Civil Justice & Claims Subcommittee

Thursday, February 23, 2017
9:30 AM
404 HOB

Meeting Packet

Richard Corcoran
Speaker

Heather Fitzenhagen
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Civil Justice & Claims Subcommittee

Start Date and Time:	Thursday, February 23, 2017 09:30 am
End Date and Time:	Thursday, February 23, 2017 12:00 pm
Location:	Sumner Hall (404 HOB)
Duration:	2.50 hrs

Consideration of the following bill(s):

HB 399 Guardianship by Diamond
HB 469 Prejudgment Interest by Harrison
HB 471 Mortgage Foreclosures by Fant

Consideration of the following proposed committee substitute(s):

PCS for HB 481 -- Trusts

NOTICE FINALIZED on 02/16/2017 4:22PM by Bowen.Erika

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 399 Guardianship
SPONSOR(S): Diamond
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 172

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee		Aziz PA	Bond MB
2) Children, Families & Seniors Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Guardianship is a concept whereby a "guardian" acts for another, called the "ward," whom the law regards as incapable of managing his or her own affairs due to age or incapacity. Before a guardian may be appointed to act for the ward, a court must determine the ward is incapable of handling his or her affairs.

When a petition to determine incapacity is filed, the court appoints a three member examining committee to examine the alleged incapacitated person. If two of the three examining committee members conclude that the person is incapacitated then a hearing is scheduled on the petition. A copy of each examining committee member's report must be served on the petitioner and the attorney for the alleged incapacitated person within three days after filing and at least five days before a hearing is held on the petition. While examining committee reports are typically received into evidence without testimony at the hearings, a recent Florida appellate decision has found these reports are inadmissible hearsay. In order for the examining committee report to be admissible, an examining committee member must be present at the adjudicatory hearing on incapacity.

The bill provides an examining committee report is admissible at an adjudicatory hearing on incapacity unless one of the parties objects. All or any portion of the examining committee member's reports may be objected to by filing and serving a written objection on the other party prior to the adjudicatory hearing. If no objection is made, then the examining committees' reports are admissible into evidence without further proof. The bill creates time limits for serving the examining committee reports on the parties and for raising objections. The bill also extends the deadline for the adjudicatory hearing from two weeks after the filing of the examining committee reports to no more than 30 days after the filing of the last filed report.

A guardian may not initiate a petition for dissolution of marriage for the ward without receiving court approval and consent from the ward's spouse. The bill removes the requirement to obtain the consent of the ward's spouse.

The bill also removes the statutory cap of $6,000 that may be used by the guardian to pay for reasonable funeral, interment, and grave marker expenses from the ward's estate.

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

The bill provides an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Overview

Guardianship is a concept whereby a "guardian," acts for another, called the "ward," whom the law regards as incapable of managing his or her own affairs due to age or incapacity. Due to the seriousness of the loss of individual rights, guardianships are generally disfavored, and a guardian may not be appointed if the court finds there is a sufficient alternative to guardianship, such as a power of attorney. There are two main forms of guardianship: guardianship over the person and guardianship over the property (or a combination of both), which may be limited or plenary. Guardianships may be established for both adults and minors. For adults, a guardianship may be established when a person has demonstrated that he or she is unable to manage his or her own affairs. If the adult is mentally competent this can be accomplished voluntarily. However, in situations where an individual's mental competence is in question, an involuntary guardianship may be required. The involuntary guardianship is established through an adjudication of incompetence, which is based upon the determination of an examination committee.

Examining Committee

Section 744.331, F.S., sets forth the procedures for determining whether a person is incapacitated. The notice of filing of a petition to determine incapacity and the petition for appointment of a guardian must be read to the alleged incapacitated person.[1] The alleged incapacitated person must be provided with an attorney, who cannot serve as the guardian or counsel for the guardian.[2] Within five days of filing a petition for determination of incapacity, the court must appoint a examining committee which must include a psychiatrist or physician and two other persons, such as a psychologist, a nurse, social worker, gerontologist, or other qualified persons with sufficient knowledge, skill, experience, or training.[3]

Each committee member must examine the person and then issue a joint report evaluating the person's mental health, functional ability, and physical health.[4] The examining committee members must submit their examining reports within 15 days after appointment.[5] Within 3 days after the report is filed and at least five days before the hearing, a copy of the committee member's report must be served on the petitioner and on the attorney for the alleged incapacitated person.[6] If the committee determines that the person is not incapacitated in any respect, the court must dismiss the petition.[7] However, if two of the three examining committee members conclude the person is incapacitated in some respect, the court proceeds to a hearing on the petition and makes a final determination based on the evidence presented by the parties.[8]

While examining committee reports are typically received into evidence without testimony at the hearings, a recent Florida appellate decision has found these reports are inadmissible hearsay.[9] In *Shen v. Parkes*, a petition was filed to determine the incapacity of Bishullang Shen.[10] An adjudicatory hearing was held in which none of the examining committee members testified but the written reports of

[1] s. 744.331(1), F.S.
[2] *Id.* at (2).
[3] *Id.* at (3). .
[4] *Id.* at (3)(e)-(f).
[5] *Id.* at (3)(e).
[6] *Id.* at (4).
[7] *Id.* at (4).
[8] *Id.* at (5).
[9] s. 90.801(1)(c), F.S., defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."
[10] *Shen v. Parkes*, 100 So. 3d 1189,1189 (Fla. 4th DCA 2012).

the examining committee were accepted by the court over Mr. Shen's hearsay objection.[11] The hearsay rule requires any assertion offered as testimony can only be received if it is or has been open to test by cross examination or an opportunity for cross-examination, except as provided otherwise by the rules of evidence, court rules, or by statute.[12] The Fourth District Court of Appeals reversed the trial court's ruling and held the examining committee reports are not an exception to the hearsay rule.[13] Therefore, the Fourth District Court of Appeals reversed the lower court's finding of incapacity because the lower court relied upon inadmissible hearsay.

Due to the *Shen* decision, many practitioners feel compelled to require the attendance of examining committee members at every hearing out of concern over a potential hearsay objection relating to the admission of the examining committee report, even when such an objection may never be asserted.[14]

Effect of the Bill

The bill requires a party objecting to the introduction of the examining committee members' reports to provide notice of the objection prior to the hearing. The bill provides each member of the examining committee will file their report with the clerk of the court within 15 days after appointment. Then, the clerk of the court must serve the report, either through electronic mail or U.S. mail, on the petitioner's counsel and the attorney for the alleged incapacitated person. Accordingly, upon service, the clerk must file a certificate of service in the incapacity proceeding. Both the petitioner's counsel and the attorney for the alleged incapacitated person must be served with all reports at least 10 days before the hearing on the petition. If such service is not effectuated, either party may move for a continuance of the hearing.

The bill provides an examining committee report is admissible at an adjudicatory hearing on incapacity unless one of the parties objects. The bill allows either the petitioner or the alleged incapacitated person to object to the introduction of the examining committee's report by filing and serving a written objection on the other party no later than five days before the hearing. The objection can be to all or any portion of the examining committee members' report and must state the basis upon which the challenge to admissibility is made. The bill provides that if an objection is timely filed and served, the court must apply the rules of evidence in determining the report's admissibility. Unless the court provides otherwise, only the alleged incapacitated person and the petitioner are allowed to object to the admissibility of the examining committee members' reports. If no objection is made, then the examining committees' reports are admissible into evidence without further proof.

The bill also extends the deadline for the adjudicatory hearing from two weeks after the filing of the examining committee reports to no more than 30 days after the filing of the last filed report.

Divorce of Ward

Once a person has been deemed incapacitated and a guardian appointed, the guardian is delegated certain rights of the incapacitated person. For example, once appointed, the guardian is delegated the authority to enter into contracts, sue and defend lawsuits, and to apply for government benefits on behalf of the ward.[15] However, certain rights are not granted to a guardian without court approval. A guardian may not initiate a petition for dissolution of marriage for the ward without receiving court approval.[16]

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[11] *Id.* at 1190.
[12] Blacks Law Dictionary, "hearsay rule" (8th Edition).
[13] Florida Probate Rule 5.170 provides "In proceedings under the Florida Probate Code and the Florida Guardianship Law the rules of evidence in civil actions are applicable unless specifically changed by the Florida Probate Code, the Florida Guardianship Law, or these rules."
[14] The Florida Bar, Real Property, Probate, and Trust Law Section, White Paper on Proposed Amendment on F.S. Section 744.331 in Light of *Shen v. Parkes*, (on file with the Civil Justice & Claims Subcommittee).
[15] s. 744.3215(3), F.S.
[16] s. 744.3215(4)(c), F.S.

In order for a guardian to initiate a dissolution of a marriage, a court must be persuaded by clear and convincing evidence that the divorce is in the best interests of the incapacitated person and that the ward's spouse has consented to the divorce. In order for the court to grant the guardian's request on behalf of the ward, the court must:

- Appoint an independent attorney to act on behalf of the incapacitated person,
- Receive as evidence independent medical, psychological, and social evaluations of the ward;
- Personally meet with the ward to obtain its own impression of the person's capacity; and
- Find by clear and convincing evidence that the person lacks the capacity to make a decision about the divorce before the court and that the ward's capacity is not likely to change in the foreseeable future.[17]

A guardian may do all of these steps before the court and, if the ward's spouse does not consent to the divorce, then the guardian is remediless. Often, a guardian is seeking a divorce on behalf of the ward to stop or thwart abuse by the abusing spouse.[18] By allowing a divorce to be contingent upon the approval of the ward's spouse, current law may allow a spouse's abuse to continue unchecked.

Effect of the Bill
The bill removes the requirement of a ward's spouse's consent when a court reviews a guardian's request to begin dissolution of marriage. However, other statutory requirements remain for a guardian seeking a divorce on behalf of the ward.

Funeral Expenses
The guardian must file a petition for the court's authorization to perform certain duties, including but not limited to paying reasonable funeral, interment, and grave marker expenses for the ward from the ward's estate, up to a maximum of $6,000.[19] This cap of $6,000 was set in 1997.

Effect of the Bill
The bill removes the statutory cap of $6,000 that may be used by the guardian to pay for reasonable funeral, interment, and grave marker expenses from the ward's estate. The reasonable amount for funeral costs of the ward will be determined by the court on a case by case basis.

B. SECTION DIRECTORY:

Section 1 amends s. 744.331, F.S., relating to procedures to determine incapacity.

Section 2 amends s. 744.3725, F.S., relating to procedure for extraordinary authority.

Section 3 amends s. 744.441, F.S., relating to powers of guardian upon court approval.

Section 4 reenacts s. 744.3215, F.S., relating to rights of person determined incapacitated.

Section 5 provides an effective date of July 1, 2017

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.

[17] s. 744.3725(1)-(4), F.S.
[18] Bella Feinstein, A New Solution to an Age-Old Problem: Statutory Authorization for Guardian Initiated Divorces, NAELA Journal vol 10, No. 2, p. 220.
[19] s. 744.441(16), F.S.

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:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

Examining committee members are paid a reasonable fee for their work and testimony.[20] The examining committee members' fees are paid by the guardianship or, if the guardianship is indigent, by the state.[21] Requiring examining committee members to attend every adjudicatory hearing, even when there are no objections to an examining committee member's report, may be an expensive burden on a guardianship or the state. To the extent that this bill will give notice to when an examining committee member needs to testify, the bill may provide a financial savings to the party petitioning for a guardianship and the state.

Additionally, the bill may provide increased revenues for funeral homes by removing the $6,000 cap placed on payments for a ward's funeral costs.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

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

[20] s. 744.331(7)(a), F.S.
[21] s. 744.331(7)(b), F.S.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to guardianship; amending s. 744.331, F.S.; requiring each examining committee member in a proceeding to determine incapacity to file his or her report with the clerk of the court within a specified timeframe after appointment; requiring the clerk of the court to serve each report on specified persons within a specified timeframe; requiring the clerk of the court to file a certificate of service of each report in the incapacity proceeding; revising the timeframe before the hearing on the petition within which specified parties must be served with all reports; authorizing the petitioner and the alleged incapacitated person to move for a continuance if service is not timely effectuated and to object to the introduction of all or any part of a report by filing and serving a written objection to admissibility on the other party within a specified timeframe; specifying that the admissibility of the report is governed by the rules of evidence; requiring that the adjudicatory hearing be conducted within a specified timeframe after the filing of the last filed report; amending s. 744.3725, F.S.; eliminating the requirement that a court must first find that a ward's spouse has consented to dissolution of marriage before

the court may authorize a guardian to exercise specified rights; amending s. 744.441, F.S.; removing the cap on funeral expenses that may be paid from a ward's estate; reenacting s. 744.3215(4), F.S., relating to the rights of persons determined incapacitated, to incorporate the amendment made to s. 744.3725, F.S., in a reference thereto; providing an effective date.

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

Section 1. Paragraphs (e) and (h) of subsection (3) and paragraph (a) of subsection (5) of section 744.331, Florida Statutes, are amended, and paragraph (i) is added to subsection (3) of that section, to read:

744.331 Procedures to determine incapacity.—

(3) EXAMINING COMMITTEE.—

(e) Each member of the examining committee shall examine the person. Each examining committee member must determine the alleged incapacitated person's ability to exercise those rights specified in s. 744.3215. In addition to the examination, each examining committee member must have access to, and may consider, previous examinations of the person, including, but not limited to, habilitation plans, school records, and psychological and psychosocial reports voluntarily offered for

use by the alleged incapacitated person. Each member of the examining committee must file his or her report with the clerk of the court ~~submit a report~~ within 15 days after appointment.

(h) Within 3 days after receipt of each examining committee member's report, the clerk shall serve the report on the petitioner's counsel and the attorney for the alleged incapacitated person, by electronic mail delivery or U.S. mail, and, upon service, shall file a certificate of service in the incapacity proceeding. The petitioner's counsel and the attorney for the alleged incapacitated person must be served with all reports at least 10 days before the hearing on the petition. If such service is not timely effectuated, the petitioner or the alleged incapacitated person may move for a continuance of the hearing ~~A copy of each committee member's report must be served on the petitioner and on the attorney for the alleged incapacitated person within 3 days after the report is filed and at least 5 days before the hearing on the petition~~.

(i) The petitioner and the alleged incapacitated person may object to the introduction into evidence of all or any portion of the examining committee members' reports by filing and serving a written objection on the other party no later than 5 days before the adjudicatory hearing. The objection must state the basis upon which the challenge to admissibility is made. If an objection is timely filed and served, the court shall apply the rules of evidence in determining the reports' admissibility.

For good cause shown, the court may extend the time to file and serve the written objection. Only the alleged incapacitated person and the petitioner are entitled to object to the admissibility of the reports, unless the court provides otherwise.

(5) ADJUDICATORY HEARING.—

(a) Upon appointment of the examining committee, the court shall set the date upon which the petition will be heard. The ~~date for the~~ adjudicatory hearing must be conducted at least 10 days, but no more than 30 days, after the filing of the last filed report of the examining committee members ~~set no more than 14 days after the filing of the reports of the examining committee members~~, unless good cause is shown. The adjudicatory hearing must be conducted at the time and place specified in the notice of hearing and in a manner consistent with due process.

Section 2. Section 744.3725, Florida Statutes, is amended to read:

744.3725 Procedure for extraordinary authority.—Before the court may grant authority to a guardian to exercise any of the rights specified in s. 744.3215(4), the court must:

(1) Appoint an independent attorney to act on the incapacitated person's behalf, and the attorney must have the opportunity to meet with the person and to present evidence and cross-examine witnesses at any hearing on the petition for authority to act;

(2) Receive as evidence independent medical, psychological, and social evaluations with respect to the incapacitated person by competent professionals or appoint its own experts to assist in the evaluations;

(3) Personally meet with the incapacitated person to obtain its own impression of the person's capacity, so as to afford the incapacitated person the full opportunity to express his or her personal views or desires with respect to the judicial proceeding and issue before the court;

(4) Find by clear and convincing evidence that the person lacks the capacity to make a decision about the issue before the court and that the incapacitated person's capacity is not likely to change in the foreseeable future; and

(5) Be persuaded by clear and convincing evidence that the authority being requested is in the best interests of the incapacitated person.~~; and~~

~~(6) In the case of dissolution of marriage, find that the ward's spouse has consented to the dissolution.~~

The provisions of this section and s. 744.3215(4) are procedural and do not establish any new or independent right to or authority over the termination of parental rights, dissolution of marriage, sterilization, abortion, or the termination of life support systems.

Section 3. Subsection (16) of section 744.441, Florida

Statutes, is amended to read:

744.441 Powers of guardian upon court approval.—After obtaining approval of the court pursuant to a petition for authorization to act, a plenary guardian of the property, or a limited guardian of the property within the powers granted by the order appointing the guardian or an approved annual or amended guardianship report, may:

(16) Pay reasonable funeral, interment, and grave marker expenses for the ward from the ward's estate~~, up to a maximum of $6,000~~.

Section 4. For the purpose of incorporating the amendment made by this act to section 744.3725, Florida Statutes, in a reference thereto, subsection (4) of section 744.3215, Florida Statutes, is reenacted to read:

744.3215 Rights of persons determined incapacitated.—

(4) Without first obtaining specific authority from the court, as described in s. 744.3725, a guardian may not:

(a) Commit the ward to a facility, institution, or licensed service provider without formal placement proceeding, pursuant to chapter 393, chapter 394, or chapter 397.

(b) Consent on behalf of the ward to the performance on the ward of any experimental biomedical or behavioral procedure or to the participation by the ward in any biomedical or behavioral experiment. The court may permit such performance or participation only if:

1. It is of direct benefit to, and is intended to preserve the life of or prevent serious impairment to the mental or physical health of the ward; or

2. It is intended to assist the ward to develop or regain his or her abilities.

(c) Initiate a petition for dissolution of marriage for the ward.

(d) Consent on behalf of the ward to termination of the ward's parental rights.

(e) Consent on behalf of the ward to the performance of a sterilization or abortion procedure on the ward.

Section 5. This act shall take effect July 1, 2017.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 399 (2017)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing bill: Civil Justice & Claims Subcommittee

Representative Diamond offered the following:

Amendment (with title amendment)

Remove lines 56-90 and insert:

the petitioner and the attorney for the alleged incapacitated person, by electronic mail delivery or U.S. mail, and, upon service, shall file a certificate of service in the incapacity proceeding. The petitioner and the attorney for the alleged incapacitated person must be served with all reports at least 10 days before the hearing on the petition. If such service is not timely effectuated, the petitioner or the alleged incapacitated person may move for a continuance of the hearing ~~A copy of each committee member's report must be served on the petitioner and on the attorney for the alleged incapacitated person within 3~~

~~days after the report is filed and at least 5 days before the hearing on the petition~~.

(i) The petitioner and the alleged incapacitated person may object to the introduction into evidence of all or any portion of the examining committee members' reports by filing and serving a written objection on the other party no later than 5 days before the adjudicatory hearing. The objection must state the basis upon which the challenge to admissibility is made. If an objection is timely filed and served, the court shall apply the rules of evidence in determining the reports' admissibility. For good cause shown, the court may extend the time to file and serve the written objection.

(5) ADJUDICATORY HEARING.—

(a) Upon appointment of the examining committee, the court shall set the date upon which the petition will be heard. The ~~date for the~~ adjudicatory hearing must be conducted at least 10 days, but no more than 30 days, after the filing of the last filed report of the examining committee members ~~set no more than 14 days after the filing of the reports of the examining committee members~~, unless good cause is shown. The adjudicatory hearing must be conducted at the time and place specified in the notice of hearing and in a manner consistent with due process.

Section 2. Subsection (1) of section 744.367, Florida Statutes, is amended to read:

744.367 Duty to file annual guardianship report.—

(1) Unless the court requires filing on a calendar-year basis, each guardian of the person shall file with the court an annual guardianship plan within 90 days after ~~at least 60 days, but no more than 90 days, before~~ the last day of the anniversary month that the letters of guardianship were signed, and the plan must cover the coming fiscal year, ending on the last day in such anniversary month. If the court requires calendar-year filing, the guardianship plan ~~for the forthcoming calendar year~~ must be filed on or before April 1 of each year. The latest annual guardianship plan approved by the court will remain in effect until the court approves a subsequent plan ~~after September 1 but no later than December 1 of the current year~~.

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

Between lines 22 and 23, insert:

amending s. 744.367, F.S.; increasing the time that a guardian has to file a required annual guardianship plan with the court if the court does not require filing on a calendar year basis; changing the time that a guardian has to file a required annual guardianship plan with the court if the court requires calendar-year filing;

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 469 Prejudgment Interest
SPONSOR(S): Harrison
TIED BILLS: None. **IDEN./SIM. BILLS:** SB 334

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee		MDM MacNamara	Bond MB
2) Judiciary Committee			

SUMMARY ANALYSIS

The term "prejudgment interest" refers to an award of interest that is in addition to the base award of damages in a civil case. In general, prejudgment interest is awarded in civil actions on liquidated damages, but not on unliquidated damages. Liquidated damages are damages for an amount that can be determined or measured back to a fixed point in time.

The bill provides that prejudgment interest must be awarded in any action in which a plaintiff recovers monetary damages. The prejudgment interest applies to each component of the monetary damages in the final judgment, including attorney's fees or costs. The interest on damages begins to accrue on the date on which the injury or loss occurs, whereas the interest on attorney fees and costs begins to accrue on the first day of the month immediately following the month in which those costs or fees were incurred.

The bill applies to actions pending on July 1, 2017, or commenced thereafter. Interest will not begin to accrue earlier than July 1, 2017, regardless of the date on which an injury or loss occurs.

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

The effective date of the bill is July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Law

Prejudgment interest is part of Florida's common law tradition, and is not provided for in statute. Prejudgment interest is the interest on a judgment which is calculated from the date of the injury or loss to the date a final judgment is entered for the plaintiff. The Florida Supreme Court has said that the general legal theory supporting an award of prejudgment interest is known as the "Loss Theory." The court explained:

> Under the "loss theory," ... neither the merit of the defenses nor the certainty of the amount of loss affects the award of prejudgment interest. Rather, the loss itself is a wrongful deprivation by the defendant of the plaintiff's property. Plaintiff is to be made whole from the date of the loss once a finder of fact has determined the amount of damages and defendant's liability therefor.[1]

Economic damages are damages that are computed and proved from the face of records or documents. They generally include past and future medical bills, wages, funeral expenses, and damages to someone's personal and real property. Non-economic damages are subjective intangible items which cannot be measured with certainty. Generally, this includes damages for physical pain and suffering, mental anguish, and loss of the enjoyment of life.

Prejudgment interest is awarded to the prevailing party for liquidated damages. A liquidated claim is a claim for an amount that can be determined or measured back to a fixed point in time. It is not speculative or intangible. Prejudgment interest is common in commercial and business litigation and collection lawsuits. For instance, a prevailing party in a breach of contract action is generally entitled to prejudgment interest on the amount of the verdict because the amount is easily determinable, not speculative, and can be measured back to a fixed point in time, generally from the date of the loss.[2]

An unliquidated claim, in contrast, is one that is based on intangible factors and is generally disputed until a jury determines the amount. Consequently, prejudgment interest is generally inapplicable to most of the award in personal injury actions or, other non-contract actions, because damages are too speculative to liquidate before a final judgment is rendered.[3] Prejudgment interest is appropriate and awarded in a personal injury action where the plaintiff can show that he or she suffered the loss of a vested property right[4] or incurs an actual out-of-pocket expense.[5]

Prejudgment interest, however, is not an absolute right and may be denied on equitable grounds.[6] Under current law, equitable considerations include: whether the delay between the injury and the

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[1] *Bosem v. Musa Holdings, Inc.*, 46 So.3d 42, 45 (Fla. 2010).
[2] *Summerton v. Mamele*, 711 So.2d 131 (Fla. DCA 1998).
[3] *Zorn v. Britton*, 162 So.879, 881 (Fla. 1935)("We have never recognized an allowance of interest on unliquidated damages for personal injuries, and the general rule seems against such allowance in the absence of statute providing for it.").
[4] *See Alvarado v. Rice*, 614 So.2d 498, 500 (Fla. 1993) (Vested property right included out-of-pocket medical expenses paid by the plaintiff before judgment.).
[5] *Id.* (finding that a claimant in a personal injury action is only entitled to prejudgment interest on past medical expenses when the trial court finds that the claimant has made actual, out-of-pocket payments on those medical bills at a date prior to the entry of judgment .).
[6] *Broward County v. Finlayson*, 555 So.2d 1211, 1213 (Fla. 1990)("[O]nce damages are liquidated, prejudgment interest is considered an element of those damages as a matter of law, and the plaintiff is to be made whole from the date of the loss."); *See also Florida Steel Corp. v. Adaptable Devs. Inc.*, 503 So.2d 1232 (Fla.1986). This general rule is not absolute. In *Flack v. Graham*, 461 So.2d 82 (Fla.1984), the court refused to permit recovery of any prejudgment interest, stating:

judgment is the fault of the prevailing party; and whether the prevailing party could have, but failed to, mitigate its damages.[7]

The statutory interest rate on judgments is calculated quarterly by averaging the discount rate of the Federal Reserve Bank of New York for the preceding 12 months, adding 400 basis points.[8] The trial court is responsible for calculating the prejudgment interest based on the final award in a post-trial hearing, and thus the issue is not presented to the jury.

Effect of the Bill

The bill creates s. 55.035, F.S., to require that a court award prejudgment interest in any action in which a plaintiff recovers monetary damages. Moreover, the prejudgment interest awarded applies to each component of such damages in the final judgment, including attorney's fees or costs. These damages included, liquidated and non-liquidated damages, economic and non-economic damages, as well as exemplary or punitive damages. The rate of interest applied is the rate established pursuant to s. 50.03, F.S.

The interest for each component of damages begins to accrue on the date on which the injury or loss occurred. For attorney's fees or costs, however, the interest begins to accrue on the first day of the month immediately following the month on which the costs or fees were incurred. Moreover, the bill is written as a mandatory award of prejudgment interest, and thus provides that the court may not deny prejudgment interest on equitable grounds.

The bill applies to a cause of action that accrues on or after July 1, 2017. Additionally, the bill applies to actions that are pending on July 1, 2017, but prejudgment interest starts to accrue on July 1, 2017.

B. SECTION DIRECTORY:

Section 1 creates s. 55.035, F.S., providing for prejudgment interest.

Section 2 relates to prejudgment interest for actions pending on July 1, 2017.

Section 3 provides an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have a fiscal impact on state government revenue.

2. Expenditures:

   The bill does not appear to have a fiscal impact on state government expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have a fiscal impact on local government revenue.

"'[I]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable.'" *Id.* at 84 (quoting *Board of Commissioners v. United States*, 308 U.S. 343 (1939)).

[7] *See SEB S.A. v. Sunbeam Corp.*, 476 F.3d 1317 (11th Cir. 2007) (applying Florida law).

[8] s. 55.03, F.S.

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate economic impact on the private sector. The bill may have a positive impact on plaintiffs in civil actions and a corresponding negative impact on defendants and/or their insurance companies.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

This bill may be retroactive to the extent that it increases the amount of damages that may be recoverable for personal injuries that occur before the effective date of the bill. Although the Legislature may enact statutory changes that are procedural or remedial, a statute may not apply retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties.[9]

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

It is possible that a strict reading of the provisions of Section 2 of the bill may limit an award of prejudgment interest that would be awarded under current common law for periods prior to July 1, 2017.

The bill only applies to "plaintiffs" and, thus, may preclude some prevailing parties in a lawsuit from being awarded prejudgment interest.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[9] *State Farm Mutual Automobile Insurance Co. v. Faforet*, 658 So.2d 55, 61 (Fla. 1995).

A bill to be entitled

An act relating to prejudgment interest; creating s. 55.035, F.S.; requiring a court to include interest on monetary damages and attorney fees and costs in a final judgment; specifying the dates on which interest shall begin to accrue; providing applicability; providing an effective date.

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

Section 1. Section 55.035, Florida Statutes, is created to read:

55.035 Prejudgment interest.—In any action in which a plaintiff recovers monetary damages, the court shall include in the award interest on each component of such damages in the final judgment. Such interest shall begin to accrue on the date on which the injury or loss occurred. If the plaintiff recovers attorney fees or costs, the court shall include in the final judgment interest on such fees or costs. Such interest shall begin to accrue on the first day of the month immediately following the month in which such costs or fees were incurred. The rate of interest applicable to this section is the rate established pursuant to s. 55.03.

Section 2. For any action to which prejudgment interest applies that is pending on July 1, 2017, or commenced

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

thereafter, the court shall award interest in accordance with s. 55.035, Florida Statutes, as created by this act. Such interest shall not begin to accrue earlier than July 1, 2017, regardless of the date on which the injury or loss occurred or the attorney fees or costs were incurred.

Section 3. This act shall take effect July 1, 2017.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing bill: Civil Justice & Claims Subcommittee

Representative Harrison offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Section 55.035, Florida Statutes, is created to read:

55.035 Prejudgment interest.-

(1) In any action in which a plaintiff recovers economic or noneconomic damages, the court shall include interest on each component of damages in the final judgment.

(a) For economic damages, interest accrues from the date of the loss of an economic benefit to the plaintiff.

(b) For noneconomic damages, interest accrues from the date the defendant received notice of a claim from the plaintiff.

(2) If the plaintiff recovers attorney fees or costs, the court shall include in the final judgment interest on such fees or costs beginning on the date the entitlement to attorney fees is fixed through agreement, arbitration award, or court determination.

(3) The rate of interest applicable to this section is the rate established pursuant to s. 55.03.

Section 2. This act does not affect the accrual of prejudgment interest before the effective date if otherwise authorized by statute or common law.

Section 3. This act shall take effect July 1, 2017 and shall apply to causes of action that accrue on or after that date.

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

Remove everything before the enacting clause and insert: An act relating to prejudgment interest; creating s. 55.035, F.S.; requiring a court to include interest in a final judgment in an action from which a plaintiff recovers economic or noneconomic damages; specifying the dates from which interest accrues; requiring a court to include interest on attorney fees and costs in the final judgment, if recovered; specifying the rate at which interest accrues; providing for applicability; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 471 Mortgage Foreclosures
SPONSOR(S): Fant
TIED BILLS: None **IDEN./SIM. BILLS:** SB 660

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee		Stranburg	Bond
2) Insurance & Banking Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

A mortgage foreclosure is an action by a lender against a debtor to force the sale of the real property that secures the loan as a means of enforcing the debt. Often, a debtor subject to foreclosure will file for bankruptcy as a means of obtaining an automatic stay of the foreclosure action plus a discharge of the mortgage debt.

In bankruptcy, a debtor must file a statement under penalty of perjury stating his or her intent to retain, redeem or surrender any property securing a debt. The debtor is supposed to act on that decision as a condition of obtaining a discharge of his or her debts. In some cases, debtors have stated an intention to surrender real property in bankruptcy proceedings but then later have actively contested the completion of foreclosure proceedings in state court.

This bill provides that a lender in a mortgage foreclosure case may use any document filed under penalty of perjury in bankruptcy court as an admission by the defendant. The bill provides that surrender in the bankruptcy case creates a rebuttable presumption that the debtor has agreed to surrender the real property and that the debtor has waived all defenses to the foreclosure action. The bill also allows the court to take judicial notice of the final order in a bankruptcy case. The bill further provides that a debtor who has agreed to surrender the property may still use a defense based on actions of the lienholder that occurred subsequent to the debtor's filing of the statement of intention to surrender the mortgaged property.

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

The bill provides an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Mortgage Foreclosure

The foreclosure procedure is governed by statutory process and the Florida Rules of Civil Procedure. It is initiated by the lender or servicer, known as the mortgagee, when the borrower, or mortgagor, fails to perform the terms of his or her mortgage, usually by defaulting on payments. Most mortgages contain an "acceleration clause," which gives the mortgagee the authority to declare the entire mortgage obligation due and payable immediately upon default. If the borrower is not able to pay the entire mortgage obligation upon proper notice, the holder of the note or its servicing agent may begin the foreclosure process in a court of proper jurisdiction.

The following is a brief outline of the judicial foreclosure process, with the caveat that litigation is driven by the parties, so the process may be slightly different from case to case:

- Upon proper notice of default to the defendant, the mortgage servicer files a foreclosure complaint,[1] which must allege that the plaintiff is the present owner and holder of the note and mortgage,[2] contain a copy of the note and mortgage,[3] and allege a statement of default,[4] along with a filing fee[5] and a *lis pendens*, which serves to cut off the rights of any person whose interest arises after filing.[6]
- Service of process must be made on defendants within 120 days after the filing of the initial pleadings.[7]
- If a defendant has not filed an answer or another paper indicating an intent to respond to the suit, then the plaintiff is entitled to an entry of default against the defendant.[8]
- If an answer is filed (thus negating the possibility of a default judgment), the plaintiff may then file for a motion of summary judgment or proceed to trial, however the vast majority of plaintiffs file a motion for summary judgment.[9]
- Following the proper motions, answers, affidavits, and other evidence being filed with the court, the judge holds a summary judgment hearing and if he or she finds in the favor of the plaintiff, the court renders a final judgment.[10]
- If summary judgment is denied, the foreclosure proceeds to a trial without a jury.[11]
- The court schedules a judicial sale of the property not less than 20 days, but no more than 35 days after the judgment if the plaintiff prevails at summary judgment or trial.[12]
- A notice of sale must be published once a week, for 2 consecutive weeks, in a publication of general circulation, and the second publication must be at least five days prior to the sale.[13]

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[1] Fla. R. Civ. P. 1.944.
[2] *Edason v. Cent. Farmers Trust Co.*, 129 So. 698, 700 (Fla. 1930).
[3] Fla. R. Civ. P. 1.130(a).
[4] *Siahpoosh v. Nor Props.*, 666 So. 2d 988, 989 (Fla. 4th DCA 1996).
[5] The filing fee for foreclosure actions depends on the value of the claim. When the claim is for $50,000 or less, the fee is $395; when the claim is over $50,000 but less than $250,000, the fee is $900; and when the claim is $250,000 or more, the fee is $1900, according to s. 28.241(1)(c), F.S.
[6] s. 48.23, F.S.
[7] Fla. R. Civ. P. 1.070(j). *See also* chs. 48 and 49, F.S.
[8] Fla. R. Civ. P. 1.500.
[9] Fla. R. Civ P. 1.510(a).
[10] s. 45.031, F.S.
[11] s. 702.01, F.S. The summary judgment motion is optional. A plaintiff can elect to go to trial without the filing of a summary judgment motion.
[12] s. 45.031(1)(a), F.S.
[13] s. 45.031(2), F.S.

- The winning bid at a public judicial sale is conclusively presumed to be sufficient consideration for the sale.[14]
- Parties have 10 days to file a verified objection to the amount of the bid or the sale procedure.[15]
- After the 10 days has expired with no objection, the sale is confirmed by the clerk's issuance of the certificate of title to the purchaser, sale proceeds are disbursed in accordance with the statutory procedure,[16] and the court may, in its discretion, enter a deficiency decree for the difference between the fair market value of the security received and the amount of the debt.[17]
- Also after the 10 days has expired, the clerk may issue a writ of possession giving possession of the real property to the purchaser and directing the sheriff to assist that purchaser with obtaining possession. Up to the point that a writ of possession is served on the property, the debtor who was foreclosed has the legal right to stay in possession of the real property.

Bankruptcy Proceedings

In general, the two purposes of bankruptcy are to convert the estate of the debtor into cash and distribute it among creditors, and to give the debtor a fresh start with such exemptions and rights as the bankruptcy statute leaves untouched.[18] The filing of a bankruptcy petition operates as an automatic stay on most legal actions against a debtor, including foreclosure.[19] The automatic stay is in effect from the time the petition is filed until discharge of the debtor, unless sooner lifted by the bankruptcy court.

There are two primary forms of bankruptcy an individual may file.[20] A petition filed pursuant to Chapter 7 of the bankruptcy code is used when the rehabilitative chapters of the code would not be applicable, such as a there being no nonexempt property to protect.[21] A Chapter 13 petition allows the debtor to stay creditor actions and propose a plan to pay creditors, rehabilitating the debtor financially.[22]

In Chapter 7 the debtor must express his or her intent regarding secured property. A debtor has three options: surrender the property and be discharged of the debt; reaffirm the debt, meaning the debtor keeps the property but is liable for the debt in the future (the debt is not discharged by bankruptcy); or redeem the property by paying cash to pay off the security interest.

The statement of intent is made under penalty of perjury. It must be filed by the debtor within 30 days of the filing of the Chapter 7 petition or on or before the date of the meeting of the creditors to appoint a trustee for the estate, whichever date is earlier.[23] Within 30 days after the first set date for the meeting of the creditors, the debtor must perform his intention with respect to each piece of secured property.[24]

In Chapter 13 filings, the debtor must create a plan to restructure and repay his debt.[25] For this plan to be confirmed by the court, it must describe how the debtor is responding to each secured claim.[26] The debtor must make a plan for the secured property that the holder of the claim accepts or the debtor surrenders the property securing the claim to the claim holder.[27]

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[14] s. 45.031(8), F.S.
[15] *Id.*
[16] s. 45.031, F.S.
[17] s. 702.06, F.S.
[18] 9 Am Jur 2d Bankruptcy § 5.
[19] 11 U.S.C. 362(a)(4)
[20] An individual can file a petition under Chapter 11, but it is rare.
[21] 9 Am Jur 2d Bankruptcy § 68.
[22] 9 Am Jur 2d Bankruptcy § 72.
[23] *Id.*
[24] 11 U.S.C. 521(a)(2)(B).
[25] 11 U.S.C. 1321 and 1322.
[26] 11 U.S.C. 1325(a)(5).
[27] *Id.*

After the debtor has fulfilled his or her duties to the bankruptcy estate, the debtor may receive a discharge.[28] This discharge voids any dischargeable debt of the debtor, including a deficiency judgment that might otherwise be obtained after surrender of secured property to a creditor.[29]

Florida Evidence Code

The Florida Evidence Code governs what evidence may be used in court actions in the state courts.[30] The Florida Evidence Code provides that a court may take judicial notice of certain facts.[31] Judicial notice is a tool of evidence that allows a judge to accept a fact without proof because the fact is already known to him or her or is so readily ascertainable that it does not need to be proven.[32] A court may take judicial notice of records of any court of this state or any court of record of the United States.[33]

The Florida Evidence Code generally prohibits hearsay testimony.[34] An exception to the hearsay prohibition is the testimony or written admission of an opposing party.[35] A party to an action may prove the contents of writings of the opposing party by the testimony of that opposing party or that party's written admission.[36]

Recent Cases Regarding Surrender of Real Property in Bankruptcy

Recent federal cases have dealt with the connection between federal bankruptcy law and state foreclosure law regarding surrender of real property. In several cases, debtors have declared an intention to surrender their home to the mortgage servicer, but then later (after discharge and the lifting of the automatic stay) actively contested a foreclosure action regarding that property.[37] In May 2015, the Bankruptcy Court for the Middle District of Florida held that "at a minimum, 'surrender' under the Bankruptcy Code §§ 521 and 1325, means a debtor cannot take an overt act that impedes a secured creditor from foreclosing its interest in secured property."[38] In October 2016, the 11th Circuit Court of Appeals, which covers Georgia, Florida, and Alabama, heard an appeal from another Florida case where the debtors surrendered the home in bankruptcy but contested the subsequent foreclosure by the lender.[39] The panel held that "[i]n bankruptcy, as in life, a person does not get to have his cake and eat it too.... Having chosen to surrender, the debtor must drop his opposition to the creditor's subsequent foreclosure action" or lose the benefit of the discharge.[40]

Effect of Proposed Changes

The bill creates s. 702.12, F.S., relating to mortgage foreclosures. The bill allows a lienholder in a foreclosure action to submit any document the defendant filed under penalty of perjury in a bankruptcy case as an admission by the defendant.

The bill creates a rebuttable presumption in favor of the mortgage holder that the defendant has surrendered his or her interest in the mortgaged property to the lienholder and waived any defense to

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[28] 11 U.S.C. 727.
[29] 11 U.S.C. 524(a)(1).
[30] s. 90.103, F.S.
[31] ss. 90.201 and 90.202, F.S.
[32] *Mitchum v. State*, 251 So. 2d 298, 300 (1st DCA 1971).
[33] s. 92.202(6), F.S.
[34] s. 90.802, F.S.
[35] s. 90.957, F.S.
[36] *Id.*
[37] *In re Meltzer*, Case No. 8:12-bk-16792-MGW (Bankr. M.D. Fla. 2015); *In re Patel*, 8:13-bk-09736-MGW (Bankr. M.D. Fla. 2015); *In re Failla*, 838 F. 3d 1170 (11th Cir. 2016).
[38] *In re Meltzer*, Case No. 8:12-bk-16792-MGW (Bankr. M.D. Fla. 2015); *In re Patel*, 8:13-bk-09736-MGW (Bankr. M.D. Fla. 2015).
[39] *In re Failla*, 838 F. 3d 1170 (11th Cir. 2016).
[40] *Id.* at 1178.

the foreclosure. The presumption is achieved by submitting a document that evidences the defendant's intention to surrender the foreclosed property and a final order entered in the bankruptcy case that discharged the defendant's debt or confirms the defendant's repayment plan.

The bill also allows the lienholder to request that the court in the foreclosure action take judicial notice of any final order entered in a bankruptcy case.

The bill does not preclude the defendant from raising a defense based on actions taken by the lienholder after the filing of the document that showed the intention to surrender the property to the lienholder.

B. SECTION DIRECTORY:

Section 1 creates s. 702.12, F.S., relating to mortgage foreclosures.

Section 2 provides an effective date of July 1, 2017.

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:

The bill creates a way to speed up certain foreclosure cases that may reduce litigation costs for the parties involved in the foreclosure action.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municiplaities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to mortgage foreclosures; creating s. 702.12, F.S.; authorizing certain lienholders to use certain documents as an admission in an action to foreclose a mortgage; providing that submission of certain documents in a foreclosure action creates certain presumptions; authorizing a lienholder to make a request for judicial notice; providing construction; providing an effective date.

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

Section 1. Section 702.12, Florida Statutes, is created to read:

702.12 Actions in foreclosure.—

(1)(a) A lienholder, in an action to foreclose a mortgage, may submit any document the defendant filed in a bankruptcy case under penalty of perjury for use as an admission by the defendant.

(b) The lienholder's submission of a document that evidences the defendant's intention to surrender to the lienholder the property that is the subject of the foreclosure, which document has not been withdrawn by the defendant, together with the submission of a final order entered in the bankruptcy case that discharges the defendant's debts or confirms the

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

defendant's repayment plan which intention is contained therein, creates a rebuttable presumption that the defendant has:

1. Surrendered to the lienholder the defendant's interest in the mortgaged property; and

2. Waived any defenses to the foreclosure.

(2) In addition to a request set forth in s. 90.203, the lienholder may request that the court take judicial notice of any final order entered in a bankruptcy case.

(3) This section does not preclude the defendant in a foreclosure action from raising a defense based upon the lienholder's conduct subsequent to the filing of the document filed in the bankruptcy case that evidenced the defendant's intention to surrender the mortgaged property to the lienholder.

Section 2. This act shall take effect July 1, 2017.

Amendment No. 2

COMMITTEE/SUBCOMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing bill: Civil Justice & Claims Subcommittee

Representative Fant offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Section 702.12, Florida Statutes, is created to read:

702.12 Actions in foreclosure.—

(1)(a) A lienholder, in an action to foreclose a mortgage, may submit any document the defendant filed in the defendant's bankruptcy case under penalty of perjury for use as an admission by the defendant.

(b) The lienholder's submission of a document the defendant filed in the defendant's bankruptcy case that evidences intention to surrender to the lienholder the property

that is the subject of the foreclosure, which document has not been withdrawn by the defendant, together with the submission of a final order entered in the bankruptcy case that discharges the defendant's debts or confirms the defendant's repayment plan which intention is contained therein, creates a rebuttable presumption that the defendant has waived any defenses to the foreclosure.

(2) In addition to a request set forth in s. 90.203, the lienholder may request that the court take judicial notice of any final order entered in a bankruptcy case.

(3) This section does not preclude the defendant in a foreclosure action from raising a defense based upon the lienholder's conduct subsequent to the filing of the document filed in the bankruptcy case that evidenced the defendant's intention to surrender the mortgaged property to the lienholder.

(4) This section applies to any foreclosure action filed on or after October 1, 2017.

Section 2. This act shall take effect October 1, 2017.

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

Remove everything before the enacting clause and insert: An act relating to bankruptcy matters in foreclosure proceedings; creating s. 702.12, F.S.; authorizing certain lienholders to use certain documents as an admission in an

action to foreclose a mortgage; providing that submission of certain documents in a foreclosure action creates certain presumptions; authorizing a lienholder to make a request for judicial notice; providing construction; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 481 Trusts
SPONSOR(S): Civil Justice & Claims Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice & Claims Subcommittee	MQM	MacNamara	Bond NB
1) Judiciary Committee			

SUMMARY ANALYSIS

The Florida Trust Code governs express trusts, charitable or noncharitable, and trusts that are required to be administered in the manner of an express trust. An express trust is created by the intent of a settlor (the individual creating the trust), and is generally evidenced by a written instrument that details the terms of the trust. The trust is administered by a trustee, with the terms of a trust providing benefits for individuals known as beneficiaries. Except as otherwise provided, the terms of a trust prevail over any provision of the Code; the Code is used to fill in gaps and provides for the operation of the trust for issues not addressed in the terms of a trust.

Historically, a trust was administered with the primary intent of accomplishing the intent of the settlor. Recent changes to trust law may be interpreted to require the administration of a trust for the benefit of the beneficiaries instead. This bill deletes language related to benefiting the beneficiaries and thus makes the intent of the settlor the primary intent of trust administration.

The bill amends portions of the Code related to the trustee and their duties, liabilities, and powers. The amendments provide which provisions of the Code govern a trustee's duty to provide accounting to the beneficiaries and extend the period for beneficiaries to file actions alleging a breach of trust.

The bill also expands the state's decanting statute. Decanting describes a trustee's power to cure or avoid issues with a trust by distributing trust property from one trust to a second trust, as opposed to distributing property directly to a beneficiary. The amendments to the decanting statute include:

- Expanding a trustee's ability to decant trust principal under the terms of the trust,
- Providing support for disabled beneficiaries, and
- Imposing greater notice requirements when a trustee exercises their ability to decant trust principal.

Lastly, the bill amends portions of the Code related to notices for charitable trusts. The bill requires that notice be sent to only one entity, the Attorney General, rather than to a state attorney in some instances and the Attorney General in others. The bill defines the method by which the Attorney General is to receive notice and gives the Attorney General standing in actions related to charitable trusts.

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

The effective date for the bill is July 1, 2017. The sections related to the period for which beneficiaries may compel trust accounting apply retroactively to all cases pending or commenced on or after July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Overview of the Florida Trust Code

Chapter 736, F.S., is referred to as the "Florida Trust Code." The Code applies to express trusts, charitable or noncharitable, and trusts created pursuant to law, judgment, or decree that requires the trust to be administered in the manner of an express trust. An express trust is 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, which arises as a result of a manifestation of an intention to create it.

The term "terms of a trust" is defined to mean the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.[1] Under the Code, "settlor" is defined as a person who creates or contributes property to a trust.[2] A "beneficiary" of the trust is a person who has a present or future beneficial interest in the trust.[3] A trustee is the person in the trust transaction who holds the legal title to the property of the trust.

A trustee is essential to the creation and validity of a trust; however, occupancy of the position by a designated person is not essential since in the absence of a trustee, whether by failure of appointment, nonacceptance, disqualification, or other cause, a court will ordinarily appoint a trustee in order to administer a trust.

The trustee is granted certain powers and is subject to certain duties imposed by the terms of the trust, equity jurisprudence, or by statute. A trustee may have the power or duty to perform various acts of management in administering the trust estate. In some cases, a trustee has the power and duty to manage the trust estate as a primary, rather than an incidental, purpose of the trust. This may involve the continuance and operation of a business in which assets of the estate are embarked or the retention, making, and handling of investments.

It is from the trust instrument that a trustee derives his or her rule of conduct, extent and limit of authority, and measure of obligation. Thus, the extent of a trustee's duties and powers is determined by the trust instrument and by the applicable rules of law, and not by the trustee's own interpretation of the trust instrument or by his or her own belief as to rules of law. Under the Code, a violation by a trustee of a duty the trustee owes a beneficiary is a breach of trust. A breach of trust by a trustee gives rise to liability by the trustee to the beneficiary for any loss of the trust estate.

Except as otherwise provided in the terms of the trust, the Code governs the duties and powers of a trustee, relations among trustees, and the rights and interests any beneficiaries. The terms of a trust prevail over any provision of the Code, except as provided in s. 736.0105(2), F.S. In all, the Code currently provides 23 terms that are solely governed by the Code and cannot be changed, waived, or otherwise altered by the terms of the trust.[4]

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[1] s. 736.0103(21), F.S.
[2] s. 736.0103(18), F.S.
[3] s. 736.0103(4), F.S.
[4] *See* s. 736.0105(2)(a-w), F.S.

Current Florida Trust Code Provisions and Effect of Proposed Amendments

The bill amends portions of Florida's Trust Code related to the intent of the settlor and interest of the beneficiaries, the duties, compensation, and powers of the trustee, and procedural requirements for charitable trusts.

Settlor Intent and Interest of the Beneficiaries

In order for a settlor to create an express trust, he or she must indicate an intention to create it. This requirement is what distinguishes an express trust from an implied trust, such as a constructive or resulting trust. In the case of an express trust, the settlor's intent usually is evidenced by a written trust document such as a will or a trust agreement that designates a trustee and indicates that the trustee is to hold the trust property in trust and designates the beneficial interests of the trust.[5] A written instrument, however, is not required to create a trust; rather, the terms of the trust may be established by clear and convincing evidence.[6] Under current law, however, the settlor's intent may be restricted in the interest of protecting the beneficiaries when interpreting and applying the Code.

Under s. 736.0105(2)(c), F.S., the trust and its terms is required to be for the benefits of the trust's beneficiaries. The Code also includes limitations on the purpose for which a trust may be created and the affect it would have on the beneficiaries of the trust. In order for a trust to be created, the trust must have a lawful purpose that does not contravene public policy, that is possible to achieve, and the trust and its terms must be for the "benefits of its beneficiaries."[7]

The bill amends ss. 736.0103(11), 736.0105(2)(c), and 736.0404, F.S., to remove the current language in those statutes that a trust and its terms be administered for the benefit of the beneficiaries. The effect is to establish the settlor's intent as the guiding principle with respect to the terms, interests, and purposes of a trust. Specifically:

- The definition of "interests of the beneficiaries" under s. 736.0103(11), F.S. is amended to mean the beneficial interests *intended by the settlor* as provided under the terms of the trust.
- The exception to the general rule that the terms of the trust prevail over provisions of the Code contained in s. 736.0105(2)(c), F.S., is amended to remove the mandatory requirement that the terms of the trust be for the benefit of the beneficiaries.
- Section 736.0404, F.S., is likewise amended to remove the requirement that trust and its terms be for the benefit of the beneficiaries. As amended, a trust's purpose only needs to be lawful, not contrary to public policy, and possible to achieve.

The Trustee: Duty to Account

One duty a trustee is required to perform under the Code is a duty to account to trust beneficiaries. The trustee is required to keep beneficiaries reasonably informed and to provide the beneficiaries with a statement of the trust account annually. If the trustee does not keep clear, distinct, and accurate accounts, or if the trustee loses his or her accounts, all presumptions will be made against the trustee and the trustee will bear the costs of any resulting damages. In addition to the Code's requirements to inform and account to beneficiaries, current law provides standards for the form and content of the accounting.[8] Subsection (3) of s. 736.08135, F.S., provides the standards for the accounting and includes the language:

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[5] The Code defines "interests of the beneficiaries" to mean the beneficial interests provided in the terms of the trust. s. 736.0103(11), F.S.
[6] s. 736.0407, F.S.
[7] s. 736.0404, F.S.
[8] s. 736.08135(1-2), F.S.

(3) This section applies to all trust accountings rendered for any accounting periods beginning on or after January 1, 2003.

A trustee's liability for failing to perform duties, such as providing trust accounting, is limited by s. 736.1008, F.S. This section provides the limitations on proceedings against the trustee, with subsection (3) addressing a claim against the trustee for a breach of trust related to the trustee's accounting duties. Current law states that any claim against the trustee for a breach of trust based on a matter not adequately disclosed in a trust disclosure document is barred as provided in ch. 95, F.S. A cause of action for such claims begins to accrue when the beneficiary has actual knowledge of:

(a) The facts upon which the claim is based if such actual knowledge is established by clear and convincing evidence; or
(b) The trustee's repudiation of the trust or adverse possession of the trust assets.[9]

In *Corya v. Sanders*,[10] the Fourth District Court of Appeal used both ss. 736.08135(3) and 736.1008(3), F.S., in determining a case involving a trustee's liability for failing to prepare trust accounts and inform the beneficiaries of the trust. With respect to s. 736.08135(3), F.S., the court determined that a trustee was not required to prepare an accounting for dates prior to January 1, 2003, saying:

> [W]e construe that language as limiting the beginning period for the first accounting, in situations where an accounting had never been done or was not prepared annually, to be no earlier than January 1, 2003.

In effect, this barred a beneficiary of an express trust from seeking to compel a trust accounting for all periods prior to January 1, 2003.

The court in *Corya* also held that a beneficiary of an express trust who has actual knowledge that he or she is a beneficiary of a trust and has not received a trust accounting is barred by s. 95.11(6), F.S.,[11] from seeking a trust accounting for any period more than 4 years prior to the filing of the action. In other words, the court held that the right of a beneficiary, with knowledge that they have not received a trust accounting, to seek an accounting is subject to a 4 year limitations period that begins to run as soon as a trust accounting is overdue.[12]

The bill amends s. 736.08135(3), F.S., to govern the form of content for all trust accountings rendered, including those for accounting periods prior to 2003. The bill amends s. 736.1008, F.S., to provide that a beneficiary's actual knowledge that he or she has not received a trust accounting does not cause a claim to accrue against the trustee for a breach of trust. Moreover, the beneficiary's actual knowledge of that fact does not commence the running of any statute of limitations concerning such claims.

The Trustee: The Decanting Statute

In some instances, the terms of a trust may grant the trustee "absolute power" to perform certain duties and responsibilities for the trust. One absolute power that may be granted to a trustee is the power to distribute trust property, or "principal," to or for the benefit of one or more trustees. The term "decanting" describes a trustee's distribution of principal from one trust into a second trust (as opposed to distributing principal directly to the beneficiary).[13]

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[9] s. 736.1008(3), F.S.
[10] 155 So.3d 1279 (Fla. 4th DCA 2015).
[11] Related to "Laches."
[12] This holding is in direct conflict with *Taplin v. Taplin*, 88 So.3d 344 (Fla. 3d DCA 2012) and *Nayee v. Nayee*, 705 So.2d 961 (Fla. 5th DCA 1998).
[13] *See Phipps v. Palm Beach Trust Co.*, 196 So. 299 (1940).

Decanting is generally used by trustees who wish to cure or avoid issues with the terms of the first trust without distributing to a beneficiary outright. In this way, decanting can fix issues with a trust while still preserving the settlor's intention of maintaining the assets in trust. Unlike a trust modification, which often times is only available through a court proceeding, a trust decanting is an exercise of the trustee's discretionary authority to make distributions. This exercise avoids having to expend trust funds for judicial involvement.

Under s. 736.04117, F.S., a trustee is allowed to decant principal to a second trust from a first when the trustee has absolute power to make principal distributions.

Although it is not necessary that the trust instrument use the term "absolute," it is necessary that the trustee's invasion power not be limited to a specific or ascertainable purpose. Thus, a power to invade for a beneficiary's best interests, welfare, comfort, or happiness is an absolute invasion power under the statute but a power to distribute or invade for a beneficiary's health, education, maintenance, or support is not.[14] Moreover, and for purposes of the analysis, a trustee may only decant principal to a supplemental needs trust[15] when the terms of the trust provide that the trustee has absolute power to invade the principal for the benefit of a disabled beneficiary.

The trustee's decision to decant is held to the same fiduciary standards as the decision to make a discretionary principal distribution (i.e., the beneficiary can sue the trustee for a decanting distribution to the same extent the beneficiary could sue the trustee for an outright distribution). Current law also imposes both procedural and substantive restrictions on a trustee's exercise of decanting power. For instance, s. 736.04117(4), F.S. requires notice, in writing, be made to all beneficiaries of the first trust at least 60 days prior to the date the trustee exercises their power to invade the trust principal.

The bill substantially amends s. 736.04117, F.S., related to the trustee's power to invade principal and expands the ability of the trustee to decant when granted less than absolute power under the terms of the trust. The bills three major effects can be summarized as follows:

1. The bill authorizes a trustee to decant principal to a second trust pursuant to a power to distribute that is not absolute. When such power is not absolute, the authorized trustee's decanting authority is restricted so that each beneficiary of the first trust must have a substantially similar interest in the second trust. The bill provides a definition for "substantially similar" to mean, in relevant part, "that there is no material change in a beneficiary's beneficial interest or in the power to make distributions and that the power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to the power under the first trust to make a distribution directly to the beneficiary."[16]
2. The bill authorizes a trustee to decant principal to a supplemental needs trust where a beneficiary is disabled. The trustee may take this action regardless of whether the authorized trustee has an absolute discretionary power or discretionary power limited to an ascertainable standard. The bill provides a definition for "supplemental needs trust" to mean a trust that the authorized trustee believes would not be considered a resource for purposes of determining whether the beneficiary who has a disability is eligible for governmental benefits.[17]
3. The bill expands the notice requirements under the state's current decanting statute. Specifically, notice is required to be provided to the settlor of the first trust, if the first trust was not a grantor trust and the second trust will be a grantor trust; all trustees of the first trust; and any person with the power to remove the authorized trustee of the first trust. Moreover, the notice must include copies of both the first and second trust instruments.

[14] s. 736.04117(1)(b), F.S.
[15] The assets in a supplemental needs trust are excluded in the determination of entitlements to government benefits.
[16] HB 481, lines 163-169.
[17] HB 481, lines 179-182.

In addition to these major changes, the bill amends current law on decanting in the following ways:

- Provides definitions for purposes of interpreting and applying the provisions of s. 736.04117, F.S. Specifically, the bill defines the terms absolute power, authorized trustee, beneficiary with a disability, current beneficiary, government benefits, internal revenue code, power of appointment, presently exercisable general power of appointment, substantially similar, supplemental needs trust, and vested interest.
- Provides that, with respect to permissible or impermissible modification of certain trust provisions, the second trust may omit, create or modify a power of appointment.
- Expands the existing prohibition on reducing certain fixed interests to include vested interests.
- Provides that the second trust may extend the term of the first trust, regardless of whether the authorized trustee has an absolute discretionary power or discretionary power limited to an ascertainable standard.
- Adds additional tax benefits associated with the first trust that must be maintained in the second trust to include the gift tax annual exclusion, and any and all other tax benefits for income, gift, estate or generation-skipping transfer for tax purposes.
- Incorporates provisions regarding "grantor" trust status and the trustee's ability to decant from a grantor trust to a non-grantor trust.
- Provides that a second trust may be created under the laws of any jurisdiction and institutes certain safeguards to prohibit an authorized trustee from decanting to a second trust which provides the authorized trustee with increased compensation or greater protection under an exculpatory or indemnification provision.
- Provides that a trustee may decant to a second trust that divides trustee responsibilities among various parties, including one or more trustees and others.

Notice for Charitable Trusts

Under s. 736.0110(3), F.S., the Attorney General may assert the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in the State of Florida. Section 736.0103(16), F.S., defines a "qualified beneficiary" as a living beneficiary who, on the date of the beneficiary's qualification is determined:

> (a) Is a distributee or permissible distributee of trust income or principal;
> (b) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributes described in paragraph (a) terminated on that date without causing the trust to terminate; or
> (c) Would be a distribute or permissible distribute of trust income or principal if the trust terminated in accordance with its terms on that date.

A "charitable trust" for purposes of s. 736.0110, F.S., means a trust, or portion of a trust, created for a charitable purpose as described in s. 736.0405(1), F.S.. Charitable purposes include, but are not limited to, "the relief of poverty; the advancement of arts, sciences, education, or religion; and the promotion of health, governmental, or municipal purposes."[18] Part XII of ch. 736, F.S., governs all charitable trusts. Specifically, and in relevant part:

- s. 736.1205, F.S., requires that the trustee of a charitable trust notify the state attorney for the judicial circuit of the principal place of administration of the trust if the power to make distributions are more restrictive than s. 736.1204(2), F.S., or if the trustee's powers are inconsistent with s. 736.1204(3), F.S.
- s. 736.1206(2), F.S., provides that the trustee of a charitable trust may amend the governing instrument with consent of the state attorney to comply with the requirements of a private foundation trust as provided in s. 736.1204(2), F.S.

[18] s. 736.0405(1), F.S.

- s. 736.1207, F.S., specifies that Part XII of the Code does not affect the power of a court to relieve a trustee from restrictions on that trustee's powers and duties for cause shown and upon complaint of the state attorney, among others.
- s. 736.1208(4)(b), F.S., requires that a trustee who has released a power to select charitable donees accomplished by reducing the class of permissible charitable organizations must deliver a copy of the release to the state attorney.
- s. 736.1209, F.S., allows the trustee to file an election with the state attorney to bring the trust under s. 736.1208(5), F.S., relating to public charitable organization(s) as the exclusive beneficiary of a trust.

As such, there is some disconnect between s. 736.0110(3), F.S., and Part XII of the Code; they can be read to require that notice be given to the Attorney General for certain charitable trusts and to the state attorney of the proper judicial circuit for the same or other trusts.

The bill grants these powers and responsibilities solely to the Attorney General.

The bill amends s. 736.0110(3), F.S., to provide the Attorney General with standing to assert the rights of a qualified beneficiary in any judicial proceeding and amends the provisions in Part XII of the Code concerning the state attorney's office. The amendments provide that the Attorney General, rather than the state attorney, receive notifications, releases, and elections for charitable trusts under ss. 736.1205, 736.1207, 736.1208, and 736.1209, F.S., and the Attorney General, rather than the state attorney, must consent to a charitable trust amendment effectuated under s. 736.1206, F.S. Lastly, the bill defines how the Attorney General is to be given notifications, releases, and elections in s. 736.1201(2), F.S., and removes the state attorney from the definitions section of Part XII of the Code.

B. SECTION DIRECTORY:

Section 1 amends s. 736.0103, F.S., relating to definitions.

Section 2 amends s. 736.0105, F.S., relating to default and mandatory rules.

Section 3 amends s. 736.0110, F.S., relating to others treated as qualified beneficiaries.

Section 4 amends s. 736.0404, F.S., relating to trust purposes.

Section 5 amends s. 736.04117, F.S., relating to a trustee's power to invade principal in trust.

Section 6 amends s. 736.08135, F.S., relating to trust accounting.

Section 7 amends s. 736.1008, F.S., relating to limitations on proceedings against trustees.

Section 8 provides for the effect of ss. 736.08135 and 736.1008, F.S., to all cases pending or commenced on or after July 1, 2017.

Section 9 amends s. 736.1201, F.S., relating to definitions.

Section 10 amends s. 736.1205, F.S., relating to notice that this part does not apply.

Section 11 amends s. 736.1206, F.S., relating to power to amend trust instrument.

Section 12 amends s. 736.1207, F.S., relating to power of court to permit deviation.

Section 13 amends s. 736.1208, F.S., relating to release, property and persons affected, manner of effecting.

Section 14 amends s. 736.1209, F.S., relating to election to come under this part.

Section 15 provides an effective date of July 1, 2017, except as otherwise provided in the act.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

   While the bill does not appear to have an overall impact on state government expenditures, the bill may lead to an increase in costs to the Attorney General's office and a corresponding decrease in work costs for the state attorney's offices. The exact costs associated with such shift is unknown and likely minimal.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

   The bill does not appear to have an 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:

   The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities

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.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to trusts; amending s. 736.0103, F.S.; redefining the term "interests of the beneficiaries"; amending s. 736.0105, F.S.; deleting a requirement that a trust be for the benefit of the trust's beneficiaries; amending s. 736.0110, F.S.; providing that the Attorney General has standing to assert certain rights in certain proceedings; amending s. 736.0404, F.S.; deleting a restriction on the purpose for which a trust is created; amending s. 736.04117, F.S.; defining and redefining terms; authorizing an authorized trustee to appoint all or part of the principal of a trust to a second trust under certain circumstances; providing requirements for the second trust and its beneficiaries; providing that the second trust may retain, omit, or create specified powers; authorizing the term of the second trust to extend beyond the term of the first trust; providing requirements for distributions to a second trust when the authorized trustee does not have absolute power; providing requirements for such second trust; providing requirements for grants of power by the second trust; authorizing a second trust created by an authorized trustee without absolute power to grant absolute power to the second trust's trustee;

authorizing an authorized trustee to appoint the principal of a first trust to a supplemental needs trust under certain circumstances; providing requirements for such supplemental needs trust; prohibiting an authorized trustee from distributing the principal of a trust in a manner that would reduce specified tax benefits; prohibiting the distribution of S corporation stock from a first trust to a second trust under certain circumstances; prohibiting a settlor to be treated as the owner of a second trust if he or she was not treated as the owner of the first trust; prohibiting an authorized trustee from distributing a trust's interest in property to a second trust if it is subject to specified rules of the Internal Revenue Code; prohibiting the exercise of power to invade a trust's principal to increase an authorized trustee's compensation or relieve him or her from certain liability; specifying who an authorized trustee must notify when he or she exercises his or her power to invade the trust's principal; specifying the documents that the authorized trustee must provide with such notice; amending s. 736.08135, F.S.; revising applicability; amending s. 736.1008, F.S.; clarifying that certain knowledge by a beneficiary does not cause a claim for

breach of trust or commence the running of a period of limitations or laches; providing intent; providing for retroactive application; amending s. 736.1201, F.S.; defining the term "delivery of notice"; conforming a provision to changes made by the act; amending s. 736.1205, F.S.; requiring an authorized trustee to provide certain notice to the Attorney General rather than the state attorney; amending ss. 736.1206, 736.1207, 736.1208, and 736.1209, F.S.; conforming provisions; providing effective dates.

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

Section 1. Subsection (11) of section 736.0103, Florida Statutes, is amended to read:

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

(11) "Interests of the beneficiaries" means the beneficial interests intended by the settlor as provided in the terms of a ~~the~~ trust.

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

736.0105 Default and mandatory rules.—

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

(c) The requirement that a trust ~~and its terms be for the benefit of the trust's beneficiaries, and that the trust~~ have a purpose that is lawful, not contrary to public policy, and possible to achieve.

Section 3. Subsection (3) of section 736.0110, Florida Statutes, is amended to read:

736.0110 Others treated as qualified beneficiaries.—

(3) The Attorney General may assert the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this state. The Attorney General has standing to assert such rights in any judicial proceedings.

Section 4. Section 736.0404, Florida Statutes, is amended to read:

736.0404 Trust purposes.—A trust may be created only to the extent the purposes of the trust are lawful, not contrary to public policy, and possible to achieve. ~~A trust and its terms must be for the benefit of its beneficiaries.~~

Section 5. Effective upon becoming a law, section 736.04117, Florida Statutes, is amended to read:

736.04117 Trustee's power to invade principal in trust.—

(1)~~(a)~~ DEFINITIONS.—As used in this section, the term: ~~Unless the trust instrument expressly provides otherwise, a trustee who has absolute power under the terms of a trust to invade the principal of the trust, referred to in this section~~

~~as the "first trust," to make distributions to or for the benefit of one or more persons may instead exercise the power by appointing all or part of the principal of the trust subject to the power in favor of a trustee of another trust, referred to in this section as the "second trust," for the current benefit of one or more of such persons under the same trust instrument or under a different trust instrument; provided:~~

~~1. The beneficiaries of the second trust may include only beneficiaries of the first trust;~~

~~2. The second trust may not reduce any fixed income, annuity, or unitrust interest in the assets of the first trust; and~~

~~3. If any contribution to the first trust qualified for a marital or charitable deduction for federal income, gift, or estate tax purposes under the Internal Revenue Code of 1986, as amended, the second trust shall not contain any provision which, if included in the first trust, would have prevented the first trust from qualifying for such a deduction or would have reduced the amount of such deduction.~~

~~(b) For purposes of this subsection, an absolute power to invade principal shall include~~

(a) "Absolute power" means a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support, regardless of whether ~~or not~~ the term "absolute" is used. A power to invade

principal for purposes such as best interests, welfare, comfort, or happiness constitutes ~~shall constitute~~ an absolute power not limited to specific or ascertainable purposes.

(b) "Authorized trustee" means a trustee, other than the settlor or a beneficiary, who has the power to invade the principal of a trust.

(c) "Beneficiary with a disability" means a beneficiary of the first trust who the authorized trustee believes may qualify for governmental benefits based on disability, regardless of whether the beneficiary currently receives those benefits or has been adjudicated incapacitated.

(d) "Current beneficiary" means a beneficiary who, on the date his or her qualification is determined, is a distributee or permissible distributee of trust income or principal. The term includes the holder of a presently exercisable general power of appointment, but does not include a person who is a beneficiary only because he or she holds another power of appointment.

(e) "Governmental benefits" means financial aid or services from any state, federal, or other public agency.

(f) "Internal Revenue Code" means the Internal Revenue Code of 1986, as amended.

(g) "Power of appointment" has the same meaning as in s. 731.201(30).

(h) "Presently exercisable general power of appointment" means a power of appointment exercisable by the powerholder at

the relevant time. The term:

1. Includes a power of appointment that is exercisable only after the occurrence of a specified event or that is subject to a specified restriction, but only after the event has occurred or the restriction has been satisfied.

2. Does not include a power exercisable only upon the powerholder's death.

(i) "Substantially similar" means that there is no material change in a beneficiary's beneficial interests or in the power to make distributions and that the power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to the power under the first trust to make a distribution directly to the beneficiary. A distribution is deemed to be for the benefit of a beneficiary if:

1. The distribution is applied for the benefit of a beneficiary;

2. The beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated, and the distribution is made as permitted under this code; or

3. The distribution is made as permitted under the terms of the first trust instrument and the second trust instrument for the benefit of the beneficiary.

(j) "Supplemental needs trust" means a trust that the authorized trustee believes would not be considered a resource

for purposes of determining whether the beneficiary who has a disability is eligible for governmental benefits.

(k) "Vested interest" means a current unconditional right to receive a mandatory distribution of income, a specified dollar amount, or a percentage of value of a trust, or a current unconditional right to withdraw income, a specified dollar amount, or a percentage of value of a trust, which right is not subject to the occurrence of a specified event, the passage of a specified time, or the exercise of discretion.

1. The term includes a presently exercisable general power of appointment.

2. The term does not include a beneficiary's interest in a trust if the trustee has discretion to make a distribution of trust property to a person other than such beneficiary.

(2) DISTRIBUTION FROM FIRST TRUST TO SECOND TRUST WHEN AUTHORIZED TRUSTEE HAS ABSOLUTE POWER TO INVADE.—

(a) Unless a trust instrument expressly provides otherwise, an authorized trustee who has absolute power under the terms of the trust to invade its principal, referred to in this section as the "first trust," to make current distributions to or for the benefit of one or more beneficiaries, may instead exercise such power by appointing all or part of the principal of the trust subject to such power in favor of a trustee of one or more other trusts, whether created under the same trust instrument as the first trust or a different trust instrument,

including a trust instrument created for the purposes of exercising the power granted by this section, each referred to in this section as the "second trust," for the current benefit of one or more of such beneficiaries only if:

1. The beneficiaries of the second trust include only beneficiaries of the first trust; and

2. The second trust does not reduce any vested interest.

(b) In an exercise of absolute power, the second trust may:

1. Retain a power of appointment granted in the first trust;

2. Omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;

3. Create or modify a power of appointment if the powerholder is a current beneficiary of the first trust;

4. Create or modify a power of appointment if the powerholder is a beneficiary of the first trust who is not a current beneficiary, but the exercise of the power of appointment may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary of the first trust; and

5. Extend the term of the second trust beyond the term of the first trust.

(c) The class of permissible appointees in favor of which a created or modified power of appointment may be exercised may

differ from the class identified in the first trust.

(3) DISTRIBUTION FROM FIRST TRUST TO SECOND TRUST WHEN AUTHORIZED TRUSTEE DOES NOT HAVE ABSOLUTE POWER TO INVADE.—Unless the trust instrument expressly provides otherwise, an authorized trustee who has a power, other than an absolute power, under the terms of a first trust to invade principal to make current distributions to or for the benefit of one or more beneficiaries may instead exercise such power by appointing all or part of the principal of the first trust subject to such power in favor of a trustee of one or more second trusts. If the authorized trustee exercises such power:

(a) The second trusts, in the aggregate, shall grant each beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to the beneficial interests of the beneficiary in the first trust.

(b) If the first trust grants a power of appointment to a beneficiary of the first trust, the second trust shall grant such power of appointment in the second trust to such beneficiary and the class of permissible appointees shall be the same as in the first trust.

(c) If the first trust does not grant a power of appointment to a beneficiary of the first trust, then the second trust may not grant a power of appointment in the second trust to such beneficiary.

(d) Notwithstanding paragraphs (a), (b), and (c), the term

of the second trust may extend beyond the term of the first trust, and, for any period after the first trust would have otherwise terminated, in whole or in part, under the provisions of the first trust, the trust instrument of the second trust may, with respect to property subject to such extended term:

1. Include language providing the trustee with the absolute power to invade the principal of the second trust during such extended term; and

2. Create a power of appointment, if the powerholder is a current beneficiary of the first trust, or expand the class of permissible appointees in favor of which a power of appointment may be exercised.

(4) DISTRIBUTION FROM FIRST TRUST TO SUPPLEMENTAL NEEDS TRUST.—

(a) Notwithstanding subsections (2) and (3), unless the trust instrument expressly provides otherwise, an authorized trustee who has the power under the terms of a first trust to invade the principal of the first trust to make current distributions to or for the benefit of a beneficiary with a disability, may instead exercise such power by appointing all or part of the principal of the first trust in favor of a trustee of a second trust that is a supplemental needs trust if:

1. The supplemental needs trust benefits the beneficiary with a disability;

2. The beneficiaries of the second trust include only

beneficiaries of the first trust; and

3. The authorized trustee determines that the exercise of such power will further the purposes of the first trust.

(b) Except as affected by any change to the interests of the beneficiary with a disability, the second trusts, in the aggregate, shall grant each other beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to such beneficiary's beneficial interests in the first trust.

(5) PROHIBITED DISTRIBUTIONS.—

(a) An authorized trustee may not distribute the principal of a trust under this section in a manner that would prevent a contribution to that trust from qualifying for, or that would reduce the exclusion, deduction, or other federal tax benefit that was originally claimed or could have been claimed for, that contribution, including:

1. The exclusions under s. 2503(b) or s. 2503(c) of the Internal Revenue Code;

2. A marital deduction under s. 2056, s. 2056A, or s. 2523 of the Internal Revenue Code;

3. A charitable deduction under s. 170(a), s. 642(c), s. 2055(a), or s. 2522(a) of the Internal Revenue Code;

4. Direct skip treatment under s. 2642(c) of the Internal Revenue Code; or

5. Any other tax benefit for income, gift, estate, or

generation-skipping transfer tax purposes under the Internal Revenue Code.

(b) If S corporation stock is held in the first trust, an authorized trustee may not distribute all or part of that stock to a second trust that is not a permitted shareholder under s. 1361(c)(2) of the Internal Revenue Code. If the first trust holds stock in an S corporation and is, or but for provisions of paragraphs (a), (c), and (d) would be, a qualified subchapter S trust within the meaning of s. 1361(d) of the Internal Revenue Code, the second trust instrument may not include or omit a term that prevents it from qualifying as a qualified subchapter S trust.

(c) Except as provided in paragraphs (a), (b), and (d), an authorized trustee may distribute the principal of a first trust to a second trust regardless of whether the settlor is treated as the owner of either trust under ss. 671-679 of the Internal Revenue Code; however, if the settlor is not treated as the owner of the first trust, he or she may not be treated as the owner of the second trust unless he or she at all times has the power to cause the second trust to cease being treated as if it was owned by the settlor.

(d) If an interest in property which is subject to the minimum distribution rules of s. 401(a)(9) of the Internal Revenue Code is held in trust, an authorized trustee may not distribute such an interest to a second trust under subsection

(2), subsection (3), or subsection (4) if the distribution would shorten the otherwise applicable maximum distribution period.

(6) EXERCISE BY WRITING.—The exercise of a power to invade principal under subsection (2), subsection (3), or subsection (4) must ~~The exercise of a power to invade principal under subsection (1) shall~~ be by a written ~~an~~ instrument ~~in writing,~~ signed and acknowledged by the authorized trustee~~,~~ and filed with the records of the first trust.

(7)~~(3)~~ RESTRICTIONS ON EXERCISE OF POWER.—The exercise of a power to invade principal under subsection (2), subsection (3), or subsection (4): ~~(1)~~

(a) Is ~~Shall be~~ considered the exercise of a power of appointment, excluding ~~other than~~ a power to appoint to the authorized trustee, the authorized trustee's creditors, the authorized trustee's estate, or the creditors of the authorized trustee's estate.

(b) Is~~, and Shall be~~ subject to the provisions of s. 689.225 covering the time at which the permissible period of the rule against perpetuities begins and the law that determines the permissible period of the rule against perpetuities of the first trust.

(c) May be to a second trust created or administered under the law of any jurisdiction.

(d) May not:

1. Increase the authorized trustee's compensation beyond

the compensation specified in the first trust instrument; or

2. Relieve the authorized trustee from liability for breach of trust or provide for indemnification of the authorized trustee for any liability or claim to a greater extent than the first trust instrument; however, the exercise of the power may divide and reallocate fiduciary powers among fiduciaries and relieve a fiduciary from liability for an act or failure to act of another fiduciary as otherwise allowed under law or common law.

(8) NOTICE.—

(a) ~~(4)~~ The authorized trustee shall provide written notification of the manner in which he or she intends to exercise his or her power to invade principal to ~~notify~~ all ~~qualified beneficiaries~~ of the following parties ~~first trust, in writing,~~ at least 60 days before ~~prior to~~ the effective date of the authorized trustee's exercise of such power ~~the trustee's power to invade principal~~ pursuant to subsection (2), subsection (3), or subsection (4): ~~(1), of the manner in which the trustee intends to exercise the power.~~

1. All qualified beneficiaries of the first trust;

2. If paragraph (5)(c) applies, the settlor of the first trust;

3. All trustees of the first trust; and

4. Any person who has the power to remove or replace the authorized trustee of the first trust.

(b) The authorized ~~A copy of the proposed instrument exercising the power shall satisfy the~~ trustee's ~~notice~~ obligation to provide notice under this subsection is satisfied by his or her providing copies of the proposed instrument exercising the power, the trust instrument of the first trust, and the proposed trust instrument of the second trust.

(c) If all of those required to be notified ~~qualified beneficiaries~~ waive the notice period by signed written instrument delivered to the authorized trustee, the authorized trustee's power to invade principal shall be exercisable immediately.

(d) The authorized trustee's notice under this subsection does ~~shall~~ not limit the right of any beneficiary to object to the exercise of the authorized trustee's power to invade principal except as otherwise provided in other applicable provisions of this code.

(9)~~(5)~~ INAPPLICABILITY OF SPENDTHRIFT CLAUSE OR OTHER PROHIBITION.—The exercise of the power to invade principal under subsection (2), subsection (3), or subsection (4) ~~(1)~~ is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(10)~~(6)~~ NO DUTY TO EXERCISE.—Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety may ~~shall~~ be made as

a result of an authorized trustee's failure to exercise ~~a trustee not exercising~~ the power to invade principal conferred under subsections (2), (3), and (4) ~~subsection (1)~~.

(11)~~(7)~~ NO ABRIDGEMENT OF COMMON LAW RIGHTS.~~The provisions of~~ This section may ~~shall~~ not be construed to abridge the right of any trustee who has a power of invasion to appoint property in further trust that arises under the terms of the first trust or under any other section of this code or under another provision of law or under common law.

Section 6. Subsection (3) of section 736.08135, Florida Statutes, is amended to read:

736.08135 Trust accountings.—

(3) Subsections (1) and (2) govern the form and content of ~~This section applies to~~ all trust accountings rendered for any accounting periods beginning on or after January 1, 2003, and all trust accountings rendered on or after July 1, 2017. This subsection does not affect the beginning period from which a trustee is required to render a trust accounting.

Section 7. Subsection (3) of section 736.1008, Florida Statutes, is amended to read:

736.1008 Limitations on proceedings against trustees.—

(3) 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 chapter 95 and accrues when the beneficiary has actual knowledge of:

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

(b) The trustee's repudiation of the trust or adverse possession of trust assets.

Paragraph (a) applies to claims based upon acts or omissions occurring on or after July 1, 2008. A beneficiary's actual knowledge that he or she has not received a trust accounting does not cause a claim to accrue against the trustee for breach of trust based upon the failure to provide a trust accounting required by s. 736.0813 or former s. 737.303, and does not commence the running of any period of limitations or laches for such a claim, and paragraph (a) and chapter 95 do not bar any such claim.

Section 8. The changes to s. 736.08135, Florida Statutes, and s. 736.1008, Florida Statutes, made by this act are intended to clarify existing law, are remedial in nature, and apply retroactively to all cases pending or commenced on or after July 1, 2017.

Section 9. Present subsections (2), (3), and (4) of

section 736.1201, Florida Statutes, are redesignated as subsections (3), (4), and (5), respectively, present subsection (5) of that section is amended, and a new subsection (2) is added to that section, to read:

736.1201 Definitions.—As used in this part:

(2) "Delivery of notice" means delivery of a written notice required under this part using any commercial delivery service requiring a signed receipt or by any form of mail requiring a signed receipt.

~~(5) "State attorney" means the state attorney for the judicial circuit of the principal place of administration of the trust pursuant to s. 736.0108.~~

Section 10. Section 736.1205, Florida Statutes, is amended to read:

736.1205 Notice that this part does not apply.—In the case of a power to make distributions, if the trustee determines that the governing instrument contains provisions that are more restrictive than s. 736.1204(2), or if the trust contains other powers, inconsistent with the provisions of s. 736.1204(3) that specifically direct acts by the trustee, the trustee shall notify the ~~state~~ Attorney General by delivery of notice when the trust becomes subject to this part. Section 736.1204 does not apply to any trust for which notice has been given pursuant to this section unless the trust is amended to comply with the terms of this part.

Section 11. Subsection (2) of section 736.1206, Florida Statutes, is amended to read:

736.1206 Power to amend trust instrument.—

(2) In the case of a charitable trust that is not subject to ~~the provisions of~~ subsection (1), the trustee may amend the governing instrument to comply with ~~the provisions of~~ s. 736.1204(2) after delivery of notice to, and with the consent of, the ~~state~~ Attorney General.

Section 12. Section 736.1207, Florida Statutes, is amended to read:

736.1207 Power of court to permit deviation.—This part does not affect the power of a court to relieve a trustee from any restrictions on the powers and duties that are placed on the trustee by the governing instrument or applicable law for cause shown and on complaint of the trustee, the Attorney General ~~state attorney~~, or an affected beneficiary and notice to the affected parties.

Section 13. Paragraph (b) of subsection (4) of section 736.1208, Florida Statutes, is amended to read:

736.1208 Release; property and persons affected; manner of effecting.—

(4) Delivery of a release shall be accomplished as follows:

(b) If the release is accomplished by reducing the class of permissible charitable organizations, by delivery of notice ~~a~~

~~copy~~ of the release to the ~~state~~ Attorney General, including a copy of the release.

Section 14. Section 736.1209, Florida Statutes, is amended to read:

736.1209 Election to come under this part.—With the consent of that organization or organizations, a trustee of a trust for the benefit of a public charitable organization or organizations may come under s. 736.1208(5) by delivery of notice to ~~filing with~~ the ~~state~~ Attorney General of the ~~an~~ election, accompanied by the proof of required consent. Thereafter the trust shall be subject to s. 736.1208(5).

Section 15. Except as otherwise provided in this act and except for this section, which shall take effect upon becoming a law, this act shall take effect July 1, 2017.

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	____	(Y/N)
ADOPTED AS AMENDED	____	(Y/N)
ADOPTED W/O OBJECTION	____	(Y/N)
FAILED TO ADOPT	____	(Y/N)
WITHDRAWN	____	(Y/N)
OTHER		

Committee/Subcommittee hearing bill: Civil Justice & Claims Subcommittee

Representative Moraitis offered the following:

Amendment (with title amendment)

Between lines 79 and 80, insert:

Section 3. Subsections (1) and (3) of section 736.0109, Florida Statutes, are amended to read:

736.0109 Methods and waiver of notice.—

(1) Notice to a person under this code or the sending of a document to a person under this code must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, ~~or~~ a properly directed facsimile

or other electronic message, or posting to a secure electronic account or website in accordance with subsection (3).

(3) A document that is sent solely by posting to an electronic account or website is not deemed sent for purposes of this section unless the sender complies with this subsection. The sender has the burden of proving compliance with this subsection ~~In addition to the methods listed in subsection (1) for sending a document, a sender may post a document to a secure electronic account or website where the document can be accessed~~.

(a) ~~Before a document may be posted to an electronic account or website,~~ The recipient must sign a separate written authorization solely for the purpose of authorizing the sender to post documents on an electronic account or website before such posting. The written authorization must:

1. Specifically indicate whether a trust accounting, trust disclosure document, or limitation notice, as those terms are defined in s. 736.1008(4), will be posted in this manner, and generally enumerate the other types of documents that may be posted in this manner.

2. Contain specific instructions for accessing the electronic account or website, including the security procedures required to access the electronic account or website, such as a username and password.

3. Advise the recipient that a separate notice will be

sent when a document is posted to the electronic account or website and the manner in which the separate notice will be sent.

4. Advise the recipient that the authorization to receive documents by electronic posting may be amended or revoked at any time and include specific instructions for revoking or amending the authorization, including the address designated for the purpose of receiving notice of the revocation or amendment.

5. Advise the recipient that posting a document on the electronic account or website may commence a limitations period as short as 6 months even if the recipient never actually accesses the electronic account, electronic website, or ~~the~~ document.

(b) Once the recipient signs the written authorization, the sender must provide a separate notice to the recipient when a document is posted to the electronic account or website. As used in this subsection, the term "separate notice" means a notice sent to the recipient by means other than electronic posting that~~, which~~ identifies each document posted to the electronic account or website and provides instructions for accessing the ~~posted~~ document. The separate notice requirement is deemed satisfied if the recipient accesses the document on the electronic account or website.

(c) A document sent by electronic posting is deemed received by the recipient on the earlier of the date on which

~~that~~ the separate notice is received or the date on which ~~that~~ the recipient accesses the document on the electronic account or website.

(d) At least annually after a recipient signs a written authorization, a sender shall send a notice advising recipients who have authorized one or more documents to be posted to an electronic account or website that such posting may commence a limitations period as short as 6 months even if the recipient never accesses the electronic account or website or the document and that authority to receive documents by electronic posting may be amended or revoked at any time. This notice must be given by means other than electronic posting and may not be accompanied by any other written communication. Failure to provide such notice within 380 days after the last notice is deemed to automatically revoke the authorization to receive documents in the manner permitted under this subsection 380 days after the last notice is sent.

(e) The notice required in paragraph (d) may be in substantially the following form: "You have authorized the receipt of documents through posting to an electronic account or website on which ~~where~~ the documents can be accessed. This notice is being sent to advise you that a limitations period, which may be as short as 6 months, may be running as to matters disclosed in a trust accounting or other written report of a trustee posted to the electronic account or website even if you

never actually access the electronic account or website or the documents. You may amend or revoke the authorization to receive documents by electronic posting at any time. If you have any questions, please consult your attorney."

(f) A sender may rely on the recipient's authorization until the recipient amends or revokes the authorization by sending a notice to the address designated for that purpose in the authorization or in the manner specified on the electronic account or website. The recipient, at any time, may amend or revoke an authorization to have documents posted on the electronic account or website.

(g) If a document is provided to a recipient solely through electronic posting and is deemed sent for purposes of this section:

1. The recipient must be able to access and print or download the document until the earlier of:

a. The date on which the recipient's access to the electronic account or website is terminated for any reason; or

b. Four ~~must remain accessible to the recipient on the electronic account or website for at least 4~~ years after the date on which ~~that~~ the document is deemed received by the recipient.

2. If the recipient's access to the electronic account or website is terminated for any reason, such termination does not invalidate the notice or sending of any document previously

posted on the electronic account or website in accordance with this subsection ~~The electronic account or website must allow the recipient to download or print the document. This subsection does not affect or alter the duties of a trustee to keep clear, distinct, and accurate records pursuant to s. 736.0810 or affect or alter the time periods for which the trustee must maintain those records~~.

3. If the recipient's access to the electronic account or website is terminated by the sender before the time period set forth in sub-subparagraph 1.b., any applicable limitations period set forth in s. 736.1008(1) or (2) that is still open is tolled for any information adequately disclosed in such document as follows:

a. From the date on which the recipient's access to the electronic account or website is terminated by the sender until 45 days after the date on which the sender provides notification of such termination to the recipient by means other than electronic posting, and:

(I) The recipient requests that any documents sent during the prior 4 years solely through electronic posting be provided to him or her by other means at no cost; or

(II) The recipient's access to the electronic account or website is restored; or

b. From the date on which any request is made pursuant to sub-sub-subparagraph 3.a.(I) until 20 days after the date on

which the requested documents are provided to the recipient by means other than electronic posting.

(h) For purposes of this subsection, access to an electronic account or website is terminated by the sender when the sender unilaterally terminates the recipient's ability to access the electronic website or account or download or print any document posted on such website or account. Access is not terminated by the sender when access is terminated by an action of the recipient or by an action of the sender in response to the recipient's request to terminate access. The recipient's revocation of authorization pursuant to paragraph (f) is not considered a request to terminate access ~~To be effective, the posting of a document to an electronic account or website must be done in accordance with this subsection. The sender has the burden of establishing compliance with this subsection~~.

(i) This subsection does not affect or alter the duties of a trustee to keep clear, distinct, and accurate records pursuant to s. 736.0810 or affect or alter the time periods for which the trustee must maintain such records ~~preclude the sending of a document by other means~~.

(j) This subsection governs the posting of a document solely for the purpose of giving notice under this code or the sending of a document to a person under this code and does not prohibit or otherwise apply to the posting of a document to an electronic account or website for any other purpose or preclude

the sending of a document by any other means.

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

Remove line 6 and insert:

beneficiaries; amending s. 736.0109, F.S.; revising provisions relating to notice or sending of electronic trust documents; providing requirements for such documents to be deemed sent; requiring a certain authorization to specify documents subject to electronic posting; revising requirements for a recipient to electronically access such documents; prohibiting the termination of a recipient's electronic access to such documents from invalidating certain notice or sending; tolling specified limitations periods under certain circumstances; providing requirements for electronic access to such documents to be deemed terminated by a sender; providing applicability; amending s. 736.0110, F.S.; providing