

Council Substitute for House Bill No. 435

An act relating to trust administration; amending s. 736.0703, F.S.; providing exceptions to duties and liabilities of cotrustees for excluded cotrustees under certain circumstances; relieving excluded cotrustees from specified liabilities and obligations under certain circumstances; providing for liabilities and obligations of included cotrustees; amending s. 736.0802, F.S.; providing an exception for trustee payments of costs and attorney's fees from trust assets except pursuant to court order under certain circumstances; requiring trustees to provide certain notice to beneficiaries; providing notice requirements; providing requirements for obtaining such a court order; specifying remedies; providing for specified refunds and sanctions; preserving certain court remedies; amending s. 736.1008, F.S.; specifying periods of repose barring claims by a beneficiary against a trustee; providing construction; providing an effective date.

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

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

736.0703 Cotrustees.—

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

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

(9) If the terms of a trust instrument provide for the appointment of more than one trustee but confer upon one or more of the trustees, to the exclusion of the others, the power to direct or prevent specified actions of the trustees, the excluded trustees shall act in accordance with the exercise of the power. Except in cases of willful misconduct on the part of the directed trustee of which the excluded trustee has actual knowledge, an excluded trustee is not liable, individually or as a fiduciary, for any consequence that results from compliance with the exercise of the power, regardless of the information available to the excluded trustees. The excluded trustees are relieved of any obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of the power. The trustee or trustees having the power to direct or prevent actions of the trustees shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power.

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

736.0802 Duty of loyalty.—

(10) Payment of costs or attorney's fees incurred in any trust proceeding from the assets of the trust may be made by the trustee without the approval of any person and without court authorization, unless the court orders otherwise as provided in paragraph (b) except that court authorization shall be required if an action has been filed or defense asserted against the trustee based upon a breach of trust. Court authorization is not required if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a breach of trust.

(a) If a claim or defense based upon a breach of trust is made against a trustee in a proceeding, the trustee shall provide written notice to each qualified beneficiary of the trust whose share of the trust may be affected by the payment of attorney's fees and costs of the intention to pay costs or attorney's fees incurred in the proceeding from the trust prior to making payment. The written notice shall be delivered by sending a copy by any commercial delivery service requiring a signed receipt, by any form of mail requiring a signed receipt, or as provided in the Florida Rules of Civil Procedure for service of process. The written notice shall inform each qualified beneficiary of the trust whose share of the trust may be affected by the payment of attorney's fees and costs of the right to apply to the court for an order prohibiting the trustee from paying attorney's fees or costs from trust assets. If a trustee is served with a motion for an order prohibiting the trustee from paying attorney's fees or costs in the proceeding and the trustee pays attorney's fees or costs before an order is entered on the motion, the trustee and the trustee's attorneys who have been paid attorney's fees or costs from trust assets to defend against the claim or defense are subject to the remedies in paragraphs (b) and (c).

(b) If a claim or defense based upon breach of trust is made against a trustee in a proceeding, a party must obtain a court order to prohibit the trustee from paying costs or attorney's fees from trust assets. To obtain an order prohibiting payment of costs or attorney's fees from trust assets, a party must make a reasonable showing by evidence in the record or by proffering evidence that provides a reasonable basis for a court to conclude that there has been a breach of trust. The trustee may proffer evidence to rebut the evidence submitted by a party. The court in its discretion may defer ruling on the motion, pending discovery to be taken by the parties. If the court finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court finds good cause, the court shall enter an order prohibiting the payment of further attorney's fees and costs from the assets of the trust and shall order attorney's fees or costs previously paid from assets of the trust to be refunded. An order entered under this paragraph shall not limit a trustee's right to seek an order permitting the payment of some or all of the attorney's fees or costs incurred in the proceeding from trust assets, including any fees required to be refunded, after the claim or defense is finally determined by the court. If a claim or defense based upon a breach of trust is withdrawn, dismissed, or resolved without a determination by the court that the trustee committed a breach of trust after the entry of an order prohibiting payment of attorney's fees and costs

pursuant to this paragraph, the trustee may pay costs or attorneys' fees incurred in the proceeding from the assets of the trust without further court authorization.

(c) If the court orders a refund under paragraph (b), the court may enter such sanctions as are appropriate if a refund is not made as directed by the court, including, but not limited to, striking defenses or pleadings filed by the trustee. Nothing in this subsection limits other remedies and sanctions the court may employ for the failure to refund timely.

(d) Nothing in this subsection limits the power of the court to review fees and costs or the right of any interested persons to challenge fees and costs after payment, after an accounting, or after conclusion of the litigation.

(e) Notice under paragraph (a) is not required if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a breach of trust.

Section 3. Subsection (3) of section 736.1008, Florida Statutes, is amended, subsection (6) of that section is renumbered as subsection (7), and new subsection (6) is added to that section, 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, and is barred as provided in chapter 95.

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

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

1. Upon the later of:

a. Ten years after the date the trust terminates, the trustee resigns, or the fiduciary relationship between the trustee and the beneficiary otherwise ends if the beneficiary had actual knowledge of the existence of the trust and the beneficiary's status as a beneficiary throughout the 10-year period; or

b. Twenty years after the date of the act or omission of the trustee that is complained of if the beneficiary had actual knowledge of the existence of

the trust and the beneficiary's status as a beneficiary throughout the 20-year period; or

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

(b) When a beneficiary shows by clear and convincing evidence that a trustee actively concealed facts supporting a cause of action, any existing applicable statute of repose shall be extended by 30 years.

(c) For purposes of sub-subparagraph (a)1.b., the failure of the trustee to take corrective action is not a separate act or omission and does not extend the period of repose established by this subsection.

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

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

Approved by the Governor May 28, 2008.

Filed in Office Secretary of State May 28, 2008.