This chapter sets forth the default rules for trust administration which can be limited or altered by the grantor (creator of the trust) in the trust instrument. Trust provisions in statute are also supplemented by case law in areas such as requirements for trust creation, treatment of revocable trusts, and rights of creditors.

Florida's Trust Code is modeled on the Uniform Trust Code of 2000. The National Conference of Commissioners on Uniform State Laws adopted the Uniform Trust Code (UTC) in 2000 and it has been enacted in some form in 18 states and the District of Columbia. In Florida, the Ad Hoc Trust Code Revision Committee (the committee) of the Florida Bar reviewed and revised the UTC to account for distinctions found in Florida statutory and case law. The product of the committee's work was the basis or the new Florida Trust Code adopted in 2006.¹

A trust is generally defined as:

a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. . . . [A] "beneficiary of a trust" [is] one who has an equitable interest in property subject to a trust and who enjoys the benefit of the administration of the trust by a trustee. The trustee is the person who holds the legal title to the property held in trust, for the benefit of the beneficiary. The settlor, or trustor, is the person who creates the trust.²

A "grantor" is "one who creates or adds to a trust and includes 'settlor' or 'trustor' and a testator who creates or adds to a trust."³ The term "trustee" as used in a technical or legal sense means the person

¹ Chapter 2006-217, L.O.F.

² 55A Fla. Jur. 2d Trusts s. 1.

³ Section 731.201(19), F.S.

who takes and holds the legal title to trust property for the benefit of another.⁴ "Trustee" includes "an original, additional, surviving, or successor trustee, whether or not appointed or confirmed by court."⁵

Cotrustees

A trust may comprise a variety of liquid and non-liquid assets. A trustee may be a natural person or may be a financial institution. A trustee may be selected for their expertise in fiduciary administration, family governance or management of a diversified portfolio of securities. The expertise of the trustee may be limited, however, when it comes to managing unique assets such as a family business, real estate or large blocks of stock that cannot be easily diversified. Management of these types of assets may require a different skill set.

Clients sometimes wish to appoint a particular trustee for a trust but also want to have a cotrustee, adviser, or committee (not the trustee) control certain trust decisions. For example, if a grantor funds a trust with stock in the family company, he or she might want to continue to make decisions regarding the purchase, sale, and voting of such stock. Similarly, a family that has a long-standing relationship with a successful money manager might want that manager (not the trustee) to make investment decisions for trust assets. In addition, a client might want someone other than the trustee to decide when to make income or principal distributions to beneficiaries. In these situations, the client wants to minimize the trustee's involvement in such decisions.

Even if a trust directs the trustee to make investments or distributions on the direction of someone else and relieves it from liability for following such directions, the trustee might have considerable monitoring or other responsibilities and may be subject to potential liability. Under present Florida law, the trustee still has the responsibility to oversee, monitor and intervene to avoid a serious breach of trust by the advisor. Florida law provides that when a grantor of a trust confers "on a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power *unless the attempted exercise is manifestly contrary to the terms of the trust 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 beneficiaries of the trust* (emphasis added)."⁶

The bill amends s. 736.0703, F.S., to provide that when the grantor appoints trustees for particular purposes:

- an excluded trustee⁷ must act in accordance with the exercise of the power given to the included 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 given to the included trustee, regardless of the information available to the excluded trustee;

⁴ 90 C.J.S. Trusts s. 2.

⁵ Section 731.201(38), F.S.

⁶ Section 736.0808(2), F.S.

⁷ The "excluded trustee" is the trustee not assigned the specific power or purpose at issue.

- an excluded trustee is relieved from any obligation to review, inquire, investigate or make recommendations or evaluations with respect to the exercise of the power by the included trustee, regardless of any information available to the excluded trustee and regardless of any actual knowledge by the excluded trustee; and
- a trustee having the power to direct or prevent actions of the 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.

Duty of Loyalty

A trustee has a duty to administer the trust solely in the interests of the beneficiaries.⁸ In the absence of a contrary provision in the trust instrument, a court order,⁹ or a specific statutory exception, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account, or which is otherwise affected by a conflict between the trustee's personal and fiduciary interests, is voidable by an affected beneficiary.¹⁰ A trustee may not usurp an opportunity properly belonging to the trust.¹¹ In voting shares of stock or in exercising powers of control over interests in other enterprises, the trustee must act in the best interest of the beneficiaries.¹²

To be contrasted with the transactions described above are those entered into between the trustee and persons who have close business¹³ or personal ties¹⁴ to the trustee. Such transactions are only presumed to be affected by a conflict between the personal and fiduciary interests of the trustee.¹⁵ Accordingly, the transactions are not voidable per se; they are voidable only if the presumption is not rebutted.

The Trust Code includes several exceptions to the basic duty of loyalty in the interest of fair, effective, and efficient trust administration. Notwithstanding the potential presence of a conflict between the personal and fiduciary interests of a trustee, the trustee's duty of loyalty does not preclude any of the following:

- Payment of reasonable compensation to the trustee or an agreement between a trustee and beneficiary relating to the appointment or compensation of the trustee,¹⁶
- Transactions between the trust and another trust, a decedent's estate, or a guardian of the property of which the trustee is a fiduciary or in which a beneficiary has an interest,¹⁷

⁸ See generally, s. 736.0802(1), F.S.

⁹ A trustee who is faced with a transaction that might involve a breach of the duty of loyalty may petition the court for appointment of a special fiduciary to act with respect to the transaction. Section 736.0802(9), F.S.

¹⁰ Section 736.0802(2), F.S.

¹¹ Section 736.0802(4), F.S.

¹² Section 736.0802(6), F.S.

¹³ Section 736.0802(3)(c) and (d), F.S. This includes an officer, director, employee, agent, or attorney of the trustee or a corporation or other person or enterprise in which the trustee (or a person owning a significant interest in the trust) has an interest that might affect the trustee's best judgment.

¹⁴ Section 736.0802(3)(a) and (b), F.S. This includes the trustee's spouse and the trustee's descendants, siblings, parents, or the spouse of any of them.

¹⁵ Section 736.0802(3), F.S.

¹⁶ Section 736.0802(7)(a) and (b), F.S.

¹⁷ Section 736.0802(7)(c), F.S.

- A deposit of trust money in a regulated financial-service institution operated by the trustee;¹⁸
- An advance by the trustee of money for the protection of the trust,¹⁹ or
- The employment of persons, including attorneys, accountants, investment advisers, or agents, even if they are the trustee or are associated with the trustee, to advise or assist the trustee in the performance of its administrative duties or the employment of agents to perform any act of administration, whether or not discretionary.²⁰

The Trust Code empowers a trustee to pay costs or attorney fees incurred in any trust proceeding from trust assets without the approval of any person or a court, except prior court approval is required if an action has been filed, or defense asserted, against the trustee based upon a breach of trust.²¹ Prior court approval is not required “if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a breach of trust.”²² The courts have held that when the personal interests of a trustee conflict with his or her position as trustee in the defense of an action, the trustee must obtain court approval before using trust funds to pay attorney’s fees from trust assets.²³

The bill amends s. 736.0802(10), F.S., to remove the requirement on a trustee to seek prior court approval to pay costs or attorney’s fees to defend against an allegation of breach of trust. The bill will permit the trustee to use trust assets, without prior court approval, to pay costs or attorney’s fees in any trust proceeding, including to defend against an allegation of breach of trust. However, when a claim or defense is made against the trustee based upon a breach of trust, if the party making the allegation shows a reasonable basis for the court to conclude that a breach of trust has in fact occurred, the bill provides that the court may enter an order prohibiting the trustee from using trust assets to pay costs or attorney’s fees. The party making the allegation of breach of trust may do so by evidence in the record or by proffering evidence to the court that a breach of trust has occurred. The trustee may proffer evidence that rebuts the allegation. The new language provides that it does not restrict the remedies a court may employ to remedy a breach of trust, including ordering appropriate refunds.

Limitations on Proceedings Against Trustees

The Trust Code specifies time limitations on bringing claims by a beneficiary against a trustee for breach of trust.²⁴ With respect to matters adequately disclosed on a trust accounting, the applicable limitation period depends on whether the trustee has sent the beneficiary a limitation notice that relates to that accounting. The shortest limitation period provided is six months. This period applies to actions on matters the trustee has adequately disclosed in a trust accounting or other trust disclosure document when the trustee has provided the beneficiary with a related limitation notice.²⁵ A limitation notice is a written statement informing the beneficiary that an action against the trustee for actions

¹⁸ Section 736.0802(7)(d), F.S.

¹⁹ Section 736.0802(7)(e), F.S.

²⁰ Section 736.0802(8), F.S.

²¹ Section 736.0802(10) F.S.

²² *Ibid.*

²³ *Shriner v. Dyer*, 462 So.2d 1122 (Fla. 4th DCA 1984); *Brigham v. Brigham*, 934 So.2d 544 (Fla. 3d DCA 2006); and *J.P. Morgan Trust Co. v. Siegel*, 965 So.2d 1193 (Fla. 4th DCA 2007).

²⁴ Section 736.1008, F.S.

²⁵ Section 736.1008(2), F.S.

based on any matter adequately disclosed in the accounting may be barred unless the action is commenced within six months of receipt of the accounting or limitation notice, whichever is later.²⁶

A significantly longer limitation period applies to claims involving matters adequately disclosed on a trust accounting when no related limitation notice is sent to the beneficiary. The Trust Code provides that the claims are barred as provided in chapter 95, F.S.²⁷ Typically, this will result in a four-year limitation with the period beginning on the date of receipt of the adequate disclosure.²⁸ An exception applies to matters involving actual or constructive fraud by the trustee. In those cases, the action must be commenced within 12 years, however the limitation period does not begin until the later of the time the facts giving rise to the action are discovered or the time the facts should have been discovered by an exercise of due diligence.²⁹

The bill provides that when “a trustee has not issued a final trust accounting or has not given written notice to the beneficiary of the availability of the trust records for examination and that claims with respect to matters not adequately disclosed may be barred, a claim against the trustee for breach of trust based on a matter not adequately disclosed in a trust disclosure document accrues when the beneficiary has actual knowledge of the facts upon which the claim is based and the trustee's repudiation of the trust, or adverse possession of trust assets, and is barred as provided in chapter 95.” [The change to current law is underlined in the preceding sentence.]

The bill further provides that notwithstanding the present limitations in law as discussed above, all claims by a beneficiary against a trustee are barred upon the later of:

- Ten years from the date that the trust terminates, the trustee resigns or the fiduciary relationship between the trustee and the beneficiary otherwise ends; or
- Twenty years after the date of the act or omission of the trustee that is complained of.

Finally, the bill provides that the failure of the trustee to take corrective action shall not be construed as a separate act or omission and shall not be construed to extend the period of limitation.

Effective Date

The bill takes effect July 1, 2008.

C. SECTION DIRECTORY:

Section 1: Amends s. 736.0703, F.S., relating to cotrustees.

Section 2: Amends s. 736.0802, F.S., relating to the duty of loyalty by trustees.

²⁶ Section 736.1008(4)(c), F.S.

²⁷ Section 736.1008(1)(a), F.S.

²⁸ See s. 95.11(3), F.S.

²⁹ Section 95.031(2)(a), F.S.

Section 3: Amends s. 736.1008, F.S., relating to limitations on proceedings against trustees.

Section 4: Provides that the bill becomes effective on July 1, 2008.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

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 because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

1 A bill to be entitled
 2 An act relating to trust administration; amending s.
 3 736.0703, F.S.; providing exceptions to duties and
 4 liabilities of cotrustees for excluded cotrustees under
 5 certain circumstances; providing for liabilities and
 6 obligations of included cotrustees; amending s. 736.0802,
 7 F.S.; providing an exception for trustee payments of costs
 8 and attorney's fees from trust assets except pursuant to
 9 court order under certain circumstances; providing
 10 requirements for obtaining such a court order; preserving
 11 certain court remedies; amending s. 736.1008, F.S.;
 12 specifying periods of repose barring claims by a
 13 beneficiary against a trustee; providing construction;
 14 providing an effective date.

15
 16 Be It Enacted by the Legislature of the State of Florida:

17
 18 Section 1. Subsection(7) of section 736.0703, Florida
 19 Statutes, is amended, and subsection (9) is added to that
 20 section, to read:

21 736.0703 Cotrustees.--

22 (7) Except as otherwise provided in subsection (9), each
 23 cotrustee shall exercise reasonable care to:

- 24 (a) Prevent a cotrustee from committing a breach of trust.
- 25 (b) Compel a cotrustee to redress a breach of trust.

26 (9) If the terms of a trust instrument provide for the
 27 appointment of more than one trustee but confer upon one or more
 28 of the trustees, to the exclusion of the others, the power to

29 direct or prevent specified actions of the trustees, the
 30 excluded trustees shall act in accordance with the exercise of
 31 the power. An excluded trustee is not liable, individually or as
 32 a fiduciary, for any consequence that results from compliance
 33 with the exercise of the power, regardless of the information
 34 available to the excluded trustees. The excluded trustees are
 35 relieved of any obligation to review, inquire, investigate, or
 36 make recommendations or evaluations with respect to the exercise
 37 of the power. The trustee or trustees having the power to direct
 38 or prevent actions of the trustees shall be liable to the
 39 beneficiaries with respect to the exercise of the power as if
 40 the excluded trustees were not in office and shall have the
 41 exclusive obligation to account to and to defend any action
 42 brought by the beneficiaries with respect to the exercise of the
 43 power.

44 Section 2. Subsection (10) of section 736.0802, Florida
 45 Statutes, is amended to read:

46 736.0802 Duty of loyalty.--

47 (10) Payment of costs or attorney's fees incurred in any
 48 trust proceeding from the assets of the trust may be made by the
 49 trustee without the approval of any person and without court
 50 authorization, unless the court orders otherwise as provided in
 51 paragraph (a). ~~except that court authorization shall be required~~
 52 ~~if an action has been filed~~

53 (a) If a claim or defense asserted against the trustee
 54 based upon a breach of trust is made against the trustee in a
 55 trust proceeding, a party must obtain a court order to prohibit
 56 the trustee from paying costs or attorney's fees from trust

57 assets. To obtain an order prohibiting payment of costs or
 58 attorney's fees from trust assets, a party must make a
 59 reasonable showing by evidence in the record or by proffering
 60 evidence that provides a reasonable basis for a court to
 61 conclude that there has been a breach of trust. The trustee may
 62 proffer evidence to rebut the evidence submitted by a party.

63 (b) Nothing in this subsection is intended to restrict the
 64 remedies a court may employ to remedy a breach of trust,
 65 including, but not limited to, ordering appropriate refunds.
 66 ~~Court authorization is not required if the action or defense is~~
 67 ~~later withdrawn or dismissed by the party that is alleging a~~
 68 ~~breach of trust or resolved without a determination by the court~~
 69 ~~that the trustee has committed a breach of trust.~~

70 Section 3. Subsection (3) of section 736.1008, Florida
 71 Statutes, is amended, subsection (6) of that section is
 72 renumbered as subsection (7), and new subsection (6) is added to
 73 that section, to read:

74 736.1008 Limitations on proceedings against trustees.--

75 (3) When a trustee has not issued a final trust accounting
 76 or has not given written notice to the beneficiary of the
 77 availability of the trust records for examination and that
 78 claims with respect to matters not adequately disclosed may be
 79 barred, a claim against the trustee for breach of trust based on
 80 a matter not adequately disclosed in a trust disclosure document
 81 accrues when the beneficiary has actual knowledge of the facts
 82 upon which the claim is based and the trustee's repudiation of
 83 the trust or adverse possession of trust assets, and is barred
 84 as provided in chapter 95.

85 (6) (a) Notwithstanding subsections (1), (2), and (3), all
 86 claims by a beneficiary against a trustee are barred upon the
 87 later of:

88 1. Ten years after the date the trust terminates, the
 89 trustee resigns, or the fiduciary relationship between the
 90 trustee and the beneficiary otherwise ends; or

91 2. Twenty years after the date of the act or omission of
 92 the trustee that is complained of.

93 (b) For purposes of this subsection, the failure of the
 94 trustee to take corrective action shall not be construed as a
 95 separate act or omission and shall not be construed to extend
 96 the period of repose established by this subsection.

97 Section 4. This act shall take effect July 1, 2008.

HB 435: TRUST ADMINISTRATION

Explanation of Amendment

Amdt 1 by Rep. Hukill (remove everything):

The amendment is a strike-all amendment and reflects the latest product worked out among the interested parties. It is identical to the recently filed Senate Bill.

Section 1:

The amendment creates a new section of law to provide that communications between a fiduciary, who administers fiduciary property, and a lawyer are privileged - identical to the existing attorney/client privilege. The new privilege applies to a fiduciary when serving as:

- a personal representative (Probate) or a trustee (Trust Code) as defined in s. 731.201,
- an administrator ad litem (Probate) as described in s. 733.308,
- a curator (Probate) as described in s. 733.501,
- a guardian or guardian ad litem (Guardianship) as defined in s. 744.102,
- a conservator (Transfer of Property to Minors) as defined in s. 710.102, or
- an attorney in fact (Powers of Attorney) as described in chapter 709.

Section 2 and Section 3:

These two sections are identical in substance to section 1 and section 2 of the bill as filed - with some slight change in wording made by Senate Bill Drafting.

Section 4:

Revises time limitations for the bringing of legal claims by a beneficiary against a trustee for breach of trust.

The first change, found in subsection (3), provides that when a trustee has not issued a final trust accounting or has not given written notice to the beneficiary of the availability of the trust records for examination and that claims with respect to matters not adequately disclosed may be barred, a claim against the trustee for breach of trust based on a matter not adequately disclosed in a trust disclosure document is barred as provided in ch. 95, F.S., and accrues when the beneficiary has actual knowledge of:

1. The facts upon which the claim is based, provided that such actual knowledge is established by clear and convincing evidence; or
2. The trustee's repudiation of the trust or adverse possession of trust assets.

The next changes, found in subsection (6), provide that notwithstanding the limitations provided elsewhere in the section, all claims by a beneficiary against a trustee for breach of trust are barred:

1. Upon the later of:
 - a. Ten years after the date the trust terminates, the trustee resigns, or the fiduciary relationship between the trustee and the beneficiary otherwise ends, provided that the beneficiary had actual knowledge of the existence of the trust during the ten-year period; or
 - b. Twenty years after the date of the act or omission of the trustee that is complained of, provided that the beneficiary had actual knowledge of the existence of the trust during the twenty-year period; or
2. Forty years after the date the trust terminates, the trustee resigns, or the fiduciary relationship between the trustee and the beneficiary otherwise ends.

For the purposes of the changes made by the amendment to subsection (6), failure of the trustee to take corrective action is not a separate act or omission and does not extend the period of repose established in the subsection.

The provisions of this section of the amendment, made to both subsection (3) and subsection (6), will apply only to claims based upon acts or omissions occurring on or after July 1, 2008.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1

22 section, only the person or entity acting as a fiduciary is
23 considered a client of the lawyer.

24 Section 2. Subsection (7) of section 736.0703, Florida
25 Statutes, is amended, and subsection (9) is added to that
26 section, to read:

27 736.0703 Cotrustees.--

28 (7) Except as otherwise provided in subsection (9), each
29 cotrustee shall exercise reasonable care to:

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

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

32 (9) If the terms of a trust instrument provide for the
33 appointment of more than one trustee but confer upon one or more
34 of the trustees, to the exclusion of the others, the power to
35 direct or prevent specified actions of the trustees, the
36 excluded trustees shall act in accordance with the exercise of
37 the power. An excluded trustee is not liable, individually or as
38 a fiduciary, for any consequence that results from compliance
39 with the exercise of the power, regardless of the information
40 available to the excluded trustees. The excluded trustees are
41 relieved of any obligation to review, inquire, investigate, or
42 make recommendations or evaluations with respect to the exercise
43 of the power. The trustee or trustees having the power to direct
44 or prevent actions of the trustees shall be liable to the
45 beneficiaries with respect to the exercise of the power as if
46 the excluded trustees were not in office and have the exclusive
47 obligation to account to and defend any action brought by the
48 beneficiaries with respect to the exercise of the power.

49 Section 3. Subsection (10) of section 736.0802, Florida
50 Statutes, is amended to read:

51 736.0802 Duty of loyalty.--

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1

52 (10) Payment of costs or attorney's fees incurred in any
53 trust proceeding from the assets of the trust may be made by the
54 trustee without the approval of any person and without court
55 authorization, unless the court orders otherwise as provided in
56 paragraph (a). ~~except that court authorization shall be required~~
57 ~~if an action has been filed~~

58 (a) If a claim or defense asserted against the trustee
59 based upon a breach of trust is made against the trustee in a
60 trust proceeding, a party must obtain a court order to prohibit
61 the trustee from paying costs or attorney's fees from trust
62 assets. To obtain an order prohibiting payment of costs or
63 attorney's fees from trust assets, a party must make a
64 reasonable showing by evidence in the record or by proffering
65 evidence that provides a reasonable basis for a court to
66 conclude that there has been a breach of trust. The trustee may
67 proffer evidence to rebut the evidence submitted by a party.

68 (b) This subsection does not restrict the remedies a court
69 may employ to remedy a breach of trust, including, but not
70 limited to, ordering appropriate refunds. ~~Court authorization is~~
71 ~~not required if the action or defense is later withdrawn or~~
72 ~~dismissed by the party that is alleging a breach of trust or~~
73 ~~resolved without a determination by the court that the trustee~~
74 ~~has committed a breach of trust.~~

75 Section 4. Subsection (3) of section 736.1008, Florida
76 Statutes, is amended, present subsection (6) of that section is
77 renumbered as subsection (7), and new subsection (6) is added to
78 that section, to read:

79 736.1008 Limitations on proceedings against trustees.--

80 (3) When a trustee has not issued a final trust accounting
81 or has not given written notice to the beneficiary of the
82 availability of the trust records for examination and that

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1

83 claims with respect to matters not adequately disclosed may be
84 barred, a claim against the trustee for breach of trust based on
85 a matter not adequately disclosed in a trust disclosure document
86 is barred as provided in chapter 95 and accrues when the
87 beneficiary has actual knowledge of:

88 (a) The facts upon which the claim is based if such actual
89 knowledge is established by clear and convincing evidence; or

90 (b) The trustee's repudiation of the trust or adverse
91 possession of trust assets, ~~and is barred as provided in chapter~~
92 95.

93
94 Paragraph (a) applies to claims based upon acts or omissions
95 occurring on or after July 1, 2008.

96 (6) (a) Notwithstanding subsections (1), (2), and (3), all
97 claims by a beneficiary against a trustee are barred:

98 1. Upon the later of:

99 a. Ten years after the date the trust terminates, the
100 trustee resigns, or the fiduciary relationship between the
101 trustee and the beneficiary otherwise ends if the beneficiary
102 had actual knowledge of the existence of the trust during the
103 10-year period; or

104 b. Twenty years after the date of the act or omission of
105 the trustee that is complained of if the beneficiary had actual
106 knowledge of the existence of the trust during the 20-year
107 period or;

108 2. Forty years after the date the trust terminates, the
109 trustee resigns, or the fiduciary relationship between the
110 trustee and the beneficiary otherwise ends.

111 (b) For purposes of this subsection, the failure of the
112 trustee to take corrective action is not a separate act or

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1

113 omission and does not extend the period of repose established by
114 this subsection.

115 (c) This subsection applies to claims based upon acts or
116 omissions occurring on or after July 1, 2008.

117 Section 5. This act shall take effect July 1, 2008.

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119

120

T I T L E A M E N D M E N T

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122

Remove the entire title and insert:

123

124

An act relating to fiduciaries; creating s. 90.5021, F.S.;
125 providing a fiduciary lawyer-client privilege for purposes of
126 the Florida Evidence Code; providing that a communication
127 between a lawyer and a client acting as a fiduciary is
128 privileged and protected from disclosure; amending s. 736.0703,
129 F.S.; providing exceptions to duties and liabilities of
130 cotrustees for excluded cotrustees under certain circumstances;
131 providing for liabilities and obligations of included
132 cotrustees; amending s. 736.0802, F.S.; providing an exception
133 for trustee payments of costs and attorney's fees from trust
134 assets except pursuant to court order under certain
135 circumstances; providing requirements for obtaining such a court
136 order; preserving certain court remedies; amending s. 736.1008,
137 F.S.; specifying when a claim accrues against a trustee for
138 breach of trust based on a matter not adequately disclosed;
139 providing for application; specifying periods of repose barring
140 claims by a beneficiary against a trustee; providing for
141 construction; providing for application; providing an effective
142 date.

143

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote Personal Responsibility: The bill will limit the ability of an ex-spouse to collect alimony when the ex-spouse is found to be living in a supportive relationship with a person the ex-spouse is not related to by consanguinity or affinity.

B. EFFECT OF PROPOSED CHANGES:

Alimony Law

Alimony is generally used to provide support to a financially dependent spouse.¹ The primary basis for alimony is whether there is need and ability to pay; alimony is not appropriate when the requesting spouse has no need for support or when the other spouse does not have the ability to pay.² Before a court can make an award of alimony, equitable distribution of the former spouse's assets must occur.³ The court then has several options with regard to awarding alimony, including permanent periodic alimony, lump-sum alimony, "bridge-the-gap alimony, rehabilitative alimony, a combination of several different types of alimony, or no alimony at all.⁴

Permanent periodic alimony is usually awarded to meet the needs of a dependent spouse, although this form of alimony can also be used to balance any inequities that might result from the property division of the final judgment.⁵ Lump sum alimony can also be used to remedy any inequity that remains as a result of the final division of property.⁶ Lump sum alimony can also be accomplished through periodic payments.⁷

In a long-term marriage, there is a presumption in favor of permanent alimony, regardless of the spouse's age or ability to earn income, although the district courts of Florida do not agree as to what constitutes a long-term marriage.⁸ Generally, however, a marriage of seventeen years or longer is considered long-term.⁹

Lump sum alimony may also take the form of "bridge-the-gap" alimony, which is alimony intended only for short-term assistance with legitimate, identifiable short-term needs.¹⁰ This form of alimony typically lasts no longer than two years.¹¹ To receive an award of rehabilitative alimony, the party seeking

¹ Victoria Ho & Jennifer Johnson, *Overview of Florida Alimony Law*, 78-OCT Fla. B. J. 71, 71 (2004).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 72.

⁸ *Young v. Young*, 677 So. 2d 1301 (Fla. 5th D.C.A. 1996).

⁹ *Cruz v. Cruz*, 574 So. 2d 1117 (Fla. 3d D.C.A. 1990).

¹⁰ *Borchard v. Borchard*, 730 So.2d 748, 753 (Fla. 2nd DCA 1999).

¹¹ *Borchard v. Borchard*, 730 So.2d 748 (Fla. 2nd DCA 1999).

support must provide the court with a rehabilitative plan including the purpose of the rehabilitation, the areas in which rehabilitation is needed, and the actual amount of money necessary for rehabilitation.¹²

Section 61.08(1), F.S., provides that:

In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. In any award of alimony, the court may order periodic payments or payments in lump sum or both. The court may consider the adultery of either spouse and the circumstances thereof in determining the amount of alimony, if any, to be awarded.

In awarding alimony, the trial court is given broad discretion to consider any factor "necessary to do equity and justice between the parties."¹³ The trial court is to consider "all relevant economic factors" when determining a proper award of maintenance or alimony.¹⁴ These factors include:

- The standard of living established during the marriage.
- The duration of the marriage.
- The age, physical, and emotional condition of each party.
- The financial resources of each party, both marital and nonmarital, and the liabilities of each of them.
- If applicable, the time necessary for either party to acquire the education or training necessary for the party to find employment.
- Each party's contribution to the marriage, including, but not limited to, homemaking services, child care, education, and career building of the other party.
- All sources of income available to either party.

In addition to the factors listed in s. 61.08(2), F.S., the court may consider any other factor necessary to do equity and justice between the parties.¹⁵

Reducing or Terminating Alimony

Current law in s. 61.14(1)(b), F.S., provides that the "court may reduce or terminate an award of alimony upon specific written findings by the court that since the granting of a divorce and the award of alimony a supportive relationship has existed between the obligee and a person with whom the obligee resides and who is not related by consanguinity or affinity." The burden of proving, by a preponderance of the evidence, that a supportive relationship exists is placed upon the obligor.

In determining whether the alleged de facto marriage should result in the reduction or termination of an existing award of alimony, the court is directed to "elicit the nature and extent of the relationship in question."¹⁶

Section 61.14(1)(b)2., F.S., requires the court to consider the following non-exclusive list of circumstances, in determining the relationship of an obligee to another person in determining whether to modify an existing award of alimony:

¹² Id.

¹³ Section 61.08(2), F.S.

¹⁴ Id.

¹⁵ Section 61.08(2), F.S.

¹⁶ Section 61.14(1)(b)2., F.S.

- Whether the obligee and the other person hold themselves out as a married couple, engaging in conduct such as using the same last name and a common mailing address, referring to each other as “my husband” or “my wife,” or “otherwise conducting themselves in a manner that evidences a permanent supportive relationship.
- The length of time that the obligee has resided in a permanent place of abode with another person who is not related by blood or affinity.
- The extent to which the obligee and other person have combined their assets or income or have otherwise demonstrated financial interdependence.
- The extent to which either the obligee or the other person supports the other, either in whole or in part.
- “The extent to which the obligee or the other person has performed valuable services for the other’s company or employer”.
- “Whether the obligee and other person have worked together to create or enhance anything of value”.
- Whether the obligee and other person have made a joint purchase of real or personal property.
- Whether there is evidence to show that the obligee and the other person have an express or implied agreement regarding property sharing and support.
- Whether the obligee and the other person have supported the children of one another, regardless of any legal obligation to do so.

The statute provides that the statutory authorization of a reduction or termination of alimony due to the existence of a supportive relationship does not abrogate the requirements that every marriage in the state be solemnized under a license, does not recognize a common law marriage as valid, and does not recognize a de facto marriage.¹⁷

“De facto marriage” is defined as “[a] marriage in which the parties live together as husband and wife under color of validity but which is defective for reasons of form, etc.”¹⁸ Common-law marriage is “[a] marriage that takes legal effect, without license or ceremony, when a couple live together as husband and wife, intend to be married, and hold themselves out to others as a married couple.”¹⁹

The Bill

The bill requires the court to consider and make a finding of fact concerning the existence of a supportive relationship as defined in s .61.14(1)(b)2., F.S., between an obligee and a person who is not related by consanguinity or affinity and with whom the obligee resides when determining a initial award of alimony or maintenance.

Essentially the bill is applying the current standard used in modifying alimony and applying it to the initial awarding of alimony.

C. SECTION DIRECTORY:

¹⁷ Section 61.14(1)(b)3., F.S.

¹⁸ BLACK’S LAW DICTIONARY, 375 (5th ed. 1979).

¹⁹ BLACK’S LAW DICTIONARY, 251 (5th ed. 1979).

Section 1: Amends s. 61.08 F.S., permitting consideration of the existence of a supportive relationship meeting specified criteria as a factor in determining an initial award of alimony or maintenance.

Section 2: Provides an effective date of July 1, 2008.

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 because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raises revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

1 A bill to be entitled
 2 An act relating to alimony; amending s. 61.08, F.S.;
 3 permitting consideration of the existence of a supportive
 4 relationship meeting specified criteria as a factor in
 5 determining an award of alimony or maintenance; providing
 6 an effective date.

7
 8 Be It Enacted by the Legislature of the State of Florida:

9
 10 Section 1. Paragraph (h) is added to subsection (2) of
 11 section 61.08, Florida Statutes, to read:

12 61.08 Alimony.--

13 (2) In determining a proper award of alimony or
 14 maintenance, the court shall consider all relevant economic
 15 factors, including but not limited to:

16 (h) Whether a supportive relationship as set forth in s.
 17 61.14(1)(b)2. has existed between the obligee and a person who
 18 is not related by consanguinity or affinity and with whom the
 19 obligee resides.

20
 21 The court may consider any other factor necessary to do equity
 22 and justice between the parties.

23 Section 2. This act shall take effect July 1, 2008.

