

**Florida Trust Code**  
**Final Committee Draft**  
(with source and revision notes)  
7/14/2005

<b>PART I GENERAL PROVISIONS AND DEFINITIONS</b>	<b>6</b>
736.101 Short title	6
736.102 Scope	6
736.103 Definitions	7
736.104 Knowledge	9
736.105 Default and mandatory rules	10
736.106 Common law of trusts; principles of equity	12
736.107 Governing law	13
736.108 Principal place of administration	13
736.109 Methods and waiver of notice	15
736.110 Others treated as qualified beneficiaries	15
736.111 Nonjudicial settlement agreements	16
736.112 Qualification of foreign trustee	17
<b>PART II JUDICIAL PROCEEDINGS</b>	<b>18</b>
736.201 Role of court in trust proceedings	18
736.202 Jurisdiction over trustee and beneficiary	19
736.203 Subject-matter jurisdiction	19
736.204 Venue	19
736.205 Trust proceedings; dismissal of matters relating to foreign trusts	20
736.206 Proceedings for review of employment of agents and review of compensation of trustee and employees of trust	20
736.207 Trust contests	21
<b>PART III REPRESENTATION</b>	<b>22</b>
736.301 Representation; basic effect	22
736.302 Representation by holder of power of appointment	23
736.303 Representation by fiduciaries and parents	23
736.304 Representation by person having substantially identical interest	24
736.305 Appointment of representative	24
736.306 Designated representative	24
<b>PART IV CREATION, VALIDITY, MODIFICATION AND TERMINATION OF TRUST</b>	<b>26</b>
736.401 Methods of creating trust	26
736.402 Requirements for creation	27

736.403	Trusts created in other jurisdictions; formalities required for revocable trusts	27
736.404	Trust purposes	28
736.405	Charitable purposes; enforcement	29
736.406	Effect of fraud, duress, mistake and undue influence	29
736.407	Evidence of oral trust	29
736.408	Trust for care of animal	29
736.409	Noncharitable trust without ascertainable beneficiary	30
736.410	Modification or termination of trust; proceedings for disapproval of nonjudicial acts	31
736.4113	Judicial modification of irrevocable trust when modification is not inconsistent with settlor's purpose	31
736.4115	Judicial modification of irrevocable trust when modification is in best interest of beneficiaries	32
736.412	Nonjudicial modification of irrevocable trust	34
736.413	Cy pres	35
736.414	Modification or termination of uneconomic trust	35
736.415	Reformation to correct mistakes	36
736.416	Modification to achieve settlor's tax objectives	36
736.417	Combination and division of trusts	37
<b>PART V CREDITORS' CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS</b>		<b>38</b>
736.501	Rights of beneficiary's creditor or assignee	38
736.502	Spendthrift provision	38
736.503	Exceptions to spendthrift provision	39
736.504	Discretionary trusts; effect of standard	39
736.505	Creditors' claims against settlor	40
736.5053	Trustee's duty to pay expenses and obligations of settlor's estate	41
736.5055	Notice of trust	42
736.506	Overdue distribution	43
736.507	Personal obligations of trustee	43
<b>PART VI REVOCABLE TRUSTS</b>		<b>44</b>
736.601	Capacity of settlor of revocable trust	44
736.602	Revocation or amendment of revocable trust	44
736.603	Settlor's powers; powers of withdrawal	45
736.604	Limitation on action contesting validity of revocable trust.	46
<b>PART VII OFFICE OF TRUSTEE</b>		<b>47</b>
736.701	Accepting or declining trusteeship	47
736.702	Trustee's bond	48
736.703	Cotrustees	48

736.704	Vacancy in trusteeship; appointment of successor	49
736.705	Resignation of trustee	50
736.706	Removal of trustee	51
736.707	Delivery of property by former trustee	51
736.708	Compensation of trustee	52
736.709	Reimbursement of expenses	52
<b>PART VIII DUTIES AND POWERS OF TRUSTEE</b>		<b>54</b>
736.801	Duty to administer trust	54
736.802	Duty of loyalty	55
736.803	Impartiality	57
736.804	Prudent administration	57
736.805	Expenses of administration	58
736.806	Trustee's skills	58
736.807	Delegation by trustee	58
736.808	Powers to direct	59
736.809	Control and protection of trust property	59
736.810	Recordkeeping and identification of trust property	59
736.8105	Duty to ascertain marketable title of trust real property	60
736.811	Enforcement and defense of claims	60
736.812	Collecting trust property	60
736.8125	Protection of successor trustees	60
736.813	Duty to inform and account	62
736.8135	Trust accountings	64
736.814	Discretionary powers; tax savings	65
736.8147	Duty to distribute trust income	66
736.815	General powers of trustee	67
736.816	Specific powers of trustee	67
736.8163	Powers of trustees relating to environmental or human health laws or to trust property contaminated with hazardous or toxic substances; liability.	72
736.8165	Administration pending outcome of contest or other proceeding	74
736.817	Distribution upon termination	75
<b>PART IX TRUST INVESTMENTS</b>		<b>76</b>
736.901	Applicability of chapter 518	76
<b>PART X LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEE</b>		<b>77</b>
736.9021	Remedies for breach of trust	77
736.9022	Damages for breach of trust	78
736.903	Damages in absence of breach	79
736.904	Attorney's fees and costs	79

736.9043	Attorney's fees for services to the trust	79
736.9045	Costs in trust proceedings	80
736.9047	Trustee's attorney's fees	80
736.905	Limitations on proceeding against trustees after beneficiary receives trust disclosure documents	85
736.906	Reliance on trust instrument	87
736.907	Event affecting administration or distribution	88
736.908	Exculpation of trustee	88
736.909	Beneficiary's consent, release, or ratification	88
736.910	Limitation on personal liability of trustee	89
736.9103	Limitations on actions against certain trusts	89
736.911	Interest as general partner	90
736.912	Protection of person dealing with trustee	90
736.913	Certification of trust	91
736.914	Improper distribution or payment; liability of distributee	93
<b>PART XI RULES OF CONSTRUCTION</b>		<b>94</b>
736.921	Rules of construction; general provisions	94
736.922	Construction of generic terms	94
736.923	Gifts to multi-generation classes to be per stirpes	94
736.924	Killer not entitled to receive property or other benefits by reason of victim's death	95
736.925	Dissolution of marriage; effect on revocable trust	95
736.926	Antilapse; survivorship with respect to future interests under terms of trust; substitute takers	95
736.927	Change in securities; accessions; nonademption	97
736.928	Penalty clause for contest	98
<b>PART XII CHARITABLE TRUSTS</b>		<b>99</b>
736.931	Definitions	99
736.932	Application of this part	99
736.933	Trustee of a private foundation trust or a split interest trust	100
736.934	Powers and duties of trustee of a private foundation trust or a split interest trust	100
736.935	Notice that this part does not apply	101
736.936	Power to amend trust instrument	101
736.937	Power of court to permit deviation	102
736.938	Release; property and persons affected; manner of effecting	102
736.939	Election to come under this part	103
736.941	Interpretation	103
<b>PART XIII MISCELLANEOUS PROVISIONS</b>		<b>104</b>
736.952	Electronic records and signatures	104

736.953 Severability clause	104
736.954 Effective date	104
736.956 Application to existing relationships	104
<b>CONFORMING REVISIONS TO OTHER FLORIDA STATUTES</b>	<b>106</b>
497.417 Disposition of proceeds received on contracts	106
497.458 Disposition of proceeds received on contracts	107
607.0802. Qualifications of directors	107
617.0802. Qualifications of directors	108
660.25 Definitions	108
660.46. Substitution of fiduciaries	108
660.418 Investment of fiduciary funds in syndicate securities	110
689.071 Land trusts transferring interests in real estate; ownership vests in trustee	111
689.075 Inter vivos trusts; powers retained by settlor	111
689.175 Worthier-title doctrine abolished	112
709.08 Durable power of attorney	113
731.103 Evidence as to death or status	113
731.1035 Applicable rules of evidence	114
731.201 General definitions	114
731.303 Representation	115
732.513 Devises to trustee	117
732.603 Antilapse; deceased devisee; class gifts	118
732.604 Failure of testamentary provision	120
732.611 Devises to multi-generation classes to be per stirpes	121
733.212 Notice of administration; filing of objections	121
738.104 Trustee's power to adjust	121
738.1041 Total return unitrust	124
738.202 Distribution to residuary and remainder beneficiaries	125
744.331 Procedures to determine incapacity	125
744.361 Powers and duties of guardian	126
744.441 Powers of guardian upon court approval	126
<u>744.462 Determination regarding alternatives to guardian</u>	127
<b>APPENDIX A: CHAPTER 737 TO CHAPTER 736 CORRELATION TABLE</b>	<b>128</b>
<b>APPENDIX B: CHAPTER 736 TO CHAPTER 737 CORRELATION TABLE</b>	<b>130</b>
<b>APPENDIX C: EFFECTIVE DATES</b>	<b>134</b>

**PART I**  
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736.108 Principal place of administration	13
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736.110 Others treated as qualified beneficiaries	15
736.111 Nonjudicial settlement agreements	16
736.112 Qualification of foreign trustee	17

**736.101 Short title.**— This chapter may be cited as the Florida Trust Code and referred to as the "code."<sup>1</sup>

**736.102 Scope.**— This code applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust. This code does not apply to constructive or resulting trusts; conservatorships; custodial arrangements pursuant to the Florida Uniform Transfers to Minors Act; business trusts providing for certificates to be issued to beneficiaries; common trust funds; land trusts under s. 689.05; trusts created by the form of the account or by the deposit agreement at a financial institution; voting trusts; security arrangements; liquidation trusts; trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind; and any arrangement under which a person is nominee or escrowee for another.<sup>2</sup>

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<sup>1</sup> Source: UTC § 101.

<sup>2</sup> Source: UTC § 102 with final sentence (from F.S. § 731.201(34)) added.

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

- (1) "Action," with respect to an act of a trustee, includes a failure to act.<sup>3</sup>
- (2) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of s. 2041(b)(1)(A) or s. 2514(c)(1) of the Internal Revenue Code of 1986, as amended.<sup>4</sup>
- (3) "Beneficiary" means a person who:
  - (a) Has a present or future beneficial interest in a trust, vested or contingent; or
  - (b) In a capacity other than that of trustee, holds a power of appointment over trust property.<sup>5</sup>
- (4) "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in s. 736.405(1).<sup>6</sup>
- (5) "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance that relates to protection of the environment or human health.<sup>7</sup>
- (6) "General power of appointment" means a power of appointment exercisable in favor of the holder of the power, the power holder's creditors, the power holder's estate, or the creditors of the power holder's estate.<sup>8</sup>
- (7) "Guardian of the person" means a person appointed by the court to make decisions regarding the support, care, education, health, and welfare of a minor or an incapacitated adult. The term does not include a guardian ad litem.<sup>9</sup>

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<sup>3</sup> Source: UTC § 103(1).

<sup>4</sup> Source: UTC § 103(2).

<sup>5</sup> Source: UTC § 103(3) with "person that" changed to "person who"

Note: The use of "who" is to maintain uniformity throughout other provisions of the Code. It is not intended to imply that a beneficiary is limited to an individual.

<sup>6</sup> Source: UTC § 103(4).

Note: From the UTC comments: "The definition of 'beneficiary' includes only those who hold beneficial interests in the trust. Because a charitable trust is not created to benefit ascertainable beneficiaries but to benefit the community at large (see Section 405(a) [F.S. § 736.405(1)]), persons receiving distributions from a charitable trust are not beneficiaries as that term is defined in this Code."

<sup>7</sup> Source: UTC § 103(6) with addition of "or human health" which is derived from 736.4025.

<sup>8</sup> Source: Restatement (Second) of Property section 11.4(1) with stylistic revisions.

<sup>9</sup> Source: UTC § 103(5) with "guardian" changed to "guardian of the person".

- (8) "Guardian of the property" means a person appointed by the court to administer the estate of a minor or incapacitated adult.<sup>10</sup>
- (9) "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.<sup>11</sup>
- (10) "Jurisdiction" with respect to a geographic area, includes a state or country.<sup>12</sup>
- (11) "Person" means an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.<sup>13</sup>
- (12) "Power of withdrawal" means a presently exercisable general power of appointment other than a power:
- (a) Exercisable by a trustee and limited by an ascertainable standard; or
  - (b) Exercisable by another person only on consent of the trustee or a person holding an adverse interest.<sup>14</sup>
- (13) "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.<sup>15</sup>
- (14) "Qualified beneficiary" means a living beneficiary who, on the date 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 distributees described in paragraph (a) terminated on that date without causing the trust to terminate; or
  - (c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated in accordance with its terms on that date.<sup>16</sup>

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<sup>10</sup> Source: UTC § 103(7) with "conservator" changed to "guardian of the property".

<sup>11</sup> Source: UTC § 103(8).

<sup>12</sup> Source: UTC § 103(9).

<sup>13</sup> Source: UTC § 103(10).

<sup>14</sup> Source: UTC § 103(11).

<sup>15</sup> Source: UTC § 103(12).

<sup>16</sup> Source: UTC § 103(13).



- (15) "Revocable," as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.<sup>17</sup>
- (16) "Settlor" means a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.<sup>18</sup>
- (17) "Spendthrift provision" means a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest.<sup>19</sup>
- (18) "State" means any state of the United States and includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.<sup>20</sup>
- (19) "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.<sup>21</sup>
- (20) "Trust instrument" means an instrument executed by a settlor that contains terms of the trust, including any amendments thereto.<sup>22</sup>
- (21) "Trustee" includes an original, additional, and successor trustee, and a cotrustee.<sup>23</sup>

**736.104 Knowledge.—**

- (1) Subject to subsection (2), a person has knowledge of a fact if the person:
  - (a) Has actual knowledge of it;
  - (b) Has received a notice or notification of it; or

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<sup>17</sup> Source: UTC § 103(14).

<sup>18</sup> Source: UTC § 103(15).

<sup>19</sup> Source: UTC § 103(16).

<sup>20</sup> Source: F.S. § 731.201(23).

<sup>21</sup> Source: UTC § 103(18).

<sup>22</sup> Source: UTC § 103(19) with "the settlor " changed to "a settlor".

<sup>23</sup> Source: UTC § 103(20).

- (c) From all the facts and circumstances known to the person at the time in question, has reason to know it.
- (2) An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act on matters involving the trust, or would have been brought to the employee's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act on matters involving the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual's regular duties or the individual knows a matter involving the trust would be materially affected by the information.<sup>24</sup>

**736.105 Default and mandatory rules.—**

- (1) Except as otherwise provided in the terms of the trust, this code governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.<sup>25</sup>
- (2) The terms of a trust prevail over any provision of this code except:
  - (a) The requirements for creating a trust;<sup>26</sup>
  - (b) The duty of the trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;<sup>27</sup>
  - (c) The requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;<sup>28</sup>

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<sup>24</sup> Source: UTC § 104.

<sup>25</sup> Source: UTC § 105(a).

<sup>26</sup> Source: UTC § 105(b)(1).

<sup>27</sup> Source: UTC § 105(b)(2).

<sup>28</sup> Source: UTC § 105(b)(3).

- (d) Periods of limitation for commencing a judicial proceeding;<sup>29</sup>
- (e) The power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice;<sup>30</sup>
- (f) The requirements under s. 736.108(1) for the designation of a principal place of administration of the trust;<sup>31</sup>
- (g) The jurisdiction and venue provisions in ss. 736.202, 736.203, and 736.204;<sup>32</sup>
- (h) The restrictions on the designation of representative under s. 736.306.
- (i) The formalities required under s. 736.403(2) for the execution of a trust;<sup>33</sup>
- (j) The power of the court to modify or terminate a trust under ss. 736.410 - 736.4115, except as provided in s. 736.4115(3)(b), and under ss. 736.413, 736.415, and 736.416;<sup>34</sup>
- (k) Except as provided in s. 736.412(4)(b), the ability to modify a trust under s. 736.412;<sup>35</sup>
- (l) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in part V;<sup>36</sup>
- (m) The trustee's duty under s. 736.5053 to pay expenses and obligations of the settlor's estate;<sup>37</sup>
- (n) The trustee's duty under s. 736.5055 to file a notice of trust at the settlor's death;<sup>38</sup>
- (o) The right of a trustee under s. 736.701 to decline a trusteeship and the right of a trustee under s. 736.705 to resign a trusteeship.

<sup>29</sup> Source: UTC § 105(b)(12).

<sup>30</sup> Source: UTC § 105(b)(13).

<sup>31</sup> Source: New.

<sup>32</sup> Source: UTC § 105(b)(14).

<sup>33</sup> Source: New.

<sup>34</sup> Source: UTC § 105(b)(4) with conforming revisions to cross-references.

<sup>35</sup> Source: New.

<sup>36</sup> Source: UTC § 105(b)(5).

<sup>37</sup> Source: New.

<sup>38</sup> Source: New.

- (p) The power of the court under s. 736.702 to require, dispense with, modify, or terminate a bond;<sup>39</sup>
- (q) The power of the court under s. 736.708(2) to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high;<sup>40</sup>
- (r) The duty under s. 736.813(1)(a) and (b) to notify qualified beneficiaries of an irrevocable trust of the existence of the trust, of the identity of the trustee, and of their rights to trust accountings;<sup>41</sup>
- (s) The duty under s. 736.813(1)(c) and (d) to provide a complete copy of the trust instrument and to account to qualified beneficiaries;<sup>42</sup>
- (t) The duty under s. 736.813(1)(e) to respond to the request of a qualified beneficiary of an irrevocable trust for relevant information about the assets and liabilities of the trust and the particulars relating to trust administration;<sup>43</sup>
- (u) The effect of an exculpatory term under s. 736.908;<sup>44</sup>
- (v) The rights under ss. 736.910 - 736.913 of a person other than a trustee or beneficiary; and<sup>45</sup>
- (w) The effect of a penalty clause for contesting a trust under s. 736.928;<sup>46</sup>

**736.106 Common law of trusts; principles of equity.**—The common law of trusts and principles of equity supplement this code, except to the extent modified by this code or another statute of this state.<sup>47</sup>

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<sup>39</sup> Source: UTC § 105(b)(6).

<sup>40</sup> Source: UTC § 105(b)(7).

<sup>41</sup> Source: UTC § 105(b)(8) with revisions.

Revisions:

- Minimum 25 year age provision deleted.
- Reference to “right to request trustee's reports” changed to a “right to trust accountings”.

<sup>42</sup> Source: New.

<sup>43</sup> Source: UTC § 105(b)(9) reworded and modified to apply only to qualified beneficiaries.

<sup>44</sup> Source: UTC § 105(b)(10).

<sup>45</sup> Source: UTC § 105(b)(11).

<sup>46</sup> Source: New.

<sup>47</sup> Source: UTC § 106.

**736.107 Governing law.**—The meaning and effect of the terms of a trust are determined by:

- (1) The law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or
- (2) In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.<sup>48</sup>

**736.108 Principal place of administration.**—

- (1) Terms of a trust designating the principal place of administration of the trust are valid only if there is a sufficient connection with the designated jurisdiction. Without precluding other means for establishing a sufficient connection, terms of a trust designating the principal place of administration are valid and controlling if:
  - (a) A trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction; or
  - (b) All or part of the administration occurs in the designated jurisdiction.<sup>49</sup>
- (2) Unless otherwise validly designated in the trust instrument, the principal place of administration of a trust is the trustee's usual place of business where the records pertaining to the trust are kept or, if the trustee has no place of business, the trustee's residence. In the case of cotrustees, the principal place of administration is:
  - (a) The usual place of business of the corporate trustee, if there is only one corporate cotrustee;
  - (b) The usual place of business or residence of the individual trustee who is a professional fiduciary, if there is only one such person and no corporate cotrustee; or otherwise,
  - (c) The usual place of business or residence of any of the cotrustees as agreed on by them.

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<sup>48</sup> Source: UTC § 107.

<sup>49</sup> **Mandatory:** *This is a mandatory provision. F.S. § 736.105(2)(f).*

- (3) Notwithstanding any other provision of this section, the principal place of administration of a trust, for which a bank, association, or trust company organized under the laws of this state or bank or savings association organized under the laws of the United States with its main office in this state has been appointed trustee, shall not be moved or otherwise affected solely because the trustee engaged in an interstate merger transaction with an out-of-state bank pursuant to s. 658.2953 in which the out-of-state bank is the resulting bank.
- (4) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries.
- (5) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by subsection (4), may transfer the trust's principal place of administration to another state or to a jurisdiction outside of the United States.
- (6) The trustee shall notify the qualified beneficiaries of a proposed transfer of a trust's principal place of administration not less than 60 days before initiating the transfer. The notice of proposed transfer must include:
  - (a) The name of the jurisdiction to which the principal place of administration is to be transferred;
  - (b) The address and telephone number at the new location at which the trustee can be contacted;
  - (c) An explanation of the reasons for the proposed transfer;
  - (d) The date on which the proposed transfer is anticipated to occur; and
  - (e) The date, not less than 60 days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.
- (7) The authority of a trustee to act without court approval under this section to transfer a trust's principal place of administration terminates if a qualified beneficiary files a lawsuit objecting to the proposed transfer on or before the date specified in the notice.
- (8) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the

trust property to a successor trustee designated in the terms of the trust or appointed pursuant to s. 736.704.<sup>50</sup>

**736.109 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.
- (2) Notice otherwise required under this code or a document otherwise required to be sent under this code need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.
- (3) Notice under this code or the sending of a document under this code may be waived by the person to be notified or sent the document.
- (4) Notice of a judicial proceeding must be given as provided in the Florida Rules of Civil Procedure.<sup>51</sup>

**736.110 Others treated as qualified beneficiaries.—**

- (1) A charitable organization expressly designated to receive distributions under the terms of a charitable trust has the rights of a qualified beneficiary under this code if the charitable organization, on the date the charitable organization's qualification is being 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 on termination of the interests of other distributees or permissible distributees then receiving or eligible to receive distributions; or

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<sup>50</sup> Source: UTC § 108 with revisions.

Revisions:

- Subsection (2) (based on F.S. § 737.101(1) and (2)) added.
- Subsection (23) (based on F.S. § 737.101(3)) added.

<sup>51</sup> Source: UTC § 109 with subsection (1) revised to include "a properly directed facsimile".

- (c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.
- (2) A person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in s.736.408 or s. 736.409 has the rights of a qualified beneficiary under this code.
- (3) The Attorney General of this state may assert the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this state.<sup>52</sup>

**736.111 Nonjudicial settlement agreements.—**

- (1) For purposes of this section, "interested persons" means persons whose interest would be affected by the settlement.
- (2) Except as otherwise provided in subsection (3), interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.
- (3) A nonjudicial settlement agreement among the trustee and trust beneficiaries is valid only to the extent the terms and conditions could be properly approved by the court. A nonjudicial settlement cannot be used to produce a result not authorized by other provisions of this code, such as to terminate or modify a trust in an impermissible manner.
- (4) Matters that may be resolved by a nonjudicial settlement agreement include:
  - (a) The interpretation or construction of the terms of the trust;
  - (b) The approval of a trustee's report or accounting;
  - (c) Direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;

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<sup>52</sup> Source: UTC § 110 with revisions.

Revisions:

- UTC § 110(a) deleted.
- UTC § 110(d) modified to replace "has the rights" with "may assert the rights".

Note: The former obligated trustees to provide notice to any beneficiary who requested it whenever the trustee was required to give notice to qualified beneficiaries. Under F.S. § 736.813(1)(c), the duty to respond to requests for information is restricted to qualified beneficiaries. The latter change means that information need not be provided the Attorney General unless and until he or she asserts the rights of a qualified beneficiary.



- (d) The resignation or appointment of a trustee and the determination of a trustee's compensation;
  - (e) Transfer of a trust's principal place of administration; and
  - (f) Liability of a trustee for an action relating to the trust.
- (5) Any interested person may request the court to approve or disapprove a nonjudicial settlement agreement.<sup>53</sup>

**736.112 Qualification of foreign trustee.**—Unless otherwise doing business in this state, local qualification by a foreign trustee is not required for the trustee to receive distribution from a local estate. Nothing in this chapter shall affect the provisions of s. 660.41.<sup>54</sup>

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<sup>53</sup> Source: UTC § 111 with revisions.

Revisions:

- UTC § 111(c) providing that nonjudicial settlement agreements are valid only if they do not violate a material purpose and they include terms and conditions that could be properly approved by the court was deleted.
- Subsection (5) modified to exclude language giving interested persons the ability to request a determination of the adequacy of representation under Part III and whether terms and conditions could have been properly approved by a court.

Note: The matters listed in subsection (4) are not intended to be exclusive.

<sup>54</sup> Source: F.S. § 737.105.

**PART II**  
**JUDICIAL PROCEEDINGS**

736.201	Role of court in trust proceedings	18
736.202	Jurisdiction over trustee and beneficiary	19
736.203	Subject-matter jurisdiction	19
736.204	Venue	19
736.205	Trust proceedings; dismissal of matters relating to foreign trusts	20
736.206	Proceedings for review of employment of agents and review of compensation of trustee and employees of trust	20
736.207	Trust contests	21

**736.201 Role of court in trust proceedings.—**

- (1) Except as provided in subsection (5) and s. 736.206, proceedings concerning trusts shall be commenced by filing a complaint and shall be governed by the Florida Rules of Civil Procedure.
- (2) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law.
- (3) A trust is not subject to continuing judicial supervision unless ordered by the court.
- (4) A judicial proceeding involving a trust may relate to the validity, administration, or distribution of a trust. This includes proceedings to:
  - (a) Determine the validity of all or part of a trust;
  - (b) Appoint or remove a trustee;
  - (c) Review trustees' fees;
  - (d) Review and settle interim or final accounts;
  - (e) Ascertain beneficiaries; determine any question arising in the administration or distribution of any trust, including questions of construction of trust instruments; instruct trustees; and determine the existence or nonexistence of any immunity, power, privilege, duty, or right;
  - (f) Obtain a declaration of rights; or

- (g) Determine any other matters involving trustees and beneficiaries.<sup>55</sup>
- (5) A proceeding for the construction of a testamentary trust may be filed in the probate proceeding for the testator's estate. The proceeding shall be governed by the Florida Probate Rules.

**736.202 Jurisdiction over trustee and beneficiary.—**

- (1) By accepting the trusteeship of a trust having its principal place of administration in this state or by moving the principal place of administration to this state, the trustee submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust.
- (2) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the courts of this state regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this state regarding any matter involving the distribution.
- (3) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.<sup>56</sup>

**736.203 Subject-matter jurisdiction.—**The circuit court has original jurisdiction in this state of all proceedings arising under this code.<sup>57</sup>

**736.204 Venue.—**Venue for actions and proceedings concerning trusts, including those under s. 736.201, may be laid in:

- (1) Any county where the venue is proper under chapter 47;

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<sup>55</sup> Source: UTC § 201 with revisions.

**Mandatory:** *This is a mandatory provision. F.S. § 736.105(2)(e).*

**Revisions:**

- Subsection (1) (based on F.S. § 737.205) added.
- Subsection (4) (based on F.S. § 737.201(1)) added.

<sup>56</sup> Source: UTC § 202 with “trust” changed to “distribution” as final word of subsection (2).

<sup>57</sup> Source: UTC § 203 with revised wording.

**Mandatory:** *This is a mandatory provision. F.S. § 736.105(2)(e).*

- (2) Any county where the beneficiary suing or being sued resides or has its principal place of business; or
- (3) The county where the trust has its principal place of administration.<sup>58</sup>

**736.205 Trust proceedings; dismissal of matters relating to foreign trusts.**—Over the objection of a party, the court shall not entertain proceedings under s. 736.201 for a trust registered, or having its principal place of administration, in another state unless all interested parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration. The court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state where the trust is registered or has its principal place of business, or the court may grant a continuance or enter any other appropriate order.<sup>59</sup>

**736.206 Proceedings for review of employment of agents and review of compensation of trustee and employees of trust.**—

- (1) After notice to all interested persons, the court may review the propriety of the employment by a trustee of any person, including any attorney, auditor, investment adviser, or other specialized agent or assistant, and the reasonableness of any compensation paid to that person or to the trustee.
- (2) If the settlor's estate is being probated, and the settlor's trust or the trustee of the settlor's trust is a beneficiary under the settlor's will, the trustee, any person employed by the trustee, or any interested person may have the propriety of employment and the reasonableness of the compensation of the trustee or any person employed by the trustee determined in the probate proceeding.
- (3) The burden of proof of propriety of the employment and the reasonableness of the compensation shall be on the trustee and the person employed by the trustee. Any person who is determined to have received excessive compensation from a trust for services rendered may be ordered to make appropriate refunds.

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<sup>58</sup> Source: F.S. § 737.202.

**Mandatory:** *This is a mandatory provision. F.S. § 736.105(2)(e).*

<sup>59</sup> Source: F.S. § 737.203.

- (4) Court proceedings to determine reasonable compensation of a trustee or any person employed by a trustee, if required, are a part of the trust administration process. The costs, including attorney's fees, of the person assuming the burden of proof of propriety of the employment and reasonableness of the compensation shall be determined by the court and paid from the assets of the trust unless the court finds the compensation paid or requested to be substantially unreasonable. The court shall direct from which part of the trust assets the compensation shall be paid.
- (5) The court may determine reasonable compensation for a trustee or any person employed by a trustee without receiving expert testimony. Any party may offer expert testimony after notice to interested persons. If expert testimony is offered, a reasonable expert witness fee shall be awarded by the court and paid from the assets of the trust. The court shall direct from which part of the trust assets the fee shall be paid.
- (6) Persons given notice as provided in this section shall be bound by all orders entered on the petition.
- (7) In a proceeding pursuant to subsection (2), the petitioner may serve formal notice as provided in the Florida Probate Rules, and such notice shall be sufficient for the court to acquire jurisdiction over the person receiving it to the extent of the person's interest in the trust.<sup>60</sup>

**736.207 Trust contests.**—An action to contest the validity of all or part of a trust may not be commenced until the trust becomes irrevocable, except that this section does not prohibit such action by the guardian of the property of an incapacitated settlor.

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<sup>60</sup> Source F.S. § 737.204.

**PART III**  
**REPRESENTATION**

736.301	Representation; basic effect	22
736.302	Representation by holder of power of appointment	23
736.303	Representation by fiduciaries and parents	23
736.304	Representation by person having substantially identical interest	24
736.305	Appointment of representative	24
736.306	Designated representative	24

**736.301 Representation; basic effect.—**

- (1) Notice, information, accountings, or reports given to a person who may represent and bind another person under this part may serve as a substitute for and have the same effect as notice, information, accountings, or reports given directly to the other person.<sup>61</sup>
- (2) Actions taken by a person who represents the interests of another person under this part are binding on the person whose interests are represented to the same extent as if the actions had been taken by the person whose interests are represented.<sup>62</sup>
- (3) Except as otherwise provided in s. 736.602, a person under this part who represents a settlor lacking capacity may receive notice and give a binding consent on the settlor's behalf.<sup>63</sup>
- (4) A trustee is not liable for giving notice, information, accountings, or reports to a beneficiary who is represented by another person under this part and nothing in this part

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<sup>61</sup> Source: UTC § 301(a) with “information, accountings or reports” added for clarification.

<sup>62</sup> Source: UTC § 301(b) with substantial rewording and with elimination of exception language relating to the termination of representation upon the objection of the person being represented.

Note: UTC comments indicate that the exception may be constitutionally required. It would seem, however, that that might not be the case when the representative is designated in the instrument by the settlor. In any case, the Committee takes no position on the question whether representation can or cannot proceed over the objection of the person being represented.

<sup>63</sup> Source: UTC § 301(c) slightly modified to reflect differences in trust modification provisions.

Note: UTC § 301(d) provides that a settlor may not represent beneficiaries in proceedings under § 412 to nonjudicially modify a trust. This restriction was not included in F.S. § 736.301 because nonjudicial modification under s. 736.412 cannot occur until after the settlor's death.

prohibits the trustee from giving notice, information, accountings or reports to the person represented.<sup>64</sup>

**736.302 Representation by holder of power of appointment.—**

- (1) The holder of a power of appointment may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.
- (2) Subsection (1) does not apply to
  - (a) Any matter determined by the court to involve fraud or bad faith by the trustee;
  - (b) A power of a trustee to distribute trust property; or
  - (c) A power of appointment held by a person while the person is the sole trustee.<sup>65</sup>

**736.303 Representation by fiduciaries and parents.—** To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

- (1) A guardian of the property may represent and bind the estate that the guardian of the property controls;
- (2) An agent having authority to act with respect to the particular question or dispute may represent and bind the principal;
- (3) A trustee may represent and bind the beneficiaries of the trust;
- (4) A personal representative of a decedent's estate may represent and bind persons interested in the estate; and
- (5) A parent may represent and bind the parent's unborn child, or the parent's minor child if a guardian of the property for the minor child has not been appointed.<sup>66</sup>

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<sup>64</sup> Source: New.

<sup>65</sup> Source: UTC § 302 with revisions.

Revisions:

- Representation extended to special as well as general powers.
- Requirement that representation is permitted only when there is no conflict of interest is eliminated.
- Limitations dealing with trustees distribution powers and matters involving fraud or bad faith added.

Note: Accord in all respects, F.S. § 731.303(1)(A).

**736.304 Representation by person having substantially identical interest.**— Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.<sup>67</sup>

**736.305 Appointment of representative.**—

- (1) If the court determines that an interest is not represented under this part, or that the otherwise available representation might be inadequate, the court may appoint a representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown. If not precluded by a conflict of interest, a representative may be appointed to represent several persons or interests.
- (2) A representative may act on behalf of the individual represented with respect to any matter arising under this code, whether or not a judicial proceeding concerning the trust is pending.
- (3) In making decisions, a representative may consider general benefits accruing to the living members of the represented individual's family.<sup>68</sup>

**736.306 Designated representative.**—

- (1) If authorized in the trust instrument one or more persons may be designated to represent and bind a beneficiary, and to receive any notice, information, accounting, or report.

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<sup>66</sup> Source: UTC § 303 with revisions.

Revisions:

- UTC § 303(b) which permits a guardian of the person to represent a ward in the absence of a guardian of the property was deleted to conform this section to F.S. § 731.303(2).
- Wording of renumbered subsection (5) modified to preclude representation of minor children by parents and to preclude representation by guardian of the person when no guardian of the property has been appointed.

<sup>67</sup> Source: UTC § 304.

<sup>68</sup> Source: UTC § 305 with addition of “if not precluded by a conflict of interest” in final sentence of subsection (1).



- (2) Except as otherwise provided in this code, a person so designated cannot represent and bind a beneficiary while that person is serving as trustee.
- (3) Except as otherwise provided in this code, a person so designated cannot represent and bind another beneficiary if the person designated also is a beneficiary, unless:
  - (a) That person was named by the settlor; or
  - (b) That person is the beneficiary's spouse or a grandparent or descendant of a grandparent of either the beneficiary or the beneficiary's spouse.
- (4) No person so designated will be liable to the beneficiary whose interests are represented (or to anyone claiming through that beneficiary) for any actions or omissions to act made in good faith.<sup>69</sup>

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<sup>69</sup> Source: New.

**Mandatory:** *This is a mandatory provision. F.S. § 736.105(2)(h).*

**Note:** The requirement that the person be "named" by the settlor is to be distinguished from the situation when the person is named by others in accordance with a process the settlor detailed in the instrument (e.g., by a committee).

**PART IV**  
**CREATION, VALIDITY, MODIFICATION,**  
**AND TERMINATION OF TRUST**

736.401	Methods of creating trust	26
736.402	Requirements for creation	27
736.403	Trusts created in other jurisdictions; formalities required for revocable trusts	27
736.404	Trust purposes	28
736.405	Charitable purposes; enforcement	29
736.406	Effect of fraud, duress, mistake and undue influence	29
736.407	Evidence of oral trust	29
736.408	Trust for care of animal	29
736.409	Noncharitable trust without ascertainable beneficiary	30
736.410	Modification or termination of trust; proceedings for disapproval of nonjudicial acts	31
736.4113	Judicial modification of irrevocable trust when modification is not inconsistent with settlor's purpose	31
736.4115	Judicial modification of irrevocable trust when modification is in best interest of beneficiaries	32
736.412	Nonjudicial modification of irrevocable trust	34
736.413	Cy pres	35
736.414	Modification or termination of uneconomic trust	35
736.415	Reformation to correct mistakes	36
736.416	Modification to achieve settlor's tax objectives	36
736.417	Combination and division of trusts	37

**736.401 Methods of creating trust.**—A trust may be created by:

- (1) Transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect on the settlor's death;
- (2) Declaration by the owner of property that the owner holds identifiable property as trustee; or
- (3) Exercise of a power of appointment in favor of a trustee.<sup>70</sup>

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<sup>70</sup> Source: UTC § 401.

**736.402 Requirements for creation.—**

- (1) A trust is created only if:
  - (a) The settlor has capacity to create a trust;
  - (b) The settlor indicates an intent to create the trust;
  - (c) The trust has a definite beneficiary or is:
    1. A charitable trust;
    2. A trust for the care of an animal, as provided in s. 736.408; or
    3. A trust for a noncharitable purpose, as provided in s. 736.409;
  - (d) The trustee has duties to perform; and
  - (e) The same person is not the sole trustee and sole beneficiary.
- (2) A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.
- (3) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.<sup>71</sup>

**736.403 Trusts created in other jurisdictions; formalities required for revocable trusts.—**

- (1) A trust not created by will is validly created if its creation complies with either the law of the jurisdiction in which the trust instrument was executed or the law of the jurisdiction in which, at the time of creation, the settlor was domiciled.<sup>72</sup>
- (2) Notwithstanding subsection (1):
  - (a) No trust or confidence of or in any messuages, lands, tenements, or hereditaments shall arise or result unless the trust complies with the provisions of s. 689.05.

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<sup>71</sup> Source: UTC § 402.

**Mandatory:** *This is a mandatory provision. F.S. § 736.105(2)(a).*

<sup>72</sup> Source: UTC § 403 revised to restrict scope to place of execution or domicile of trustee.

- (b) The testamentary aspects of a revocable trust, executed by a settlor who is a domiciliary of this state at the time of execution, are invalid unless the trust instrument is executed by the settlor with the formalities required for the execution of a will in this state. For purposes of this subsection, "testamentary aspects" means those provisions of the trust instrument that dispose of the trust property on or after the death of the settlor other than to the settlor's estate.<sup>73</sup>
- (3) This section does not apply to trusts established as part of an employee annuity described in s. 403 of the Internal Revenue Code of 1986, as amended, an Individual Retirement Account as described in s. 408 of the Internal Revenue Code of 1986, as amended, a Keogh (HR-10) Plan, or a retirement or other plan that is qualified under s. 401 of the Internal Revenue Code of 1986, as amended.<sup>74</sup>
- (4) This section applies to trusts created on or after the effective date of this code. Section 737.111, as in effect prior to the effective date of this code, continues to apply to trusts created before the effective date of this code.<sup>75</sup>

**736.404 Trust purposes.**—A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries.<sup>76</sup>

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<sup>73</sup> Source: F.S. §§ 689.05 and 737.111(1), (2) and (4) with significant revisions.

**Mandatory:** *This is a mandatory provision. F.S. § 736.105(2)(i).*

Revisions:

- Subsection (1) added to conform section to requirements for a trust containing real property in F.S. § 689.05.
- Subsection (2) restricted to revocable trusts...
- Executed by settlors who were Florida domiciliaries at the time of execution...
- Without regard to the place of execution.

Notes: The effect of these changes will be to validate some trusts executed under the supervision of non-Florida attorneys for their Florida clients. Unlike F.S. § 737.111(3), this provision makes no specific reference to trust amendments as the term trust instrument is defined to include trust amendments in F.S. § 736.103(20).

<sup>74</sup> Source: F.S. § 737.111(5).

<sup>75</sup> Source: F.S. § 737.111(6), as amended.

<sup>76</sup> Source: UTC § 404.

**Mandatory:** *This is a mandatory provision. F.S. § 736.105(2)(c).*

**736.405 Charitable purposes; enforcement.—**

- (1) A trust may be created for charitable purposes. 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.
- (2) If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries. The selection must be consistent with the settlor's intent to the extent it can be ascertained.
- (3) The settlor of a charitable trust, among others, has standing to enforce the trust.<sup>77</sup>

**736.406 Effect of fraud, duress, mistake, and undue influence.—**A trust is void if its creation is procured by fraud, duress, mistake, or undue influence. Any part of the trust is void if so procured, but the remainder of the trust not so procured is valid if it is not invalid for other reasons.<sup>78</sup>

**736.407 Evidence of oral trust.—**Except as required by s. 736.403 or a statute other than this code, a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.<sup>79</sup>

**736.408 Trust for care of animal.—**

- (1) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates on the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, on the death of the last surviving animal.
- (2) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person

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<sup>77</sup> Source: UTC § 405 with slight rewording of subsection (1) and “arts, sciences” added to list of permissible charitable purposes.

<sup>78</sup> Source F.S. § 737.206 with “creation” substituted for “execution” in the first sentence.

Note: UTC § 406 was replaced with this version.

<sup>79</sup> Source: UTC § 407 with addition of references to §§ 736.402 and 736.403.

having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

- (3) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise as part of the settlor's estate.<sup>80</sup>

**736.409 Noncharitable trust without ascertainable beneficiary.**—Except as otherwise provided in s. 736.408 or by another statute, the following rules apply:

- (1) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than 21 years.
- (2) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.
- (3) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise as part of the settlor's estate.<sup>81</sup>

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<sup>80</sup> Source: UTC § 408, with “otherwise to settlor's successors in interest” in the last sentence of subsection (3) changed to “otherwise to the settlor's estate.”

Note: The effect of this change is to add the trust property to the settlor's estate which could occur long after the settlor's death. The UTC version avoids this result.

<sup>81</sup> Source: UTC § 409, with “otherwise to settlor's successors in interest” in the last sentence of subsection (3) changed to “otherwise to the settlor's estate.”

Note: The effect of this change is to add the trust property to the settlor's estate which could occur long after the settlor's death. The UTC version avoids this result.

**736.410 Modification or termination of trust; proceedings for disapproval of nonjudicial acts.—<sup>82</sup>**

- (1) In addition to the methods of termination prescribed by ss. 736.4113 through 736.414, a trust terminates to the extent the trust expires or is revoked or is properly distributed pursuant to its terms.
- (2) A proceeding to disapprove a proposed modification or termination under s. 736.412 or a trust combination or division under s. 736.417 may be commenced by any beneficiary.
- (3) A proceeding to disapprove a proposed termination under s. 736.414(1) may be commenced by any qualified beneficiary.<sup>83</sup>

**736.4113 Judicial modification of irrevocable trust when modification is not inconsistent with settlor's purpose.—**

- (1) Upon the application of a trustee of the trust or any qualified beneficiary, a court at any time may modify the terms of a trust that is not then revocable in the manner provided in subsection(2), if:
  - (a) The purposes of the trust have been fulfilled or have become illegal, impossible, wasteful, or impracticable to fulfill;
  - (b) Because of circumstances not anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of a material purpose of the trust; or
  - (c) A material purpose of the trust no longer exists.
- (2) In modifying a trust under this section, a court may:
  - (a) Amend or change the terms of the trust, including terms governing distribution of the trust income or principal, or terms governing administration of the trust;

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<sup>82</sup> Note: The Committee notes that the representation provisions of part III apply to trust terminations and modifications (whether judicial or nonjudicial) under §§ 736.410 through 736.417.

<sup>83</sup> Source: UTC § 410 with substantial revisions to title, scope and purpose.

**Mandatory:** *This is a mandatory provision. F.S. § 736.105(2)(j).*

Note: Although this section bears a resemblance to UTC § 410, the purpose of this provision and hence its title are different. UTC § 410 relates to proceedings to approve or disapprove trusts modifications, terminations, combinations or divisions. The Florida Trust Code version is restricted to proceedings to disapprove certain nonjudicial actions.

- (b) Terminate the trust in whole or in part;
  - (c) Direct or permit the trustee to do acts that are not authorized or that are prohibited by the terms of the trust; or
  - (d) Prohibit the trustee from performing acts that are permitted or required by the terms of the trust.
- (3) In exercising its discretion to modify a trust under this section:
- (a) The court shall consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and extrinsic evidence relevant to the proposed modification.
  - (b) The court shall consider spendthrift provisions as a factor in making its decision, but the court is not precluded from modifying a trust because the trust contains spendthrift provisions.
- (4) The provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.<sup>84</sup>

**736.4115 Judicial modification of irrevocable trust when modification is in best interest of beneficiaries.—**

- (1) Without regard to the reasons for modification provided in s. 736.4113, if compliance with the terms of a trust is not in the best interest of the beneficiaries, on the application of a trustee or any qualified beneficiary, a court may at any time modify a trust that is not then revocable as provided in s. 736.4113(2).
- (2) In exercising its discretion to modify a trust under this section:
  - (a) The court shall exercise its discretion in a manner that conforms to the extent possible with the intent of the

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<sup>84</sup> Source: F.S. § 737.4031(1) with restructuring and simplification.

**Mandatory:** *This is a mandatory provision. F.S. § 736.105(2)(j).*

**Revisions:** The more significant modifications from prior law include:

- The separate definition of beneficiary that appears in F.S. § 737.4031(6)(a) was removed and references to beneficiary in the section have been changed to “qualified beneficiaries”. In some cases, the former definition may be somewhat narrower than qualified beneficiaries now used in the provision.
- The word “terminate” was added to subsection (4).



settlor, taking into account the current circumstances and best interests of the beneficiaries.

- (b) The court shall consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and extrinsic evidence relevant to the proposed modification.
  - (c) The court shall consider spendthrift provisions as a factor in making its decision, but the court is not precluded from modifying a trust because the trust contains spendthrift provisions.
- (3) This section shall not apply to:
- (a) A trust created prior to January 1, 2001.
  - (b) A trust created after December 31, 2000, if:
    1. Under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rule against perpetuities in s. 689.225(2), notwithstanding s. 689.225(2)(f); and
    2. The terms of the trust expressly prohibit judicial modification.
- (4) For purposes of subsection (3), a revocable trust shall be treated as created when the right of revocation terminates.
- (5) The provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.<sup>85</sup>

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**Note:** This section replaces UTC § 411 in its entirety. It is a restructured and simplified version of the portion of F.S. § 737.4031(1) which permits modifications, terminations, etc., when the action is not inconsistent with the settlor's intent. This section requires judicial action which can be initiated only upon the application of a trustee or a qualified beneficiary (i.e., a settlor and beneficiaries other than a qualified beneficiaries lack standing).

<sup>85</sup> Source: F.S. § 737.4031(2).

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(j).*

**Revisions:** The more significant modifications from prior law include:

- The separate definition of beneficiary that appears in F.S. § 737.4031(6)(a) was removed and references to beneficiary in the section have been changed to "qualified beneficiaries". In some cases, the former definition may be somewhat narrower than qualified beneficiaries now used in the provision.
- The word "terminate" was added to subsection (5).

**736.412 Nonjudicial modification of irrevocable trust.—**

- (1) After the settlor's death, a trust may be modified at any time as provided in s. 736.4113(2) on the unanimous agreement of the trustee and all qualified beneficiaries.
- (2) Modification of a trust as authorized in this section is not prohibited by a spendthrift clause, or by a provision in the trust instrument that prohibits amendment or revocation of the trust.
- (3) An agreement to modify a trust under this section is binding on a beneficiary whose interest is represented by another person under part III of this code.
- (4) This section shall not apply to:
  - (a) A trust created prior to January 1, 2001.
  - (b) A trust created after December 31, 2000, if, under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rule against perpetuities in s. 689.225(2), notwithstanding s. 689.225(2)(f), unless the terms of the trust expressly authorize nonjudicial modification.
  - (c) Any trust for which a charitable deduction is allowed or allowable under the Internal Revenue Code until the termination of all charitable interests in the trust.
- (5) For purposes of subsection (4), a revocable trust shall be treated as created when the right of revocation terminates.
- (6) The provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.<sup>86</sup>

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Note: There is no corresponding section of the UTC. This section is a restructured and simplified version of the portion F.S. § 737.4031(2) which permits modifications, terminations, etc., when the action is in the best interest of the trust beneficiaries. This section requires judicial action which can be initiated only upon the application of a trustee or a qualified beneficiary (i.e., a settlor and beneficiaries other than a qualified beneficiaries lack standing).

<sup>86</sup> Source: F.S. § 737.4032 as modified and simplified.

**Mandatory:** *This is a mandatory provision. F.S. § 736.105(2)(k).*

**Revisions:** The more significant modifications from prior law include:

- Subsection (3) is included to support the ability, expressed more directly in F.S. § 736.410(2), of any beneficiary to seek court review of an agreement to terminate or modify a trust under this section, even though the beneficiary may not be a necessary signatory to the agreement.
- The separate definition of beneficiary that appears in F.S. § 737.4032(8)(a) was removed and references to beneficiary in the section have been changed to "qualified beneficiaries". In some cases, the former definition may be somewhat narrower than qualified beneficiaries now used in the provision.

### 736.413 Cy pres.—

- (1) If a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful, the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.
- (2) A proceeding to modify or terminate a trust under this section may be commenced by a settlor, a trustee, or any qualified beneficiary.<sup>87</sup>

### 736.414 Modification or termination of uneconomic trust.—

- (1) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than \$100,000 may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.<sup>88</sup>
- (2) Upon application of a trustee or any qualified beneficiary, the court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.<sup>89</sup>
- (3) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust. The trustee may enter into

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- The word “terminate” was added to subsection (5).
  - Addition of 736.413(2) providing that the settlor as well as trustee or qualified beneficiaries may commence a cy pres action.

Note: There is no corresponding section of the UTC for this section.

<sup>87</sup> Source: UTC § 413 with substantial revisions.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(j).*

Revisions:

- Elimination of UTC § 413(a)(1) and (2) the effect of which according to the comments is to create a presumption in favor of application of the cy pres doctrine.
- Elimination of UTC § 413(b) which places restrictions on the validity of gifts over to noncharitable beneficiaries after charitable purpose has become unlawful, impracticable, etc.

Notes: For the definition of charitable purpose, see F.S. § 736.405(1). This provision is limited to dispositions in trust.

<sup>88</sup> Source: UTC § 414(a).

<sup>89</sup> Source: UTC § 414(b) with addition of introductory clause to clarify that trustee and qualified beneficiaries may apply to a court for the remedies provided in the subsection.

agreements or make such other provisions that it deems necessary or appropriate to protect the interests of the beneficiaries and the trustee and to carry out the intent and purposes of the trust.<sup>90</sup>

- (4) The existence of a spendthrift provision in the trust does not make this section inapplicable unless the trust instrument expressly provides that the trustee may not terminate the trust pursuant to this section.<sup>91</sup>
- (5) This section does not apply to an easement for conservation or preservation.<sup>92</sup>

**736.415 Reformation to correct mistakes.**—Upon application of a settlor or any interested person, the court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intent if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intent even though it contradicts an apparent plain meaning of the trust instrument.<sup>93</sup>

**736.416 Modification to achieve settlor's tax objectives.**— Upon application of any interested person, to achieve the settlor's tax objectives the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intent. The court may provide that the modification has retroactive effect.<sup>94</sup>

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<sup>90</sup> Source: Second sentence of F.S. § 737.402(3).

<sup>91</sup> Source: Final sentence of F.S. § 737.402(3).

<sup>92</sup> Source: UTC § 414(d).

<sup>93</sup> Source: UTC § 415 with revisions.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(j).*

Revisions:

- Addition of initial clause to give standing to settlor or any interested person.
- Addition of words “accomplishment of the”.
- Addition of final sentence which appears in slightly different form in the UTC Comments.

<sup>94</sup> Source: UTC § 416 with addition of introductory clause to clarify standing.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(j).*

**736.417 Combination and division of trusts.—**

- (1) After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust.<sup>95</sup>
- (2) Subject to the terms of the trust, the trustee may take into consideration differences in federal tax attributes and other pertinent factors in administering the trust property of any separate account or trust, in making applicable tax elections, and in making distributions. A separate trust created by severance must be treated as a separate trust for all purposes from the date on which the severance is effective. The effective date of the severance may be retroactive to a date before the date on which the trustee exercises such power.<sup>96</sup>

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<sup>95</sup> Source: UTC § 417.

<sup>96</sup> Source: Final three sentences of F.S. § 737.402(bb).

**PART V**  
**CREDITORS' CLAIMS; SPENDTHRIFT AND**  
**DISCRETIONARY TRUSTS**

736.501	Rights of beneficiary's creditor or assignee	38
736.502	Spendthrift provision	38
736.503	Exceptions to spendthrift provision	39
736.504	Discretionary trusts; effect of standard	39
736.505	Creditors' claims against settlor	40
736.5053	Trustee's duty to pay expenses and obligations of settlor's estate	41
736.5055	Notice of trust	42
736.506	Overdue distribution	43
736.507	Personal obligations of trustee	43

**736.501 Rights of beneficiary's creditor or assignee.**—To the extent a beneficiary's interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or by other means. The court may limit the award to such relief as is appropriate under the circumstances.<sup>97</sup>

**736.502 Spendthrift provision.**—

- (1) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest. This subsection does not apply to any trust in existence on the effective date of this code.
- (2) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust," or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.
- (3) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this part, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

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<sup>97</sup> Source: UTC § 501.

- (4) A valid spendthrift provision does not prevent the appointment of interests through the exercise of a power of appointment.<sup>98</sup>

#### **736.503 Exceptions to spendthrift provision.—**

- (1) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another state.
- (2) A spendthrift provision is unenforceable against:
  - (a) A beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance;
  - (b) A judgment creditor who has provided services for the protection of a beneficiary's interest in the trust; and
  - (c) A claim of this state or the United States to the extent a statute of this state or federal law so provides.
- (3) A claimant against which a spendthrift provision cannot be enforced may obtain from a court or pursuant to the Uniform Interstate Family Support Act an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances.<sup>99</sup>

#### **736.504 Discretionary trusts; effect of standard.—**

- (1) Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:
  - (a) The discretion is expressed in the form of a standard of distribution; or
  - (b) The trustee has abused the discretion.

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<sup>98</sup> Source: UTC § 502 with subsection (4) added.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(l).*

<sup>99</sup> Source: UTC § 503.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(l).*

**Note:** Reference to the Uniform Interstate Family Support Act in subsection (3) is intended to insure that adoption of this subsection does not do damage to our current writ system. The exception for creditors who have provided services for the protection of a beneficiary's interest is not currently recognized in Florida. It could apply, for example, (but is not limited) to a claim for attorney's fees.

- (2) If the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee.
- (3) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.<sup>100</sup>

**736.505 Creditors' claims against settlor.—**

- (1) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:
  - (a) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.
  - (b) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.
- (2) For purposes of this section:
  - (a) During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and
  - (b) Upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in:
    - (i) Section 2041(b)(2) or s. 2514(e); or

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<sup>100</sup> Source: UTC § 504 with substantial revisions.

Revisions:

- UTC § 504(1) defining child was deleted.
- UTC § 504(3) providing exceptions for certain exception creditors was deleted.



(ii) Section 2503(b)

of the Internal Revenue Code of 1986, as amended.<sup>101</sup>

**736.5053 Trustee's duty to pay expenses and obligations of settlor's estate.—**

- (1) A trustee of a trust described in s. 733.707(3) shall pay to the personal representative of a settlor's estate any amounts that the personal representative certifies in writing to the trustee are required to pay the expenses of the administration and obligations of the settlor's estate. Payments made by a trustee, unless otherwise provided in the trust instrument, must be charged as expenses of the trust without a contribution from anyone. The interests of all beneficiaries of such a trust are subject to the provisions of this subsection; however, the payments must be made from assets or property or the proceeds thereof, other than assets proscribed in s. 733.707(3), that are included in the settlor's gross estate for federal estate tax purposes.
- (2) Unless a settlor provides by will, or designates in a trust described in s. 733.707(3) funds or property passing under the trust to be so used, the expenses of the administration and obligations of the settlor's estate must be paid from the trust in the following order:
  - (a) Property of the residue of the trust remaining after all distributions that are to be satisfied by reference to a specific property or type of property, fund, or sum.
  - (b) Property that is not to be distributed from specified or identified property or a specified or identified item of property.
  - (c) Property that is to be distributed from specified or identified property or a specified or identified item of property.
- (3) Trust distributions that are to be satisfied from specified or identified property must be classed as distributions to be

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<sup>101</sup> Source: UTC § 505.

Revisions:

- UTC § 505(c) was replaced by Florida's current provisions which include: F.S. §§. 733.607(2), 733.707(3), 737.3054 (see 736.5053), 737.3061 (added as 736.9103), 737.308 (added as 736.5055). In addition, F.S. § 737.3061 was revised and redesignated as F.S. § 736.9103.

Note: The Committee recognized that there is a need for Florida to consider the trend in favor of allowing self-settled trusts as asset protection vehicles. Nevertheless, the Committee agreed to proceed on the basis of existing Florida law with respect to creditors rights and self-settled trusts.

satisfied from the general assets of the trust and not otherwise disposed of in the trust instrument on the failure or insufficiency of funds or property from which payment should be made, to the extent of the insufficiency. Trust distributions given for valuable consideration abate with other distributions of the same class only to the extent of the excess over the value of the consideration until all others of the same class are exhausted. Except as provided in this section, trust distributions abate equally and ratably and without preference or priority between real and personal property. When a specified or identified item of property that has been designated for distribution in the trust instrument or that is charged with a distribution is sold or taken by the trustee, other beneficiaries shall contribute according to their respective interests to the beneficiary whose property has been sold or taken. Before distribution the trustee shall determine the amounts of the respective contributions, and they must be paid or withheld before distribution is made.

- (4) The trustee shall pay the expenses of trust administration, including compensation of trustees and their attorneys, before and in preference to the expenses of the administration and obligations of the settlor's estate.<sup>102</sup>

#### **736.5055 Notice of trust.—**

- (1) Upon the death of a settlor of a trust described in s. 733.707(3), the trustee must file a notice of trust with the court of the county of the settlor's domicile and the court having jurisdiction of the settlor's estate.
- (2) The notice of trust must contain the name of the settlor, the settlor's date of death, the title of the trust, if any, the date of the trust, and the name and address of the trustee.
- (3) If the settlor's probate proceeding has been commenced, the clerk must notify the trustee in writing of the date of the commencement of the probate proceeding and the file number.
- (4) The clerk shall file and index the notice of trust in the same manner as a caveat unless there exists a probate proceeding for the settlor's estate, in which case the notice of trust must be filed in the probate proceeding and the clerk shall send a copy to the personal representative.

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<sup>102</sup> Source: F.S. § 737.3054.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(m).*

- (5) The clerk shall send a copy of any caveat filed regarding the settlor to the trustee, and the notice of trust to any caveator, unless there is a probate proceeding pending and the personal representative and the trustee are the same.
- (6) Any proceeding affecting the expenses of the administration or obligations of the settlor's estate prior to the trustee filing a notice of trust are binding on the trustee.
- (7) The trustee's failure to file the notice of trust does not affect the trustee's obligation to pay expenses of administration and obligations of the settlor's estate as provided in s. 733.607(2).<sup>103</sup>

#### **736.506 Overdue distribution.—**

- (1) In this section, “mandatory distribution” means a distribution of income or principal that the trustee is required to make to a beneficiary under the terms of the trust, including a distribution on termination of the trust. The term does not include a distribution subject to the exercise of the trustee’s discretion even if (1) the discretion is expressed in the form of a standard of distribution, or (2) the terms of the trust authorizing a distribution couple language of discretion with language of direction.
- (2) Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution on termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.<sup>104</sup>

**736.507 Personal obligations of trustee.—**Except to the extent of the trustee's interest in the trust other than as a trustee, trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.<sup>105</sup>

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<sup>103</sup> Source: F.S. § 737.308.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(n).*

<sup>104</sup> Source: UTC § 506.

<sup>105</sup> Source: UTC § 507.

**PART VI**  
**REVOCABLE TRUSTS**

736.601 Capacity of settlor of revocable trust	44
736.602 Revocation or amendment of revocable trust	44
736.603 Settlor's powers; powers of withdrawal	45
736.604 Limitation on action contesting validity of revocable trust.	46

**736.601 Capacity of settlor of revocable trust.**—The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.<sup>106</sup>

**736.602 Revocation or amendment of revocable trust.**—

- (1) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to a trust created under an instrument executed before the effective date of this code.
- (2) If a revocable trust is created or funded by more than one settlor:
  - (a) To the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses;
  - (b) To the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution; and
  - (c) Upon the revocation or amendment of the trust by fewer than all of the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment.
- (3) Subject to s. 736.403(2), the settlor may revoke or amend a revocable trust:
  - (a) By substantial compliance with a method provided in the terms of the trust; or
  - (b) If the terms of the trust do not provide a method, by:

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<sup>106</sup> Source: UTC § 601.

1. A later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or
  2. Any other method manifesting clear and convincing evidence of the settlor's intent.
- (4) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.
- (5) A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only as authorized by s. 709.08.
- (6) A guardian of the property of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only as provided in s. 744.441.
- (7) A trustee who does not know that a trust has been revoked or amended is not liable for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.<sup>107</sup>

### **736.603 Settlor's powers; powers of withdrawal.—**

- (1) While a trust is revocable, the duties of the trustee are owed exclusively to the settlor.
- (2) During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.<sup>108</sup>

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<sup>107</sup> Source: UTC § 602 with revisions.

Revisions:

- Subsection (5) revised to reflect cross-reference to F.S. § 709.08.
- Subsection (6) revised to reflect cross-reference to F.S. § 744.441.

Note: Subsection (1) providing that all trusts are revocable unless expressly made irrevocable in the instrument is a change in Florida law

<sup>108</sup> Source: UTC § 603 with revisions.

- Language in UTC § 603(a) referring to the rights of the beneficiaries eliminated.
- Restriction in UTC § 603(a) relating to settlor's capacity eliminated.

Notes: Elimination of the language in UTC § 603(a) referring to the rights of the beneficiaries reflects current Florida law that beneficiaries of a revocable trust have no rights while the settlor is alive. Language relating to the settlor's capacity was eliminated because it might permit the beneficiaries of a revocable trust to obtain a copy of the trust instrument if the settlor lost capacity.

**736.604 Limitation on action contesting validity of revocable trust.**—An action to contest the validity of a trust that was revocable at the settlor's death is barred if not commenced within the earlier of:

- (1) The time as provided in chapter 95; or
- (2) Six months after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.<sup>109</sup>

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<sup>109</sup> Source: F.S. § 737.208 and UTC § 604.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(d).*

Revisions:

- Text of UTC § 604 replaced with text of F.S. § 737.208
- UTC § 604(c), covering the liability of beneficiaries to return improper distributions was replaced with F.S. § 736.914 (based on 737.209) and was moved to Part X.

**PART VII**  
**OFFICE OF TRUSTEE**

736.701	Accepting or declining trusteeship	47
736.702	Trustee's bond	48
736.703	Cotrustees	48
736.704	Vacancy in trusteeship; appointment of successor	49
736.705	Resignation of trustee	50
736.706	Removal of trustee	51
736.707	Delivery of property by former trustee	51
736.708	Compensation of trustee	52
736.709	Reimbursement of expenses	52

**736.701 Accepting or declining trusteeship.—**

- (1) Except as otherwise provided in subsection (3), a person designated as trustee accepts the trusteeship:
  - (a) By substantially complying with a method of acceptance provided in the terms of the trust; or
  - (b) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.
- (2) A person designated as trustee who has not yet accepted the trusteeship may decline the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable time after knowing of the designation is deemed to have declined the trusteeship.<sup>110</sup>
- (3) A person designated as trustee may, without accepting the trusteeship:
  - (a) Act to preserve the trust property if, within a reasonable time after acting, the person sends a declination of the trusteeship to a qualified beneficiary; and

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<sup>110</sup> **Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(o).*

- (b) Inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.<sup>111</sup>

#### **736.702 Trustee's bond.—**

- (1) A trustee shall give bond to secure performance of the trustee's duties only if the court finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust and the court has not dispensed with the requirement.
- (2) The court may specify the amount of a bond, its liabilities, and whether sureties are necessary. The court may modify or terminate a bond at any time.<sup>112</sup>

#### **736.703 Cotrustees.—**

- (1) Cotrustees who are unable to reach a unanimous decision may act by majority decision.
- (2) If a vacancy occurs in a cotrusteeship, the remaining cotrustees or a majority of the remaining cotrustees may act for the trust.
- (3) A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.
- (4) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

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<sup>111</sup> Source: UTC § 701 with “rejected” and “rejection” in subsection (2) and (3) changed to “declined” and “declination”, respectively.

<sup>112</sup> Source: UTC § 702.

Note: The Committee notes that the power a court has to modify or terminate a bond under this subsection includes the power to modify any required surety.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(p).*



- (5) A trustee may not delegate to a cotrustee the performance of a function the settlor reasonably expected the trustees to perform jointly. A trustee may revoke a delegation previously made.
- (6) Except as otherwise provided in subsection (7), a trustee who does not join in an action of another trustee is not liable for the action.
- (7) Each trustee shall exercise reasonable care to:
  - (a) Prevent a cotrustee from committing a breach of trust; and
  - (b) Compel a cotrustee to redress a breach of trust.
- (8) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notifies any cotrustee of the dissent at or before the time of the action is not liable for the action.<sup>113</sup>

**736.704 Vacancy in trusteeship; appointment of successor.—**

- (1) A vacancy in a trusteeship occurs if:
  - (a) A person designated as trustee declines the trusteeship;
  - (b) A person designated as trustee cannot be identified or does not exist;
  - (c) A trustee resigns;
  - (d) A trustee is disqualified or removed;
  - (e) A trustee dies; or
  - (f) A trustee is adjudicated to be incapacitated.
- (2) If one or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.

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<sup>113</sup> Source: UTC § 703 with revisions.

Revisions:

- Addition of “or a majority of the remaining cotrustees” in subsection (2)
- Removal of “Unless a delegation was irrevocable” in introductory clause to second sentence of subsection (5) reflecting Committee belief that no delegation should be irrevocable.
- Removal of word “serious” each place it appears in the subsection(7).

- (3) A vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:
  - (a) By a person named or designated pursuant to the terms of the trust to act as successor trustee.
  - (b) By a person appointed by unanimous agreement of the qualified beneficiaries.
  - (c) By a person appointed by the court.
- (4) A vacancy in a trusteeship of a charitable trust that is required to be filled must be filled in the following order of priority:
  - (a) By a person named or designated pursuant to the terms of the trust to act as successor trustee.
  - (b) By a person selected by unanimous agreement of the charitable organizations expressly designated to receive distributions under the terms of the trust.
  - (c) By a person appointed by the court.
- (5) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust.<sup>114</sup>

### **736.705 Resignation of trustee.—**

- (1) A trustee may resign:
  - (a) Upon at least 30 days' notice to the qualified beneficiaries, the settlor, if living, and all cotrustees; or
  - (b) With the approval of the court.<sup>115</sup>

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<sup>114</sup> Source: UTC § 704 with revisions.

Revisions:

- “rejects” changed to “declines in subsection (1)(a).
- Subsection (1)(f) of UTC rewritten.
- In subsections (3)(a) and (4)(a), “designated in” changed to “designated pursuant to” to accommodate situations when the person is designated pursuant to a process set out in the terms of the trust.
- Language referring to concurrence of attorney general removed from subsection (4)(b).

<sup>115</sup> **Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(o).*

- (2) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.
- (3) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation.<sup>116</sup>

**736.706 Removal of trustee.—**

- (1) The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.
- (2) The court may remove a trustee if:
  - (a) The trustee has committed a serious breach of trust;
  - (b) Lack of cooperation among cotrustees substantially impairs the administration of the trust;
  - (c) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
  - (d) There has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.
- (3) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under s. 736.9021(2) as may be necessary to protect the trust property or the interests of the beneficiaries.<sup>117</sup>

**736.707 Delivery of property by former trustee.—**

- (1) Unless a cotrustee remains in office or the court otherwise orders, and until the trust property is delivered to a

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<sup>116</sup> Source: UTC § 705.

<sup>117</sup> Source: UTC § 706.

successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.

- (2) A trustee who has resigned or been removed shall within a reasonable time deliver the trust property within the trustee's possession to the cotrustee, successor trustee, or other person entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes. The provisions of this subsection are in addition to and are not in derogation of the rights of a removed or resigning trustee under the common law.<sup>118</sup>

#### **736.708 Compensation of trustee.—**

- (1) If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances.
- (2) If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if:
  - (a) The duties of the trustee are substantially different from those contemplated when the trust was created; or
  - (b) The compensation specified by the terms of the trust would be unreasonably low or high.<sup>119</sup>
- (3) If the trustee has rendered other services in connection with the administration of the trust, then, in addition to reasonable compensation as trustee, there shall also be allowed reasonable compensation for the other services rendered.<sup>120</sup>

#### **736.709 Reimbursement of expenses.—**

- (1) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for reasonable expenses that were properly incurred in the administration of the trust.

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<sup>118</sup> Source: UTC § 707.

<sup>119</sup> **Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(q).*

<sup>120</sup> Source: UTC § 708 with addition of subsection (3) which is loosely derived from F.S. § 737.2035(2).

- (2) An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.<sup>121</sup>

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<sup>121</sup> Source: UTC § 709 with subsection (1) reworded for simplification.

**PART VIII**  
**DUTIES AND POWERS OF TRUSTEE**

736.801	Duty to administer trust	54
736.802	Duty of loyalty	55
736.803	Impartiality	57
736.804	Prudent administration	57
736.805	Expenses of administration	58
736.806	Trustee's skills	58
736.807	Delegation by trustee	58
736.808	Powers to direct	59
736.809	Control and protection of trust property	59
736.810	Recordkeeping and identification of trust property	59
736.8105	Duty to ascertain marketable title of trust real property	60
736.811	Enforcement and defense of claims	60
736.812	Collecting trust property	60
736.8125	Protection of successor trustees	60
736.813	Duty to inform and account	62
736.8135	Trust accountings	64
736.814	Discretionary powers; tax savings	65
736.8147	Duty to distribute trust income	66
736.815	General powers of trustee	67
736.816	Specific powers of trustee	67
736.8163	Powers of trustees relating to environmental or human health laws or to trust property contaminated with hazardous or toxic substances; liability.	72
736.8165	Administration pending outcome of contest or other proceeding	74
736.817	Distribution upon termination	75

**736.801 Duty to administer trust.**—Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this code.<sup>122</sup>

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<sup>122</sup> Source: UTC § 801.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(b).*

**736.802 Duty of loyalty.—**

- (1) As between a trustee and the beneficiaries, a trustee shall administer the trust solely in the interests of the beneficiaries.
- (2) Subject to the rights of persons dealing with or assisting the trustee as provided in s. 736.912, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:
  - (a) The transaction was authorized by the terms of the trust;
  - (b) The transaction was approved by the court;
  - (c) The beneficiary did not commence a judicial proceeding within the time allowed by s. 736.905;
  - (d) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with s. 736.909;
  - (e) The transaction involves a contract entered into or claim acquired by the trustee when that person had neither become nor contemplated becoming trustee; or
  - (f) the transaction was consented to in writing by a settlor of the trust while the trust was revocable.
- (3) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:
  - (a) The trustee's spouse;
  - (b) The trustee's descendants, siblings, parents, or their spouses;
  - (c) An officer, director, employee, agent, or attorney of the trustee; or
  - (d) A corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

- (4) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.
- (5) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with chapter 518. In addition to its compensation for acting as trustee, the trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust. If the trustee receives compensation from the investment company or investment trust for providing those services, the trustee must notify the qualified beneficiaries at least annually.
- (6) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.
- (7) This section does not preclude the following transactions, if fair to the beneficiaries:
  - (a) An agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;
  - (b) Payment of reasonable compensation to the trustee;
  - (c) A transaction between a trust and another trust, decedent's estate, or guardian of the property of which the trustee is a fiduciary or in which a beneficiary has an interest;
  - (d) A deposit of trust money in a regulated financial-service institution operated by the trustee; or
  - (e) An advance by the trustee of money for the protection of the trust.
- (8) This section does not preclude the employment of persons, including attorneys, accountants, investment advisers, or agents, even if they are the trustee, an affiliate of the trustee or otherwise associated with the trustee, to advise or assist the trustee in the exercise of any of the trustee's powers and to pay reasonable compensation and costs incurred in



connection with such employment from the assets of the trust; to act without independent investigation on their recommendations; and, instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary.

- (9) The court may appoint a special fiduciary to act with respect to any proposed transaction that might violate this section if entered into by the trustee.
- (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, 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.<sup>123</sup>

**736.803 Impartiality.**—If a trust has two or more beneficiaries, the trustee shall act impartially in administering the trust property, giving due regard to the beneficiaries' respective interests.<sup>124</sup>

**736.804 Prudent administration.**—A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.<sup>125</sup>

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<sup>123</sup> Source: UTC § 802 with revisions.

Revisions:

- Stylistic rewording of subsection (2)(e) to clarify meaning.
- “an officer, director, employee” added to subsection (3)(c).
- UTC § 802(d) was deleted. That subsection reads:
  - (d) A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.
- Addition of word “otherwise” in first sentence of subsection (5).
- Final sentence of subsection (5) reworded to simplify and clarify meaning.
- Subsection (8), (based on F.S. § 737.402(y) with “auditors” changed to “accountants” added.

<sup>124</sup> Source: UTC § 803.

<sup>125</sup> Source: UTC § 804.

**736.805 Expenses of administration.**—In administering a trust, the trustee shall only incur expenses that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.<sup>126</sup>

**736.806 Trustee's skills.**—A trustee who has special skills or expertise, or is named trustee in reliance on the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.<sup>127</sup>

**736.807 Delegation by trustee.**—

- (1) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:
  - (a) Selecting an agent;
  - (b) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
  - (c) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.
- (2) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.
- (3) A trustee who complies with subsection (1) is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.
- (4) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.<sup>128</sup>

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<sup>126</sup> Source: UTC § 805 with stylistic changes only.

<sup>127</sup> Source: UTC § 806.

<sup>128</sup> Source: UTC § 807.

**736.808 Powers to direct.—**

- (1) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.
- (2) If the terms of a trust confer on a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.
- (3) The terms of a trust may confer on a trustee or other person a power to direct the modification or termination of the trust.
- (4) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.<sup>129</sup>

**736.809 Control and protection of trust property.—**A trustee shall take reasonable steps to take control of and protect the trust property.<sup>130</sup>

**736.810 Recordkeeping and identification of trust property.—**

- (1) A trustee shall keep clear, distinct, and accurate records of the administration of the trust.
- (2) A trustee shall keep trust property separate from the trustee's own property.
- (3) Except as otherwise provided in subsection (4), a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

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<sup>129</sup> Source: UTC § 808.

<sup>130</sup> Source: UTC § 809.

- (4) If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.<sup>131</sup>

**736.8105 Duty to ascertain marketable title of trust real property.**—A trustee holding title to real property received from a settlor or estate shall not be required to obtain title insurance or proof of marketable title until a marketable title is required for a sale or conveyance of the real property.<sup>132</sup>

**736.811 Enforcement and defense of claims.**—A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.<sup>133</sup>

**736.812 Collecting trust property.**—A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and, except as provided in s. 736.8125, to redress a breach of trust known to the trustee to have been committed by a former trustee.<sup>134</sup>

**736.8125 Protection of successor trustees.**—A successor trustee is not personally liable for actions taken by any prior trustee; nor does any successor trustee have a duty to institute any proceeding against any prior trustee, or file any claim against any prior trustee's estate, for any of the prior trustee's actions as trustee under any of the following circumstances:

- (1) When the successor trustee succeeds a trustee who was also the settlor of a trust that was revocable during the time that the settlor served as trustee;
- (2) As to any beneficiary who has waived any accounting required by s. 736.813, but only as to the periods included in the waiver;

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<sup>131</sup> Source: UTC § 810 with “adequate” in subsection (1) replaced with “clear, distinct, and accurate”.

<sup>132</sup> Source: F.S. § 737.3055.

<sup>133</sup> Source: UTC § 811.

<sup>134</sup> Source: UTC § 812.

- (3) As to any beneficiary who has released the successor trustee from the duty to institute any proceeding or file any claim;
- (4) As to any person who is not a qualified beneficiary; or
- (5) As to any qualified beneficiary:
  - (a) If a super majority of the eligible beneficiaries have released the successor trustee;
  - (b) If the qualified beneficiary has not delivered a written request to the successor trustee to institute an action or file a claim against the prior trustee within 6 months after the date of the successor trustee's acceptance of the trust, if the successor trustee has notified the qualified beneficiary in writing of its acceptance in accordance with 736.813(1)(a) and that writing advises the beneficiary that, unless the beneficiary delivers the written request within 6 months after the date of acceptance, the right to proceed against the successor trustee will be barred pursuant to this section; or
  - (c) For any action or claim that the qualified beneficiary is barred from bringing against the prior trustee.
- (6) For the purposes of this section:
  - (a) Eligible beneficiaries means:
    - 1. If at the time the determination is made there is one or more beneficiaries described in s. 736.103(14)(c), the beneficiaries described in s. 736.103(14)(a) and (c); or
    - 2. If there is no beneficiary described in s. 736.103(14)(c), the beneficiaries described in s. 736.103(14)(a) and (b).
  - (b) A super majority of eligible beneficiaries means at least two-thirds in interest of the eligible beneficiaries if the interests of the eligible beneficiaries are reasonably ascertainable; otherwise, it means at least two-thirds in number of the eligible beneficiaries.
- (7) Nothing in this section affects any liability of the prior trustee or the right of the successor trustee or any beneficiary to pursue an action or claim against the prior trustee.<sup>135</sup>

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<sup>135</sup> Source: F.S. § 737.306(3) - (6) with revisions.

Revisions:

**736.813 Duty to inform and account.**—The trustee shall keep the qualified beneficiaries of the trust reasonably informed of the trust and its administration.<sup>136</sup>

- (1) The trustee's duty to inform and account includes, but is not limited to, the following:
  - (a) Within 60 days after acceptance of the trust, the trustee shall give notice to the qualified beneficiaries of the acceptance of the trust and the full name and address of the trustee.<sup>137</sup>
  - (b) Within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, the trustee shall give notice to the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to accountings under this section.<sup>138</sup>
  - (c) Upon reasonable request, the trustee shall provide a qualified beneficiary with a complete copy of the trust instrument.<sup>139</sup>

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- Use of “qualified beneficiaries” in subsection (5)(a).
  - Deletion from subsection (6) of the following language currently found in F.S. § 737.306(3)(f): “A release or waiver under this section may be exercised by a legal representative or natural guardian of the beneficiary without the filing of any proceeding or approval of any court.”

<sup>136</sup> Source: Introductory clause to F.S. § 737.303 with “beneficiaries” changed to “qualified beneficiaries”.

<sup>137</sup> Source: F.S. § 737.303(1) with revisions.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(r).*

Revisions:

- 30 day period increased to 60 days.
- “inform” changed to “give notice to”.
- “beneficiaries” changed to “qualified beneficiaries”.

<sup>138</sup> Source: UTC § 813(a)(2) with revisions.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(r).*

Revisions:

- “beneficiaries” changed to “qualified beneficiaries”.
- “notify” changed to “give notice to”
- “right to a trustee’s report ...” changed to “right to accountings under this section”.

<sup>139</sup> Source: F.S. § 737.303(2) with “beneficiaries” changed to “qualified beneficiaries”.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(s).*

- (d) A trustee of an irrevocable trust shall provide a trust accounting as set forth in s. 736.8135 to each qualified beneficiary annually and on termination of the trust or on change of the trustee.<sup>140</sup>
- (e) Upon reasonable request, the trustee shall provide a qualified beneficiary with relevant information about the assets and liabilities of the trust and the particulars relating to administration.<sup>141</sup>

Paragraphs (a) and (b) do not apply to an irrevocable trust created before the effective date of this code, or to a revocable trust that becomes irrevocable before the effective date of this code. Paragraph (a) does not apply to a trustee who accepts a trusteeship before the effective date of this code.<sup>142</sup>

- (2) A qualified beneficiary may waive the trustee's duty to account under subsection (1)(d). A qualified beneficiary may withdraw a waiver previously given. Waivers and withdrawals of prior waivers under this subsection must be in writing. Withdrawals of prior waivers are effective only with respect to accountings for future periods.<sup>143</sup>
- (3) The representation provisions of part III apply with respect to all rights of a qualified beneficiary under this section.<sup>144</sup>

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<sup>140</sup> Source: F.S. § 737.303(4)(a) with significant revision.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(s).*

**Revision:** F.S. § 737.303(4)(a) merely provides that beneficiaries have a right to an accounting annually etc. This subsection imposes a duty on the trustee to provide the accountings but only to "qualified beneficiaries".

<sup>141</sup> Source: F.S. § 737.303(3) with revisions.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(t).*

**Revisions:**

- "beneficiaries" changed to "qualified beneficiaries".
- "assets" changed to "assets and liabilities".

<sup>142</sup> Source: UTC § 813(e).

<sup>143</sup> Source: F.S. § 737.403(4)(d) with revisions.

**Revisions:**

- Second sentence relating to withdrawal of waivers added (Source UTC § 813(d)).
- "beneficiary" changed to "qualified beneficiary."

**Note:** The Committee discussed whether a waiver here also constitutes a waiver of an action against the trustee for matters that would have been disclosed on the waived accounting and whether and how any applicable statute of limitations would apply to such an action. Under 736.909, it would appear that only an informed waiver would work for these purposes.

<sup>144</sup> Source: F.S. § 737.303(4)(e) with revisions.

**Revisions:**

- Significant rewording to conform to Code and to simplify.
- "Beneficiary" changed to "qualified beneficiary."

- (4) As provided in s. 736.603(1), while a trust is revocable, the trustee's duties under this section extend only to the settlor.<sup>145</sup>
- (5) This section applies to trust accountings rendered for accounting periods beginning on or after January 1, 2008.<sup>146</sup>

**736.8135 Trust accountings.—**

- (1) A trust accounting must be a reasonably understandable report from the date of the last accounting or, if none, from the date on which the trustee became accountable, that adequately discloses the information required in subsection (2).
- (2)
  - (a) The accounting must begin with a statement identifying the trust, the trustee furnishing the accounting, and the time period covered by the accounting.
  - (b) The accounting must show all cash and property transactions and all significant transactions affecting administration during the accounting period, including compensation paid to the trustee and the trustee's agents. Gains and losses realized during the accounting period and all receipts and disbursements must be shown.
  - (c) The accounting must, to the extent feasible, identify and value trust assets on hand at the close of the accounting period. For each asset or class of assets reasonably capable of valuation, the accounting shall contain two values, the asset acquisition value or carrying value and the estimated current value. The accounting must identify each known noncontingent liability with an estimated current amount of the liability if known.
  - (d) To the extent feasible, the accounting must show significant transactions that do not affect the amount for which the trustee is accountable, including name

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Note: Although probably unnecessary, the Committee believes it is useful to confirm the applicability of the representation provisions in this context particularly since a similar provision is contained in F.S. § 737.303 and its absence here could falsely imply something unintended.

<sup>145</sup> Source: New.

Note: Although this subsection is redundant, the Committee believes it is useful to have the concept stated at this location as well as in F.S. § 736.603(1).

<sup>146</sup> Source: F.S. § 737.303(5).



changes in investment holdings, adjustments to carrying value, a change of custodial institutions, and stock splits.

- (e) The accounting must reflect the allocation of receipts, disbursements, accruals, or allowances between income and principal when the allocation affects the interest of any beneficiary of the trust.
  - (f) The trustee shall include in the final accounting a plan of distribution for any undistributed assets shown on the final accounting.
- (3) This section applies to all trust accountings rendered for any accounting periods beginning on or after January 1, 2003.<sup>147</sup>

**736.814 Discretionary powers; tax savings.—**

- (1) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute," "sole," or "uncontrolled," the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.<sup>148</sup> A court shall not determine that a trustee abused its discretion merely because the court would have exercised the discretion in a different manner or would not have exercised the discretion.<sup>149</sup>
- (2) Subject to subsection (3), and unless the terms of the trust expressly indicate that a rule in this subsection does not apply, a person who is a beneficiary and a trustee of a trust may not:
  - (a) Make discretionary distributions of either principal or income to or for the benefit of that trustee, other than distributions subject to an ascertainable standard;
  - (b) Make discretionary allocations of receipts or expenses as between principal and income, unless the trustee acts in a fiduciary capacity whereby the trustee has no power to enlarge or shift any beneficial interest except as an incidental consequence of the discharge of the trustee's fiduciary duties;

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<sup>147</sup> Source: F.S. § 737.3035 with paragraph (f) of subsection (2) added.

<sup>148</sup> Source: UTC § 814(a).

<sup>149</sup> Source: UTC § 1001.

- (c) Make discretionary distributions of either principal or income to satisfy any of the trustee's legal support obligations; or
  - (d) Exercise any other power, including the right to remove or to replace any trustee, so as to cause the powers enumerated in paragraph (a), paragraph (b), or paragraph (c) to be exercised on behalf of, or for the benefit of, a beneficiary who is also a trustee.<sup>150</sup>
- (3) Subsection (2) does not apply to:
- (a) A power held by the settlor of the trust;
  - (b) A power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in s. 2056(a) or s. 2523(a) of the Internal Revenue Code of 1986, as amended, was previously allowed;
  - (c) Any trust during any period that the trust may be revoked or amended by its settlor; or
  - (d) A trust if contributions to the trust qualify for the annual exclusion under s. 2503(c) of the Internal Revenue Code of 1986, as amended.<sup>151</sup>
- (4) A power whose exercise is limited or prohibited by subsection (2) may be exercised by the remaining trustees whose exercise of the power is not so limited or prohibited. If there is no trustee qualified to exercise the power, on petition by any qualified beneficiary, the court may appoint an independent trustee with authority to exercise the power.<sup>152</sup>
- (5) A person who has the right to remove or to replace a trustee does not possess nor may that person be deemed to possess, by virtue of having that right, the powers of the trustee that is subject to removal or to replacement.<sup>153</sup>

**736.8147 Duty to distribute trust income.**—If a will or trust instrument granting income to the settlor's or testator's spouse for life is silent as to the time of distribution of income and the frequency thereof, the trustee shall distribute all net income, as defined in chapter 738, to the spouse no less frequently than

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<sup>150</sup> Source: § 737.402(4)(a) with minor revisions.

<sup>151</sup> Source: UTC § 814(d) with addition of subsection (3)(a).

<sup>152</sup> Source: F.S. § 737.402(4)(c) with some rewording.

<sup>153</sup> Source: F.S. § 737.402(4)(e).

annually. This provision shall apply to any trust established before, on, or after the effective date hereof unless the trust instrument expressly directs or permits net income to be distributed less frequently than annually.<sup>154</sup>

**736.815 General powers of trustee.—**

- (1) A trustee, without authorization by the court, may, except as limited or restricted by this code, exercise:
  - (a) Powers conferred by the terms of the trust; and
  - (b) Except as limited by the terms of the trust:
    1. All powers over the trust property that an unmarried competent owner has over individually owned property;
    2. Any other powers appropriate to achieve the proper investment, management, and distribution of the trust property; and
    3. Any other powers conferred by this code.
- (2) The exercise of a power is subject to the fiduciary duties prescribed by this code.<sup>155</sup>

**736.816 Specific powers of trustee.—**Except as limited or restricted by this code, a trustee may:<sup>156</sup>

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<sup>154</sup> Source: F.S. § 737.3053 with "all net income to the income beneficiary, as defined in chapter 738, no less frequently . . ." changed to "all net income, as defined in chapter 738, to the spouse no less frequently . . .".

Note: The change is intended to restrict application of the section to the lifetime of the surviving spouse for marital deduction trusts that continue after the spouse dies.

<sup>155</sup> Source: UTC § 815 with "except as otherwise provided by this Code" added in subsection (1).

<sup>156</sup> Source: UTC§ 816 with significant revisions

Revisions:

- "Except as.. " added to introductory clause.
- UTC § 816(13) relating to liability for violations of environmental law was replaced with F.S. § 736.8163.
- UTC § 816(19) authorizing pledges of trust property to guarantee loans to beneficiaries was deleted because of the potential conflict it created with respect to a spendthrift clause.
- UTC § 816(20) relating to appointment and delegation to act in another jurisdiction was deleted because the Committee believed that the authorities enumerated in this subsection are already authorized (with greater safeguards) in F.S. § 736.807.
- UTC § 816(23) was deleted because the Committee believed the powers in this subsection are inherent in a trustee's power to defend the trust but that inclusion here could be problematic if the trustee could bind beneficiaries to arbitration over their objection.

- (1) Collect trust property and accept or reject additions to the trust property from a settlor, including an asset in which the trustee is personally interested, and to hold property in the name of a nominee or in other form without disclosure of the trust so that title to the property may pass by delivery, but the trustee is liable for any act of the nominee in connection with the property so held;<sup>157</sup>
- (2) Acquire or sell property, for cash or on credit, at public or private sale;<sup>158</sup>
- (3) Acquire an undivided interest in a trust asset, including, but not limited to, a money market mutual fund, mutual fund, or common trust fund, in which asset the trustee holds an undivided interest in any trust capacity, including any money market or other mutual fund from which the trustee or any affiliate or associate of the trustee is entitled to receive reasonable compensation for providing necessary services as an investment adviser, portfolio manager, or servicing agent. A trustee or affiliate or associate of the trustee may receive compensation for such services in addition to fees received for administering the trust, provided such compensation is fully disclosed in writing to all qualified beneficiaries;<sup>159</sup>
- (4) Exchange, partition, or otherwise change the character of trust property;<sup>160</sup>
- (5) Deposit trust money in an account in a regulated financial-service institution;<sup>161</sup>
- (6) Borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond

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Notes: In general, the source for each of the separate subsections in F.S. § 736.816 is found in either a corresponding subsection of UTC § 816 or in a subsection of F.S. § 737.402. Note, however, that:

- Current F.S. § 737.402(v) dealing with the power to allocate between income and principal was not included in the enumeration of powers in F.S. § 736.816 because it is covered in Chapter 738.
- The substance of F.S. § 737.403 dealing with trust mergers, consolidations and severances is covered in F.S. § 736.417.

<sup>157</sup> Source: UTC § 816(1) with "including ..." (derived from 737.402(2)(q)) added.

<sup>158</sup> Source: UTC § 816(2).

<sup>159</sup> Source: F.S. § 737.402(2)(e) with revisions.

Revisions:

- References to cotrustee eliminated because trustee includes cotrustee under the Code.
- "Current income beneficiaries" in final sentence replaced with "qualified beneficiaries."

<sup>160</sup> Source: UTC § 816(3).

<sup>161</sup> Source: UTC § 816(4).

the duration of the trust and advance money for the protection of the trust;<sup>162</sup>

- (7) With respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital;<sup>163</sup>
- (8) With respect to stocks or other securities, exercise the rights of an absolute owner, including the right to:
  - (a) Vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;
  - (b) Hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;
  - (c) Pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights; and
  - (d) Deposit the securities with a depository or other regulated financial-service institution;<sup>164</sup>
- (9) With respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries;<sup>165</sup>
- (10) Enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;<sup>166</sup>

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<sup>162</sup> Source: UTC § 816(5) with "and advance ..." (from 737.402(2)(s)) added.

<sup>163</sup> Source: UTC § 816(6).

<sup>164</sup> Source: UTC § 816(7).

<sup>165</sup> Source: UTC § 816(8).

<sup>166</sup> Source: UTC § 816(9).

- (11) Grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;<sup>167</sup>
- (12) Insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust;<sup>168</sup>
- (13) Abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;<sup>169</sup>
- (14) Pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;<sup>170</sup>
- (15) Pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust;<sup>171</sup>
- (16) Allocate items of income or expense to either trust income or principal, as provided by law;<sup>172</sup>
- (17) Exercise elections with respect to federal, state, and local taxes;<sup>173</sup>
- (18) Select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights thereunder, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;<sup>174</sup>
- (19) Make loans out of trust property, including loans to a beneficiary on terms and conditions that are fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;<sup>175</sup>

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<sup>167</sup> Source: UTC § 816(10).

<sup>168</sup> Source: UTC § 816(11).

<sup>169</sup> Source: UTC § 816(12).

<sup>170</sup> Source: UTC § 816(14).

<sup>171</sup> Source: UTC § 816(15).

<sup>172</sup> Source: F.S. § 737.402(2)(v).

<sup>173</sup> Source: UTC § 816(16).

<sup>174</sup> Source: UTC § 816(17).

<sup>175</sup> Source: UTC § 816(18) with "the trustee considers to be" changed to "that are".

- (20) Employ persons, including attorneys, accountants, investment advisers, or agents, even if they are the trustee, an affiliate of the trustee or otherwise associated with the trustee, to advise or assist the trustee in the exercise of any of the trustee's powers and pay reasonable compensation and costs incurred in connection with such employment from the assets of the trust and act without independent investigation on their recommendations;<sup>176</sup>
- (21) Pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:
  - (a) Paying it to the beneficiary's guardian of the property or, if the beneficiary does not have a guardian of the property, the beneficiary's guardian of the person;
  - (b) Paying it to the beneficiary's custodian under a Uniform Transfers to Minors Act or custodial trustee under a Uniform Custodial Trust Act, and, for that purpose, creating a custodianship or custodial trust;
  - (c) If the trustee does not know of a guardian of the property, guardian of the person, custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or
  - (d) Managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution;<sup>177</sup>
- (22) On distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;<sup>178</sup>
- (23) Prosecute or defend, including appeals, an action, claim, or judicial proceeding in any jurisdiction to protect trust property or the trustee in the performance of the trustee's duties;<sup>179</sup>

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<sup>176</sup> Source: F.S. § 737.402(2)(y) with final clause deleted as being redundant with § 736.807.

<sup>177</sup> Source: UTC § 816(21).

<sup>178</sup> Source: UTC § 816(22).

<sup>179</sup> Source: UTC § 816(24) with "to protect trust property and the trustee" changed to "to protect trust property or the trustee"

- (24) Sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers; and<sup>180</sup>
- (25) On termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.<sup>181</sup>

**736.8163 Powers of trustees relating to environmental or human health laws or to trust property contaminated with hazardous or toxic substances; liability.—**

- (1) From the creation of a trust until final distribution of the assets from the trust, the trustee has, without court authorization, the powers specified in subsection (2).
- (2) Unless otherwise provided in the trust instrument, a trustee has the power, acting reasonably to:
  - (a) Inspect or investigate, or cause to be inspected or investigated, property held by the trustee, including interests in sole proprietorships, partnerships, or corporations and any assets owned by any such business entity for the purpose of determining compliance with an environmental law affecting that property or to respond to an actual or threatened violation of an environmental law affecting that property;
  - (b) Take, on behalf of the trust, any action necessary to prevent, abate, or otherwise remedy an actual or potential violation of an environmental law affecting property held by the trustee, either before or after initiation of an enforcement action by a governmental body;
  - (c) Refuse to accept property in trust if the trustee determines that any property to be donated or conveyed to the trustee either is contaminated with a hazardous substance or is being used or has been used for an activity directly or indirectly involving a hazardous substance, which circumstance could result

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<sup>180</sup> Source: UTC § 816(25).

<sup>181</sup> Source: UTC § 816(26) with "subject to the right ..." (from UTC § 817) added.



in liability to the trust or trustee or otherwise impair the value of the assets to be held;

- (d) Settle or compromise at any time any claim against the trust or trustee that may be asserted by a governmental body or private party that involves the alleged violation of an environmental law affecting property of any trust over which the trustee has responsibility;
  - (e) Disclaim any power granted by any document, statute, or rule of law that, in the sole judgment of the trustee, may cause the trustee to incur personal liability, or the trust to incur liability, under any environmental law;
  - (f) Decline to serve as a trustee, or having undertaken to serve as a trustee, to resign at any time, if the trustee believes that there is or may be a conflict of interest in its fiduciary capacity and in its individual capacity because of potential claims or liabilities that may be asserted against it on behalf of the trust by reason of the type or condition of the assets held; or
  - (g) Charge against the income and principal of the trust the cost of any inspection, investigation, review, abatement, response, cleanup, or remedial action that this section authorizes the trustee to take; and, in the event of the closing or termination of the trust or the transfer of the trust property to another trustee, to hold assets sufficient to cover the cost of cleaning up any known environmental problem.
- (3) A trustee is not personally liable to any beneficiary or any other person for a decrease in value of assets in a trust by reason of the trustee's compliance or efforts to comply with an environmental law, specifically including any reporting requirement under that law.
- (4) A trustee that acquires ownership or control of a vessel or other property without having owned, operated, or materially participated in the management of that vessel or property before assuming ownership or control as trustee is not considered an owner or operator for purposes of liability under chapter 376, chapter 403, or any other environmental law. A trustee that willfully, knowingly, or recklessly causes or exacerbates a release or threatened release of a hazardous substance is personally liable for the cost of the response, to the extent that the release or threatened release is attributable to the trustee's activities. This subsection does not preclude the filing of claims against the assets that constitute the trust held by the trustee or the filing of actions against the trustee in its representative

capacity and in any such action, an award or judgment against the trustee must be satisfied only from the assets of the trust.

- (5) Neither the acceptance by the trustee of the property nor a failure by the trustee to inspect or investigate the property creates any inference as to whether there is liability under an environmental law with respect to that property.
- (6) For the purposes of this section, the term "hazardous substance" means a substance defined as hazardous or toxic, or any contaminant, pollutant, or constituent thereof, or otherwise regulated by an environmental law.
- (7) This section does not apply to any trust created under a document executed before July 1, 1995, unless the trust is amendable and the settlor amends the trust at any time to incorporate the provisions of this section.<sup>182</sup>

**736.8165 Administration pending outcome of contest or other proceeding.—**

- (1) Pending the outcome of a proceeding filed to determine the validity of all or part of a trust or the beneficiaries of all or part of a trust, the trustee shall proceed with the administration of the trust as if no proceeding had been commenced, except that no action may be taken and no distribution may be made to a beneficiary in contravention of the rights of those persons who may be affected by the outcome of the proceeding.
- (2) Upon motion of a party and after notice to interested persons, a court may, on good cause shown, make an exception to the prohibition under subsection (1) and authorize the trustee to act or to distribute trust assets to a beneficiary subject to any conditions the court, in its discretion, may impose, including the posting of bond by the beneficiary.<sup>183</sup>

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<sup>182</sup> Source: F.S. § 737.4025 with revisions.

Revisions:

- Section title modified.
- 737.4025(6) defining "environmental law" moved to F.S. § 736.103(5).

<sup>183</sup> Source: F.S. § 737.208 with revisions.

Revisions:

- "no distribution may be made" changed to "no action may be taken and no distribution may be made" in subsection (1).

**736.817 Distribution on termination.**—Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes. The provisions of this section are in addition to and are not in derogation of the rights of a trustee under the common law with respect to final distribution of a trust.<sup>184</sup>

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- “authorize the trustee to distribute” changed to “authorize the trustee to act or to distribute” in subsection (2).

<sup>184</sup> Source: UTC § 817 with revisions.

Revisions:

- UTC § 817(a) was deleted.
- UTC § 817(c) was deleted.
- UTC § 817(b) restructured.

Notes: The Committee felt that UTC § 817(c) merely duplicated F.S. § 736.909. Since subsection (a) was also deleted, this section consists only of UTC § 817(b). The final sentence is intended to insure that this section does not override the holdings of cases such as *First Union Nat'l Bank v. Jones*, 768 So.2d 1213 (Fla. 4<sup>th</sup> DCA 2000) and *Merrill Lynch Trust Co. v. Alzheimer's Lifeliners Ass'n, Inc.*, 832 So.2d 948 (Fla. 2d DCA 2002).

**PART IX**  
**TRUST INVESTMENTS**

736.901 Applicability of chapter 518

76

**736.901 Applicability of chapter 518.**—A trustee shall invest trust property in accordance with chapter 518.<sup>185</sup>

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<sup>185</sup> Source: New.

**PART X**  
**LIABILITY OF TRUSTEES AND RIGHTS**  
**OF PERSONS DEALING WITH TRUSTEE**

736.9021 Remedies for breach of trust	77
736.9022 Damages for breach of trust	78
736.903 Damages in absence of breach	79
736.904 Attorney's fees and costs	79
736.9043 Attorney's fees for services to the trust	79
736.9045 Costs in trust proceedings	80
736.9047 Trustee's attorney's fees	80
736.905 Limitations on proceeding against trustees after beneficiary receives trust disclosure documents	85
736.906 Reliance on trust instrument	87
736.907 Event affecting administration or distribution	88
736.908 Exculpation of trustee	88
736.909 Beneficiary's consent, release, or ratification	88
736.910 Limitation on personal liability of trustee	89
736.9103 Limitations on actions against certain trusts	89
736.911 Interest as general partner	90
736.912 Protection of person dealing with trustee	90
736.913 Certification of trust	91
736.914 Improper distribution or payment; liability of distributee	93

**736.9021 Remedies for breach of trust.—**

- (1) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.
- (2) To remedy a breach of trust that has occurred or may occur, the court may:
  - (a) Compel the trustee to perform the trustee's duties;
  - (b) Enjoin the trustee from committing a breach of trust;
  - (c) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
  - (d) Order a trustee to account;
  - (e) Appoint a special fiduciary to take possession of the trust property and administer the trust;
  - (f) Suspend the trustee;

- (g) Remove the trustee as provided in s. 736.706;
  - (h) Reduce or deny compensation to the trustee;
  - (i) Subject to s. 736.912, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
  - (j) Order any other appropriate relief.
- (3) As an illustration of the remedies available to the court, and without limiting the court's discretion as provided in subsection (2), if a breach of trust results in the favoring of any beneficiary to the detriment of any other beneficiary, or consists of an abuse of the trustee's discretion:
- (a) To the extent the breach of trust has resulted in no distribution to a beneficiary or a distribution that is too small, the court may require the trustee to pay from the trust to the beneficiary an amount the court determines will restore the beneficiary, in whole or in part, to his or her appropriate position.
  - (b) To the extent the breach of trust has resulted in a distribution to a beneficiary that is too large, the court may restore the beneficiaries, the trust, or both, in whole or in part, to their appropriate positions by requiring the trustee to withhold an amount from one or more future distributions to the beneficiary who received the distribution that was too large or by requiring that beneficiary to return some or all of the distribution to the trust.

**736.9022 Damages for breach of trust.—**

- (1) A trustee who commits a breach of trust is liable for the greater of:
  - (a) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred, including lost income, capital gain, or appreciation that would have resulted from proper administration; or
  - (b) The profit the trustee made by reason of the breach.
- (2) Except as otherwise provided in this subsection, if more than one person, (including a trustee or trustees) is liable to the beneficiaries for a breach of trust, each liable person is entitled to contribution from the other person or persons. A person is not entitled to contribution if the person committed

the breach of trust in bad faith. A person who received a benefit from the breach of trust is not entitled to contribution from another person to the extent of the benefit received.<sup>186</sup>

**736.903 Damages in absence of breach.**—Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.<sup>187</sup>

**736.904 Attorney's fees and costs.**—

- (1) In all actions:
  - (a) For breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers, and
  - (b) In proceedings arising under ss. 736.4113, 736.4115, or 736.412,

the court shall award taxable costs as in chancery actions, including attorney's and guardian ad litem's fees.

- (2) When awarding taxable costs, including attorney's and guardian ad litem's fees, under this section, the court, in its discretion, may direct payment from a party's interest, if any, in the trust or enter a judgment that may be satisfied from other property of the party, or both.<sup>188</sup>

**736.9043 Attorney's fees for services to the trust.**—

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<sup>186</sup> Source: UTC § 1002 with revisions.

Revisions:

- “liable to the beneficiaries affected” changed to “liable” in subsection (1).
- “including lost income ...” added to subsection (1)(a).
- Second sentence of subsection (2) changed from “A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the beach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries”.

<sup>187</sup> Source: UTC § 1003 with subsection (a) deleted.

Notes: UTC § 1003(a) held a trustee accountable for any profit made by the trustee even absent a breach.

<sup>188</sup> Source: F.S. § 737.627 with revisions.

Revisions:

- Subsection (1)(b) added.
- Subsection (3) deleted.

Note: Subsection (3) was redundant with section 736.956(a)(2).

- (1) Any attorney who has rendered services to a trust may be awarded reasonable compensation from the trust. The attorney may apply to the court for an order awarding attorney's fees, and, after notice and service on the trustee and all beneficiaries entitled to an accounting under s. 736.813, the court shall enter its order on the fee application.
- (2) Whenever attorney's fees are to be paid out of the trust, the court may, in its discretion, direct from what part of the trust they shall be paid.
- (3) Except when a trustee's interest may be adverse in a particular matter, the attorney shall give reasonable notice in writing to the trustee of the attorney's retention by an interested person and the attorney's entitlement to fees pursuant to this section. A court may reduce any fee award for services rendered by the attorney prior to the date of actual notice to the trustee, if the actual notice date is later than a date of reasonable notice. In exercising this discretion, the court may exclude compensation for services rendered after the reasonable notice date but prior to the date of actual notice.<sup>189</sup>

#### **736.9045 Costs in trust proceedings.—**

- (1) In all trust proceedings, costs may be awarded as in chancery actions.
- (2) Whenever costs are to be paid out of the trust, the court may, in its discretion, direct from what part of the trust they shall be paid.<sup>190</sup>

#### **736.9047 Trustee's attorney's fees.—**

- (1) If the trustee of a revocable trust retains an attorney to render legal services in connection with the initial administration of the trust, the attorney is entitled to reasonable compensation for those legal services, payable from the assets of the trust without court order. The trustee and the attorney may agree to compensation that is

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<sup>189</sup> Source: F.S. § 737.2035 with revisions.

Revisions:

- Subsection (1) moved to new F.S. § 736.9045.
- First word of subsection (2) changed from "When" to "Whenever".
- Former subsection (3) deleted as obsolete.

<sup>190</sup> Source: New. Split out of F.S. § 737.2035.



determined in a manner or amount other than the manner or amount provided in this section. The agreement is not binding on a person who bears the impact of the compensation unless that person is a party to or otherwise consents to be bound by the agreement. The agreement may provide that the trustee is not individually liable for the attorney's fees and costs.

- (2) Unless otherwise agreed, compensation based on the value of the trust assets immediately following the settlor's death and the income earned by the trust during initial administration at the rate of 75 percent of the schedule provided in s. 733.6171(3)(a)-(h) is presumed to be reasonable total compensation for ordinary services of all attorneys employed generally to advise trustees concerning their duties in initial trust administration.
- (3) An attorney who is retained to render only limited and specifically defined legal services shall be compensated as provided in the retaining agreement. If the amount or method of determining compensation is not provided in the agreement, the attorney is entitled to a reasonable fee, taking into account the factors set forth in subsection (6).
- (4) Ordinary services of the attorney in an initial trust administration include legal advice and representation concerning the trustee's duties relating to:
  - (a) Review of the trust instrument and each amendment for legal sufficiency and interpretation.
  - (b) Implementation of substitution of the successor trustee.
  - (c) Persons who must or should be served with required notices and the method and timing of such service.
  - (d) The obligation of a successor to require a former trustee to account.
  - (e) The trustee's duty to protect, insure, and manage trust assets and the trustee's liability relating to these duties.
  - (f) The trustee's duty regarding investments imposed by the prudent investor rule.
  - (g) The trustee's obligation to inform and account to beneficiaries and the method of satisfaction of these obligations; the liability of the trust and trustee to the settlor's creditors; and the advisability or necessity for probate proceedings to bar creditors.

- (h) Contributions due to the personal representative of the settlor's estate for payment of expenses of administration and obligations of the settlor's estate.
  - (i) Identifying tax returns required to be filed by the trustee, the trustee's liability for payment of taxes, and the due date of returns.
  - (j) Filing a nontaxable affidavit, if not done by a personal representative.
  - (k) Order of payment of expenses of administration of the trust and order and priority of abatement of trust distributions.
  - (l) Distribution of income or principal to beneficiaries or funding of further trusts provided in the governing instrument.
  - (m) Preparation of any legal documents required to effect distribution.
  - (n) Fiduciary duties, avoidance of self-dealing, conflicts of interest, duty of impartiality, and obligations to beneficiaries.
  - (o) If there is a conflict of interest between a trustee who is a beneficiary and other beneficiaries of the trust, advice to the trustee on limitations of certain authority of the trustee regarding discretionary distributions or exercise of certain powers and alternatives for appointment of an independent trustee and appropriate procedures.
  - (p) Procedures for the trustee's discharge from liability for administration of the trust on termination or resignation.
- (5) In addition to the attorney's fees for ordinary services, the attorney for the trustee shall be allowed further reasonable compensation for any extraordinary service. What is an extraordinary service may vary depending on many factors, including the size of the trust. Extraordinary services may include, but are not limited to:
- (a) Involvement in a trust contest, trust construction, a proceeding for determination of beneficiaries, a contested claim, elective share proceedings, apportionment of estate taxes, or other adversary proceedings or litigation by or against the trust.
  - (b) Representation of the trustee in audit or any proceeding for adjustment, determination, or collection of any taxes.

- (c) Tax advice on postmortem tax planning, including, but not limited to, disclaimer, renunciation of fiduciary commission, alternate valuation date, allocation of administrative expenses between tax returns, the QTIP or reverse QTIP election, allocation of GST exemption, qualification for Internal Revenue Code ss. 303 and 6166 privileges, deduction of last illness expenses, distribution planning, asset basis considerations, throwback rules, handling income or deductions in respect of a decedent, valuation discounts, special use and other valuation, handling employee benefit or retirement proceeds, prompt assessment request, or request for release from personal liability for payment of tax.
  - (d) Review of estate tax return and preparation or review of other tax returns required to be filed by the trustee.
  - (e) Preparation of decedent's federal estate tax return. If this return is prepared by the attorney, a fee of one-half of 1 percent up to a value of \$10 million and one-fourth of 1 percent on the value in excess of \$10 million, of the gross estate as finally determined for federal estate tax purposes, is presumed to be reasonable compensation for the attorney for this service. These fees shall include services for routine audit of the return, not beyond the examining agent level, if required.
  - (f) Purchase, sale, lease, or encumbrance of real property by the trustee or involvement in zoning, land use, environmental, or other similar matters.
  - (g) Legal advice regarding carrying on of decedent's business or conducting other commercial activity by the trustee.
  - (h) Legal advice regarding claims for damage to the environment or related procedures.
  - (i) Legal advice regarding homestead status of trust real property or proceedings involving the status.
  - (j) Involvement in fiduciary, employee, or attorney compensation disputes.
  - (k) Considerations of special valuation of trust assets, including discounts for blockage, minority interests, lack of marketability, and environmental liability.
- (6) Upon petition of any interested person in a proceeding to review the compensation paid or to be paid to the attorney for the trustee, the court may increase or decrease the

compensation for ordinary services of the attorney for the trustee or award compensation for extraordinary services if the facts and circumstances of the particular administration warrant. In determining reasonable compensation, the court shall consider all of the following factors giving such weight to each as it may determine to be appropriate:

- (a) The promptness, efficiency, and skill with which the initial administration was handled by the attorney.
  - (b) The responsibilities assumed by, and potential liabilities of, the attorney.
  - (c) The nature and value of the assets that are affected by the decedent's death.
  - (d) The benefits or detriments resulting to the trust or its beneficiaries from the attorney's services.
  - (e) The complexity or simplicity of the administration and the novelty of issues presented.
  - (f) The attorney's participation in tax planning for the estate, the trust, and the trust's beneficiaries and tax return preparation or review and approval.
  - (g) The nature of the trust assets, the expenses of administration, and the claims payable by the trust and the compensation paid to other professionals and fiduciaries.
  - (h) Any delay in payment of the compensation after the services were furnished.
  - (i) Any other relevant factors.
- (7) The court may determine reasonable attorney's compensation without receiving expert testimony. Any party may offer expert testimony after notice to interested persons. If expert testimony is offered, an expert witness fee may be awarded by the court and paid from the assets of the trust. The court shall direct from what part of the trust the fee is paid.
- (8) If a separate written agreement regarding compensation exists between the attorney and the settlor, the attorney shall furnish a copy to the trustee prior to commencement of employment and, if employed, shall promptly file and serve a copy on all interested persons. Neither a separate agreement nor a provision in the trust suggesting or directing the trustee to retain a specific attorney will obligate the trustee to employ the attorney or obligate the attorney to accept the representation, but if the attorney who is a party to the agreement or who drafted the trust is employed, the

compensation paid shall not exceed the compensation provided in the agreement.

- (9) Court proceedings to determine compensation, if required, are a part of the trust administration process, and the costs, including fees for the trustee's attorney, shall be determined by the court and paid from the assets of the trust unless the court finds the attorney's fees request to be substantially unreasonable. The court shall direct from what part of the trust they are paid.
- (10) "Initial trust administration" as used in this section means administration of a revocable trust during the period that begins with the death of the settlor and ends on the final distribution of trust assets outright or to continuing trusts created under the trust agreement, but if an estate tax return is required, not until after issuance of an estate tax closing letter or other evidence of termination of the estate tax proceeding. This initial period is not intended to include continued regular administration of the trust.<sup>191</sup>

#### **736.905 Limitations on proceedings against trustees.—**

- (1) Except as provided in subsection (2), all claims by a beneficiary against a trustee for breach of trust are barred as provided in chapter 95 as to:
  - (a) All matters adequately disclosed in a trust disclosure document issued by the trustee, with the limitations period beginning on the date of receipt of adequate disclosure; and
  - (b) All matters not adequately disclosed in a trust disclosure document if the trustee has issued its final trust accounting and has given written notice to the beneficiary of the availability of the trust records for examination and that any claims with respect to matters not adequately disclosed may be barred unless an action is commenced within the applicable limitations period provided in chapter 95. The limitations period begins on the date of receipt of the final trust accounting and notice.

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<sup>191</sup> Source: F.S. § 737.2041 with revisions.

Revisions:

- Minor revisions to subsections (1), (4)(g), (4)(k) and (5)(c).
- Subsection (11) deleted as obsolete.

- (2) Unless sooner barred by adjudication, consent, or limitations, a beneficiary is barred from bringing an action against a trustee for breach of trust with respect to a matter that was adequately disclosed in a trust disclosure document unless a proceeding to assert the claim is commenced within 6 months after receipt from the trustee of the trust disclosure document or a limitation notice that applies to that disclosure document, whichever is received later.
- (3) When a trustee has not issued its final trust accounting or has not given written notice to the beneficiary of the availability of the trust records for examination and that claims with respect to matters not adequately disclosed may be barred, a claim against the trustee for breach of trust based on a matter not adequately disclosed in a trust disclosure document accrues when the beneficiary has actual knowledge of the trustee's repudiation of the trust or adverse possession of trust assets, and is barred as provided in chapter 95.
- (4) As used in this section:
  - (a) The term "trust disclosure document" means a trust accounting or any other written report of the trustee. A trust disclosure document adequately discloses a matter if it provides sufficient information so that a beneficiary knows of a claim or reasonably should have inquired into the existence of a claim with respect to that matter.
  - (b) A "trust accounting" means an accounting that adequately discloses the information required by and that substantially complies with the standards set forth in s. 736.8135.
  - (c) The term "limitation notice" means a written statement of the trustee that an action by a beneficiary against the trustee for breach of trust based on any matter adequately disclosed in a trust disclosure document may be barred unless the action is commenced within 6 months after receipt of the trust disclosure document or receipt of a limitation notice that applies to that trust disclosure document, whichever is later. A limitation notice may, but is not required to be, in the following form: "An action for breach of trust based on matters disclosed in a trust accounting or other written report of the trustee may be subject to a 6-month statute of limitations from the receipt of the trust accounting or other written report. If you have questions, please consult your attorney."

- (5) For purposes of this section, a limitation notice applies to a trust disclosure document when the limitation notice is:
- (a) Contained as a part of the trust disclosure document or as a part of another trust disclosure document received within 1 year prior to the receipt of the latter trust disclosure document;
  - (b) Accompanied concurrently by the trust disclosure document or by another trust disclosure document that was received within 1 year prior to the receipt of the latter trust disclosure document;
  - (c) Delivered separately within 10 days of the delivery of the trust disclosure document or of another trust disclosure document that was received within 1 year prior to the receipt of the latter trust disclosure document. For purposes of this paragraph, a limitation notice is not delivered separately if it is accompanied by another written communication, other than a written communication that refers only to the limitation notice; or
  - (d) Received more than 10 days after the delivery of the trust disclosure document, but only if the limitation notice references that trust disclosure document and:
    - 1. Offers to provide to the beneficiary on request another copy of that trust disclosure document if it was received by the beneficiary within 1 year prior to receipt of the limitation notice; or
    - 2. Is accompanied by another copy of that trust disclosure document if the trust disclosure document was received by the beneficiary 1 year or more prior to the receipt of the limitation notice.
- (6) This section applies to trust accountings for accounting periods beginning on or after January 1, 2008, and to written reports, other than trust accountings, received by a beneficiary on or after January 1, 2008.<sup>192</sup>

**736.906 Reliance on trust instrument.**—A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.<sup>193</sup>

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<sup>192</sup> Source: F.S. § 737.307 with substantial rewording and restructuring.

<sup>193</sup> Source: UTC § 1006.

**736.907 Event affecting administration or distribution.**—If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.<sup>194</sup>

**736.908 Exculpation of trustee.**—

- (1) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:
  - (a) Relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or
  - (b) Was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship with the settlor.
- (2) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated directly to the settlor.<sup>195</sup>

**736.909 Beneficiary's consent, release, or ratification.**—A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

- (1) The consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or

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<sup>194</sup> Source: UTC § 1007.

<sup>195</sup> Source: UTC § 1008 with insertion of word “directly”.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(u).*

**Note:** The change was intended to indicate the Committee's disapproval of the statement in the comment to UTC § 1008 that disclosure of an exculpatory term to the settlor's attorney is disclosure to the settlor.



- (2) At the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.<sup>196</sup>

### **736.910 Limitation on personal liability of trustee.—**

- (1) Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in the contract disclosed the fiduciary capacity.
- (2) A trustee is personally liable for torts committed in the course of administering a trust or for obligations arising from ownership or control of trust property only if the trustee is personally at fault.
- (3) A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim.
- (4) Issues of liability between the trust estate and the trustee individually may be determined in a proceeding for accounting, surcharge, or indemnification, or in any other appropriate proceeding.<sup>197</sup>

### **736.9103 Limitations on actions against certain trusts.—**

- (1) After the death of a settlor, no creditor of the settlor may bring, maintain, or continue any direct action against a trust described in s. 733.707(3), the trustee of the trust, or any beneficiary of the trust that is dependent on the individual liability of the settlor. Those claims and causes of action against the settlor shall be presented and enforced against the settlor's estate as provided in part VII of chapter 733, and the personal representative of the settlor's estate may

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<sup>196</sup> Source: UTC § 1009.

<sup>197</sup> Source: UTC § 1010 with revisions.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(v).*

**Revisions:**

- “including liability for violation of environmental law” deleted from subsection (2).
- Subsection (4) (from F.S. § 737.306(2)) was added.

obtain payment from the trustee of a trust described in s. 733.707(3) as provided in ss. 733.607(2), 733.707(3), and 736.5053.

- (2) This section shall not preclude a direct action against a trust described in s. 733.707(3), the trustee of the trust, or a beneficiary of the trust that is not dependent on the individual liability of the settlor.
- (3) This section does not affect the lien of any duly recorded mortgage or security interest or the lien of any person in possession of personal property or the right to foreclose and enforce the mortgage or lien.<sup>198</sup>

### **736.911 Interest as general partner.—**

- (1) Unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trust's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to a Uniform Partnership Act or Uniform Limited Partnership Act.
- (2) A trustee who holds an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault.
- (3) If the trustee of a revocable trust holds an interest as a general partner, the settlor is personally liable for contracts and other obligations of the partnership as if the settlor were a general partner.<sup>199</sup>

### **736.912 Protection of person dealing with trustee.—**

- (1) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a

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<sup>198</sup> Source: F.S. § 737.3061.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(v).*

<sup>199</sup> Source: UTC § 1011 with revisions.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(v).*

Revisions:

- “the Uniform Partnership Act” changed to “A Uniform Partnership Act” in subsection (1).
- UTC § 1011(c) providing an exception to immunity when an interest in the partnership is held by the trustee in another capacity or is held by certain relatives of the trustee was deleted.

trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.

- (2) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.
- (3) A person who in good faith delivers assets to a trustee need not ensure their proper application.
- (4) A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated is protected from liability as if the former trustee were still a trustee.
- (5) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.<sup>200</sup>

#### **736.913 Certification of trust.—**

- (1) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:
  - (a) That the trust exists and the date the trust instrument was executed;
  - (b) The identity of the settlor;
  - (c) The identity and address of the currently acting trustee;
  - (d) The powers of the trustee;
  - (e) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
  - (f) The authority of cotrustees to sign or otherwise authenticate and whether all or less than all are

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<sup>200</sup> Source: UTC § 1012.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(v).*

required in order to exercise powers of the trustee;  
and

- (g) The manner of taking title to trust property.
- (2) A certification of trust may be signed or otherwise authenticated by any trustee.
  - (3) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.
  - (4) A certification of trust need not contain the dispositive terms of a trust.
  - (5) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments that designate the trustee and confer on the trustee the power to act in the pending transaction.
  - (6) A person who acts in reliance on a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying on the certification.
  - (7) A person who in good faith enters into a transaction in reliance on a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.
  - (8) This section does not limit the right of a person to obtain a copy of the trust instrument when required to be furnished by law or in a judicial proceeding concerning the trust.<sup>201</sup>

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<sup>201</sup> Source: UTC § 1013 with revisions.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(v).*

Revisions:

- UTC § 1013(a)(7) referring to the trust's taxpayer identification number was deleted.
- Subsection (9) amended to include "when required to be furnished by law or".

Note: The additional language added to subsection (9) is intended to eliminate any potential conflict with this subsection and the Patriot Act.

**736.914 Improper distribution or payment; liability of distributee.**—Any person who was paid improperly from a trust must return the assets or funds received and the income from those assets or interest on the funds since distribution or payment, unless the distribution or payment cannot be questioned because of adjudication, estoppel, or limitations. If the person does not have the property, its value at the date of disposition, income thereon, and gain received by the person must be returned.<sup>202</sup>

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<sup>202</sup> Source: F.S. § 737.209.

**PART XI**  
**RULES OF CONSTRUCTION**

736.921	Rules of construction; general provisions	94
736.922	Construction of generic terms	94
736.923	Gifts to multi-generation classes to be per stirpes	94
736.924	Killer not entitled to receive property or other benefits by reason of victim's death	95
736.925	Dissolution of marriage; effect on revocable trust	95
736.926	Antilapse; survivorship with respect to future interests under terms of trust; substitute takers	95
736.927	Change in securities; accessions; nonademption	97
736.928	Penalty clause for contest	98

**736.921 Rules of construction; general provisions.**—Except as provided in s. 736.105(2):

- (1) The intent of the settlor as expressed in the terms of the trust controls the legal effect of the dispositions therein made.
- (2) The rules of construction as expressed in this part shall apply unless a contrary intent is indicated by the terms of the trust.<sup>203</sup>

**736.922 Construction of generic terms.**—Adopted persons and persons born out of wedlock are included in class gift terminology and terms of relationship, in accordance with rules for determining relationships for purposes of intestate succession.<sup>204</sup>

**736.923 Gifts to multi-generation classes to be per stirpes.**—Class gifts to descendants, issue, and other multi-generation classes shall be per stirpes.<sup>205</sup>

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<sup>203</sup> Source: F.S. § 737.621 with revisions.

Revisions:

- Addition of introductory (“Except as ...”) clause and some restructuring.
- “expressed in the trust” changed to “expressed in the terms of the trust” in subsection (1).

Note: Introductory clause is intended to eliminate any possible conflict with mandatory provisions in F.S. § 736.105(2).

<sup>204</sup> Source: F.S. § 737.623.

<sup>205</sup> Source: F.S. § 737.624 with section reworded to limit applicability to multi-generational class gifts.

Note: Intent was to eliminate potential conflict between the directive in this section and new F.S. § 736.926 dealing with survivorship requirements for future interests in trust.

**736.924 Killer not entitled to receive property or other benefits by reason of victim's death.—**

- (1) A beneficiary of a trust who unlawfully and intentionally kills or unlawfully and intentionally participates in procuring the death of the settlor or another person on whose death such beneficiary's interest depends, shall not be entitled to any trust interest, including homestead, dependent on the victim's death, and such interest shall devolve as though the killer had predeceased the victim.
- (2) A final judgment of conviction of murder in any degree is conclusive for the purposes of this section. In the absence of a murder conviction in any degree, the court may determine by the greater weight of the evidence whether the killing was unlawful and intentional for purposes of this section.<sup>206</sup>

**736.925 Dissolution of marriage; effect on revocable trust.—**

Unless the trust instrument or the judgment for dissolution of marriage or divorce expressly provides otherwise, if a revocable trust is executed by a husband or wife as settlor prior to annulment of the marriage or entry of a judgment for dissolution of marriage or divorce of the settlor from the settlor's spouse, any provision of the trust that affects the settlor's spouse will become void on annulment of the marriage or entry of the judgment of dissolution of marriage or divorce, and any such trust will be administered and construed as if the settlor's spouse had died on the date of the annulment or on entry of the judgment for dissolution of marriage or divorce.<sup>207</sup>

**736.926 Antilapse; survivorship with respect to future interests under terms of inter vivos and testamentary trusts; substitute takers.—**

- (1) In this section:
  - (a) "Beneficiary" means the beneficiary of a future interest and includes a class member if the future interest is in the form of a class gift.
  - (b) "Distribution date," with respect to a future interest, means the time when the future interest is to take effect in possession or enjoyment. The distribution

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<sup>206</sup> Source: UTC § 737.625.

<sup>207</sup> Source: UTC § 737.106 with title changed for clarity.

date need not occur at the beginning or end of a calendar day, but can occur at a time during the course of a day.

- (c) "Future interest" includes an alternative future interest and a future interest in the form of a class gift.
  - (d) "Future interest under the terms of a trust" means a future interest that was created by an inter vivos or testamentary transfer creating a trust or to an existing trust or by an exercise of a power of appointment to an existing trust, directing the continuance of an existing trust, designating a beneficiary of an existing trust, or creating a trust.
  - (e) "Surviving beneficiary" or "surviving descendant" means a beneficiary or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date by operation of law.
- (2) A future interest under the terms of a trust is contingent on the beneficiary's surviving the distribution date. Unless a contrary intent appears in the trust instrument, if a beneficiary of a future interest under the terms of a trust fails to survive the distribution date, and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. They take per stirpes the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date.
- (3) In the application of this section:
- (a) Words of survivorship attached to a future interest are a sufficient indication of an intent contrary to the application of this section; and
  - (b) A residuary clause in a will is not a sufficient indication of an intent contrary to the application of this section, whether or not the will specifically provides that lapsed or failed devises are to pass under the residuary clause.
- (4) If, after the application of subsections (2) and (3), there is no surviving taker, the property passes in the following order:
- (a) If the future interest was created by the exercise of a power of appointment, the property passes under the donor's gift-in-default clause, if any, which clause is treated as creating a future interest under the terms of a trust.



- (b) If no taker is produced by the application of paragraph (a) and the trust was created in a nonresiduary devise or appointment in the transferor's will, the property passes under the residuary clause in the transferor's will; for purposes of this section, the residuary clause is treated as creating a future interest under the terms of a trust.
- (c) If no taker is produced by the application of paragraphs (a) and (b), the property passes to those persons, including the state, and in such shares as would succeed to the transferor's intestate estate under the intestate succession law of the transferor's domicile if the transferor died when the disposition is to take effect in possession or enjoyment.

For purposes of paragraphs (b) and (c), "transferor" with respect to a future interest created by the exercise of a power of appointment means the donor if the power was a nongeneral power and the donee if the power was a general power.

- (5) This section shall apply to all trusts other than trusts that were irrevocable before the effective date of this code.<sup>208</sup>

**736.927 Change in securities; accessions; nonademption.**—A gift of specific securities, rather than their equivalent value, shall entitle the beneficiary only to:

- (1) As much of the gifted securities of the same issuer held by the trust estate at the time of the occurrence of the event entitling the beneficiary to distribution.
- (2) Any additional or other securities of the same issuer held by the trust estate because of action initiated by the issuer, excluding any acquired by exercise of purchase options.

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<sup>208</sup> Source: UPC § 2-707 with substantial revisions.

Revisions:

- This new section replaces Florida's existing inter vivos trust antilapse statute, F.S. § 737.6035. With respect to that statute, this version applies only to future interests, in inter vivos or testamentary trusts, created by transfer, devise or exercise of a power of appointment, when the owner of the future interest dies before the interest takes in possession and without regard to the relationship between the trust creator and the predeceasing owner of the future interest.
- With respect to the UPC, this provision provides that words of survivorship attached to an interest are a sufficient indication of an intent contrary to the application of section.

- (3) Securities of another issuer held by the trust estate as a result of a merger, consolidation, reorganization, or other similar action initiated by the original issuer.<sup>209</sup>

**736.928 Penalty clause for contest.—**

- (1) A provision in a trust instrument purporting to penalize any interested person for contesting the trust instrument or instituting other proceedings relating to a trust estate or trust assets is unenforceable.
- (2) This section shall apply to trusts created on or after October 1, 1993. For purposes of this subsection, a revocable trust shall be treated as created when the right of revocation terminates.<sup>210</sup>

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<sup>209</sup> Source: F.S. § 737.622.

<sup>210</sup> Source: F.S. § 737.207 with revision.

**Mandatory:** *This is a mandatory provision. See F.S. § 736.105(2)(v).*

**Revision:** Subsection (2) was added to incorporate the effective date provision of the bill in which F.S. § 737.207 was added to the Florida statutes.

**PART XII**  
**CHARITABLE TRUSTS**

736.931	Definitions	99
736.932	Application of this part	99
736.933	Trustee of a private foundation trust or a split interest trust	100
736.934	Powers and duties of trustee of a private foundation trust or a split interest trust	100
736.935	Notice that this part does not apply	101
736.936	Power to amend trust instrument	101
736.937	Power of court to permit deviation	102
736.938	Release; property and persons affected; manner of effecting	102
736.939	Election to come under this part	103
736.941	Interpretation	103

**736.931 Definitions.**—As used in this part:

- (1) "Charitable organization" means an organization described in s. 501(c)(3) of the Internal Revenue Code and exempt from tax under s. 501(a) of the Internal Revenue Code.
- (2) "Internal Revenue Code" means the Internal Revenue Code of 1986, as amended.
- (3) "Private foundation trust" means a trust, including a trust described in s. 4947(a)(1) of the Internal Revenue Code, as defined in s. 509(a) of the Internal Revenue Code.
- (4) "Split interest trust" means a trust for individual and charitable beneficiaries that is subject to the provisions of s. 4947(a)(2) of the Internal Revenue Code.
- (5) "State attorney" means the state attorney for the judicial circuit of the principal place of administration of the trust pursuant to s. 736.108<sup>211</sup>

**736.932 Application of this part.**—Except as otherwise provided in the trust, the provisions of this part apply to all private foundation trusts and split interest trusts, whether created or established before or after November 1, 1971, and to all trust assets acquired by the trustee before or after November 1, 1971.<sup>212</sup>

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<sup>211</sup> Source: F.S. § 737.501.

<sup>212</sup> Source: F.S. § 737.502.

**736.933 Trustee of a private foundation trust or a split interest trust.**—Except as provided in s. 736.935, the trustee of a private foundation trust or a split interest trust has the duties and powers conferred on it by this part.<sup>213</sup>

**736.934 Powers and duties of trustee of a private foundation trust or a split interest trust.**—

- (1) In the exercise of its powers, including the powers granted by this part, a trustee has a duty to act with due regard to its obligation as a fiduciary, including a duty not to exercise any power in such a way as to:
  - (a) Deprive the trust of an otherwise available tax exemption, deduction, or credit for tax purposes.
  - (b) Deprive a donor of a trust asset or tax deduction or credit.
  - (c) Operate to impose a tax on a donor, trust, or other person.

"Tax" includes, but is not limited to, any federal, state, or local excise, income, gift, estate, or inheritance tax.

- (2) Except as provided in s. 736.935, a trustee of a private foundation trust shall make distributions at such time and in such manner as not to subject the trust to tax under s. 4942 of the Internal Revenue Code.
- (3) Except as provided in subsection (4) and in s. 736.935, a trustee of a private foundation trust, or a split interest trust to the extent that the split interest trust is subject to the provisions of s. 4947(a)(2) of the Internal Revenue Code, in the exercise of its powers shall not:
  - (a) Engage in any act of self-dealing as defined in s. 4941(d) of the Internal Revenue Code.
  - (b) Retain any excess business holdings as defined in s. 4943(c) of the Internal Revenue Code.
  - (c) Make any investments in a manner that subjects the foundation to tax under s. 4944 of the Internal Revenue Code.

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<sup>213</sup> Source: F.S. § 737.503.

- (d) Make any taxable expenditures as defined in s. 4945(d) of the Internal Revenue Code.
- (4) Paragraphs (3)(b) and (c) shall not apply to a split interest trust if:
- (a) All the income interest, and none of the remainder interest, of the trust is devoted solely to one or more of the purposes described in s. 170(c)(2)(B), and all amounts in the trust for which a deduction was allowed under s. 170, s. 545(b)(2), s. 556(b)(2), s. 642(c), s. 2055, s. 2106(a)(2), or s. 2522 have an aggregate fair market value of not more than 60 percent of the aggregate fair market value of all amounts in the trust (all section references herein to the Internal Revenue Code); or
  - (b) A deduction was allowed under s. 170, s. 545(b)(2), s. 556(b)(2), s. 642(c), s. 2055, s. 2106(a)(2), or s. 2522 for amounts payable under the terms of the trust to every remainder beneficiary, but not to any income beneficiary (all section references herein to the Internal Revenue Code).<sup>214</sup>

**736.935 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. 736.934(2), or if the trust contains other powers, inconsistent with the provisions of s. 736.934(3) that specifically direct acts by the trustee, the trustee shall notify the state attorney when the trust becomes subject to this part. Section 736.934 shall 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.<sup>215</sup>

**736.936 Power to amend trust instrument.**—

- (1) In the case of a trust that is solely for a named charitable organization or organizations and for which the trustee does not possess any discretion concerning the distribution of income or principal among two or more such organizations, the trustee may amend the governing instrument to comply with the provisions of s. 736.934(2) with the consent of the named charitable organization or organizations.

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<sup>214</sup> Source: F.S. § 737.504.

<sup>215</sup> Source: F.S. § 737.505.

- (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. 736.934(2) with the consent of the state attorney.<sup>216</sup>

**736.937 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 it by the governing instrument or applicable law for cause shown and on complaint of the trustee, state attorney, or an affected beneficiary and notice to the affected parties.<sup>217</sup>

**736.938 Release; property and persons affected; manner of effecting.**—

- (1) The trustee of a trust, all of the unexpired interests in which are devoted to one or more charitable purposes, may release a power to select charitable donees unless the creating instrument provides otherwise.
- (2) The release of a power to select charitable donees may apply to all or any part of the property subject to the power and may reduce or limit the charitable organizations, or classes of charitable organizations, in whose favor the power is exercisable.
- (3) A release shall be effected by a duly acknowledged written instrument signed by the trustee and delivered as provided in subsection (4).
- (4) Delivery of a release shall be accomplished as follows:
  - (a) If the release is accomplished by specifying a charitable organization or organizations as beneficiary or beneficiaries of the trust, by delivery of a copy of the release to each designated charitable organization.
  - (b) If the release is accomplished by reducing the class of permissible charitable organizations, by delivery of a copy of the release to the state attorney.
- (5) If a release is accomplished by specifying a public charitable organization or organizations as beneficiary or beneficiaries of the trust, the trust at all times thereafter shall be operated

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<sup>216</sup> Source: F.S. § 737.506.

<sup>217</sup> Source: F.S. § 737.507.

exclusively for the benefit of, and be supervised by, the specified public charitable organization or organizations.<sup>218</sup>

**736.939 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. 736.838(5) by filing with the state attorney an election, accompanied by the proof of required consent. Thereafter the trust shall be subject to s. 736.938(5).<sup>219</sup>

**736.941 Interpretation.**—This part shall be interpreted to effectuate the intent of the state to preserve, foster, and encourage gifts to, or for the benefit of, charitable organizations.<sup>220</sup>

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<sup>218</sup> Source: F.S. § 737.508.

<sup>219</sup> Source: F.S. § 737.509.

<sup>220</sup> Source: F.S. § 737.511.

**PART XIII**  
**MISCELLANEOUS PROVISIONS**

736.952	Electronic records and signatures	104
736.953	Severability clause	104
736.954	Effective date	104
736.956	Application to existing relationships	104

**736.952 Electronic records and signatures.**—Any provisions of this code governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of such records or signatures, conform to the requirements of s. 102 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. s. 7002) and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.<sup>221</sup>

**736.953 Severability clause.**—If any provision of this code or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this code that can be given effect without the invalid provision or application, and to this end the provisions of this code are severable.<sup>222</sup>

**736.954 Effective date.**—This code takes effect on July 1, 2007.<sup>223</sup>

**736.956 Application to existing relationships.**—

- (a) Except as otherwise provided in this code, on the effective date of this code:
  - (1) This code applies to all trusts created before, on, or after its effective date;
  - (2) This code applies to all judicial proceedings concerning trusts commenced on or after its effective date;

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<sup>221</sup> Source: UTC § 1102 with the initial word changed from “The” to “Any”.

<sup>222</sup> Source: UTC § 1103.

<sup>223</sup> Source: UTC § 1104.



- (3) This code applies to judicial proceedings concerning trusts commenced before its effective date unless the court finds that application of a particular provision of this code would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this code does not apply and the superseded law applies;
  - (4) Any rule of construction or presumption provided in this code applies to trust instruments executed before the effective date of this code unless there is a clear indication of a contrary intent in the terms of the trust; and
  - (5) An act done before the effective date of this code is not affected by this code.
- (b) If a right is acquired, extinguished, or barred on the expiration of a prescribed period that has commenced to run under any other statute before the effective date of this code, that statute continues to apply to the right even if it has been repealed or superseded.<sup>224</sup>

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<sup>224</sup> Source: UTC § 1106.

## CONFORMING REVISIONS TO OTHER FLORIDA STATUTES

497.417	Disposition of proceeds received on contracts	106
497.458	Disposition of proceeds received on contracts	107
607.0802.	Qualifications of directors	107
617.0802.	Qualifications of directors	108
660.25	Definitions	108
660.46.	Substitution of fiduciaries	108
660.418	Investment of fiduciary funds in syndicate securities	110
689.071	Land trusts transferring interests in real estate; ownership vests in trustee	111
689.075	Inter vivos trusts; powers retained by settlor	111
689.175	Worthier-title doctrine abolished	112
709.08	Durable power of attorney	113
731.103	Evidence as to death or status	113
731.1035	Applicable rules of evidence	114
731.201	General definitions	114
731.303	Representation	115
732.513	Devises to trustee	117
732.603	Antilapse; deceased devisee; class gifts	118
732.604	Failure of testamentary provision	120
732.611	Devises to multi-generation classes to be per stirpes	121
733.212	Notice of administration; filing of objections	121
738.104	Trustee's power to adjust	121
738.1041	Total return unitrust	124
738.202	Distribution to residuary and remainder beneficiaries	125
744.331	Procedures to determine incapacity	125
744.361	Powers and duties of guardian	126
744.441	Powers of guardian upon court approval	126
<u>744.462</u>	<u>Determination regarding alternatives to guardian</u>	127

### **497.417 Disposition of proceeds received on contracts.—**

\* \* \* \* \*

- (4) The trustee of the trust established pursuant to this section shall only have the power to:
  - (a) Invest in investments as prescribed in s. 215.47 and exercise the powers set forth in ~~part IV of chapter 737~~ part VIII of chapter 736, provided that the board

may by order require the trustee to liquidate or dispose of any investment within 30 days after such order.

\* \* \* \* \*

**497.458 Disposition of proceeds received on contracts.—**

\* \* \* \* \*

- (5) The trustee of the trust established pursuant to this section shall only have the power to:
  - (a) Invest in investments as prescribed in s. 215.47 and exercise the powers set forth in ~~part IV of chapter 737~~ part VIII of chapter 736, provided that the licensing authority may by order require the trustee to liquidate or dispose of any investment within 30 days after such order, or within such other times as the order may direct. The licensing authority may issue such order if it determines that the investment violates any provision of this chapter or is not in the best interests of the preneed contract holders whose contracts are secured by the trust funds.

\* \* \* \* \*

**607.0802. Qualifications of directors.—**

\* \* \* \* \*

- (2) In the event that the eligibility to serve as a member of the board of directors of a condominium association, cooperative association, homeowners' association, or mobile home owners' association is restricted to membership in such association and membership is appurtenant to ownership of a unit, parcel, or mobile home, a grantor of a trust described in s. 733.707(3), or a qualified beneficiary as defined in s. ~~737.303(4)(b)~~ 736.103(14) of a trust which owns a unit, parcel, or mobile home shall be deemed a member of the association and eligible to serve as a director of the condominium association, cooperative association, homeowners' association, or mobile home owners' association, provided that said beneficiary occupies the unit, parcel, or mobile home.

**617.0802. Qualifications of directors.—**

\* \* \* \* \*

- (2) In the event that the eligibility to serve as a member of the board of directors of a condominium association, cooperative association, homeowners' association, or mobile home owners' association is restricted to membership in such association and membership is appurtenant to ownership of a unit, parcel, or mobile home, a grantor of a trust described in s. 733.707(3), or a qualified beneficiary as defined in s. ~~737.303(4)(b)~~736.103(14) of a trust which owns a unit, parcel, or mobile home shall be deemed a member of the association and eligible to serve as a director of the condominium association, cooperative association, homeowners' association, or mobile home owners' association, provided that said beneficiary occupies the unit, parcel, or mobile home.

**660.25 Definitions.—**Subject to other definitions contained in other sections of this code, and unless the context otherwise requires, in this chapter:

\* \* \* \* \*

- (6) Terms used but not defined in this chapter, but which are expressly defined in chapter 518, the financial institutions codes, chapter 732, chapter 733, chapter 734, chapter 735, chapter ~~736~~737, chapter 738, chapter 744, or chapter 747, shall in this chapter, unless the context otherwise requires, have the meanings ascribed to them in said chapters; and references in any of said chapters to a "trust company" or to "trust companies" shall include every trust department as defined in s. 658.12.

**660.46 Substitution of fiduciaries.—**

- (1) The provisions of this section shall apply to the transfer of fiduciary accounts by substitution, and for those purposes these provisions shall constitute alternative procedures to those provided or required by any other provisions of law relating to the transfer of fiduciary accounts or the substitution of persons acting or who are to act in a fiduciary capacity. In this section, and only for its purposes, the term:
- (a) "Limitation notice" has the meaning ascribed in s. ~~737.307(3)~~736.905(4)(c).
  - (b) "Original fiduciary" means any trust company or trust department which, at the time of the initiation of the

proceedings provided for in this section, holds or has been named or otherwise designated to hold a fiduciary capacity, alone or with others, with respect to any fiduciary account and which proposes in the proceedings provided for in this section to terminate its fiduciary capacity with respect to such fiduciary account by the substitution of a proposed substitute fiduciary.

- (c) "Proposed substitute fiduciary" means any trust company or trust department qualified under the laws of this state to act in the fiduciary capacity to which it is proposed in said proceedings to be substituted in the place and stead of the original fiduciary.
  - (d) "Trust accounting" has the meaning ascribed in s. 737.3035736.8135.
  - (e) "Trust disclosure document" has the meaning ascribed in s. 737.307(2)736.905(4)(a).
- (2) Any original fiduciary and any proposed substitute fiduciary may, with respect to any fiduciary account or accounts which they shall mutually select, initiate proceedings by joining in the filing of a petition in the circuit court, requesting the substitution of the proposed substitute fiduciary for the original fiduciary as to such fiduciary account or accounts. The petition may be filed in the county in which the main office of the original fiduciary is located and, except to the extent inconsistent with the provisions of this section, shall be governed by the Florida Rules of Civil Procedure; however, if any fiduciary account is then the subject of a proceeding in a court in this state pursuant to the Florida Probate Code, the Florida Guardianship Law, chapter 737736, or chapter 747, the petition relating to such fiduciary account shall be filed in that proceeding and shall be governed by the procedural or other relevant rules applicable to such proceeding except to the extent inconsistent with the provisions of this section.
- (3) Unless a waiver or consent shall be filed in the proceedings as provided in subsection (4), the provisions of s. 731.301(1) and (2) shall apply with respect to notice of the proceedings to all persons who are then cofiduciaries with the original fiduciary, other than a person joining as a petitioner in the proceedings; to all persons named in the governing instrument as substitutes or successors to the fiduciary capacity of the original fiduciary; to the persons then living who are entitled under the governing instrument to appoint a substitute or successor to act in the fiduciary capacity of the original fiduciary; to all vested beneficiaries of the fiduciary account; and to all then-living originators of the governing

instrument. Unless a waiver or consent shall be filed in the proceedings as provided in subsection (4), the provisions of s. 731.301 shall apply with respect to notice to all contingent beneficiaries of the fiduciary account. Only the persons or classes of persons described in the foregoing provisions of this subsection shall be deemed to be interested persons for the purposes of this section and the proceedings and notices provided for in this section; and the provisions of ss. 731.301(3) and 731.303(3), (4), and ~~(5)~~ part III of chapter 736, relating to notice requirements, the effect of notice, and representation of interests, shall apply to the proceedings provided for in this section.

\* \* \* \* \*

- (9) Unless previously or otherwise barred by adjudication, waiver, consent, limitation, or the provisions of subsection (8), an action for breach of trust or breach of fiduciary duties or responsibilities against an original fiduciary in whose place and stead another trust company or trust department has been substituted pursuant to the provisions of this section is barred for any beneficiary who has received a trust disclosure document adequately disclosing the matter unless a proceeding to assert the claim is commenced within 6 months after receipt of the trust disclosure document or the limitation notice that applies to the trust disclosure document, whichever is received later. In any event, and notwithstanding lack of adequate disclosure, all claims against such original fiduciary which has complied with the requirements of s. 736.905(1)(b) disclosure document ~~received by the beneficiary and has informed the beneficiary of the location and availability of records for his or her examination~~ are barred as provided in chapter 95. Section ~~737.307(2) and (3)~~ 736.905(4)(a) and (c) applies to this subsection.
  
- (10) A beneficiary has received a final trust disclosure document or a limitation notice if, when the beneficiary is an adult, it is received by him or her or if, when the beneficiary is a minor or a disabled person, it is received by his or her representative as ~~defined in s. 731.303~~ provided in part III of chapter 736.

\* \* \* \* \*

**660.418 Investment of fiduciary funds in syndicate securities.**—Notwithstanding any other provision of law, any financial institution with fiduciary powers may, in its fiduciary capacity, purchase bonds or other securities underwritten or otherwise distributed by the financial institution or by a syndicate

that includes the financial institution, or an affiliate of the financial institution, provided that such purchase is made through a licensed securities dealer, is otherwise prudent, and is not prohibited by the instrument governing the fiduciary relationship and that disclosure is made at least annually to those persons entitled to a statement of accounts pursuant to s. ~~737.303(4)~~736.813 indicating that such securities have been or may be purchased. This section applies to purchases of bonds or other securities made at the time of the initial offering of such bonds or securities or at any time after such initial offering.

**689.071 Land trusts transferring interests in real estate; ownership vests in trustee.—**

\* \* \* \* \*

- (5) In addition to any other limitation on personal liability existing pursuant to statute or otherwise, the provisions of s. ~~737.306~~736.910 apply to the trustee of a land trust created pursuant to this section.

**689.075 Inter vivos trusts; powers retained by settlor.—**

\* \* \* \* \*

- (1) A trust which is otherwise valid and which complies with s. ~~737.111~~736.403, including, but not limited to, a trust the principal of which is composed of real property, intangible personal property, tangible personal property, the possible expectancy of receiving as a named beneficiary death benefits as described in s. 733.808, or any combination thereof, and which has been created by a written instrument shall not be held invalid or an attempted testamentary disposition for any one or more of the following reasons:
  - (a) Because the settlor or another person or both possess the power to revoke, amend, alter, or modify the trust in whole or in part;
  - (b) Because the settlor or another person or both possess the power to appoint by deed or will the persons and organizations to whom the income shall be paid or the principal distributed;
  - (c) Because the settlor or another person or both possess the power to add to, or withdraw from, the trust all or any part of the principal or income at one time or at different times;

- (d) Because the settlor or another person or both possess the power to remove the trustee or trustees and appoint a successor trustee or trustees;
  - (e) Because the settlor or another person or both possess the power to control the trustee or trustees in the administration of the trust;
  - (f) Because the settlor has retained the right to receive all or part of the income of the trust during her or his life or for any part thereof;
  - (g) Because the settlor is, at the time of the execution of the instrument, or thereafter becomes, sole trustee.
- (2) Nothing contained herein shall affect the validity of those accounts, including but not limited to bank accounts, share accounts, deposits, certificates of deposit, savings certificates, and other similar arrangements, heretofore or hereafter established at any bank, savings and loan association, or credit union by one or more persons, in trust for one or more other persons, which arrangements are, by their terms, revocable by the person making the same until her or his death or incompetency.
- (3) The fact that any one or more of the powers specified in subsection (1) are in fact exercised once, or more than once, shall not affect the validity of the trust or its nontestamentary character.
- (4) This section shall be applicable to trusts executed before or after July 1, 1969, by persons who are living on or after said date. ~~However, the requirement of conformity with the formalities for the execution of wills as found in paragraph (1)(g) shall not be imposed upon any trust executed prior to July 1, 1969.~~
- (5) The amendment of this section, by chapter 75-74, Laws of Florida, is intended to clarify the legislative intent of this section at the time of its original enactment that it apply to all otherwise valid trusts which are created by written instrument and which are not expressly excluded by the terms of this section and that no such trust shall be declared invalid for any of the reasons stated in subsections (1) and (3) regardless of whether the trust involves or relates to an interest in real property.

**689.175 WORTHIER-TITLE DOCTRINE ABOLISHED.**—The doctrine of worthier title is abolished as a rule of law and as a rule of construction. Language in a governing instrument describing the beneficiaries of a disposition as the transferor's "heirs," "heirs at



law," "next of kin," "distributees," "relatives," or "family," or language of similar import, does not create or presumptively create a reversionary interest in the transferor.<sup>225</sup>

**709.08 Durable power of attorney.—**

\* \* \* \* \*

- (8) **Standard of care.**—Except as otherwise provided in paragraph (4)(e), an attorney in fact is a fiduciary who must observe the standards of care applicable to trustees as described in s. ~~737.302~~736.901. The attorney in fact is not liable to third parties for any act pursuant to the durable power of attorney if the act was authorized at the time. If the exercise of the power is improper, the attorney in fact is liable to interested persons as described in s. 731.201 for damage or loss resulting from a breach of fiduciary duty by the attorney in fact to the same extent as the trustee of an express trust.

\* \* \* \* \*

**731.103 Evidence as to death or status.**—In proceedings under this code and under chapter 736, ~~the rules of evidence in civil actions are applicable unless specifically changed by the code.~~ The following additional rules relating to determination of death and status are applicable:

- (1) An authenticated copy of a death certificate issued by an official or agency of the place where the death purportedly occurred is prima facie proof of the fact, place, date, and time of death and the identity of the decedent.
- (2) A copy of any record or report of a governmental agency, domestic or foreign, that a person is alive, missing, detained, or, from the facts related, presumed dead is prima facie evidence of the status and of the dates, circumstances, and places disclosed by the record or report.
- (3) A person who is absent from the place of his or her last known domicile for a continuous period of 5 years and whose absence is not satisfactorily explained after diligent search and inquiry is presumed to be dead. The person's death is presumed to have occurred at the end of the period unless there is evidence establishing that death occurred earlier. Evidence showing that the absent person was

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<sup>225</sup> Source: UPC § 2-710.

exposed to a specific peril of death may be a sufficient basis for the court determining at any time after such exposure that he or she died less than 5 years after the date on which his or her absence commenced. A petition for this determination shall be filed in the county in Florida where the decedent maintained his or her domicile or in any county of this state if the decedent was not a resident of Florida at the time his or her absence commenced.

- (4) This section does not preclude the establishment of death by direct or circumstantial evidence prior to expiration of the five year time period set forth in subsection (3).<sup>226</sup>

**731.1035 Applicable rules of evidence.**—In proceedings under this code, the rules of evidence in civil actions are applicable unless specifically changed by the code.<sup>227</sup>

**731.201 General definitions.**—Subject to additional definitions in subsequent chapters that are applicable to specific chapters or parts, and unless the context otherwise requires, in this code, in s. 409.9101, and in chapters 736, ~~737~~, 738, and 744:

\* \* \* \* \*

- (2) "Beneficiary" means heir at law in an intestate estate and devisee in a testate estate. The term "beneficiary" does not apply to an heir at law or a devisee after that person's interest in the estate has been satisfied. In the case of a devise to an existing trust or trustee, or to a trust or trustee described by will, the trustee is a beneficiary of the estate. Except as otherwise provided in this subsection, the beneficiary of the trust is not a beneficiary of the estate of which that trust or the trustee of that trust is a beneficiary. However, if each trustee is also a personal representative of the estate, ~~the beneficiary or beneficiaries~~ each qualified beneficiary of the trust as defined in s. ~~737.303(4)(b)~~ 736.103(14) shall be regarded as a beneficiary of the estate.

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<sup>226</sup> Source: F.S. § 731.103 revised.

Revisions:

- Insertion of reference to chapter 736 in introductory sentence.
- Addition of new subsection (4) (from F.S. § 737.626(4)).

<sup>227</sup> Source: New.

- (9) "Devisee" means a person designated in a will or trust to receive a devise. Except as otherwise provided in this subsection, in the case of a devise to an existing trust or trustee, or to a trust or trustee of a trust described by will, the trust or trustee, rather than the beneficiaries of the trust, is the devisee. However, if each trustee is also a personal representative of the estate, ~~the beneficiary or beneficiaries~~ each qualified beneficiary of the trust as defined in s. ~~737.303(4)(b)~~ 736.103(14) shall be regarded as a devisee.

\* \* \* \* \*

- (27) "Power of appointment" A power of appointment is authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property.<sup>228</sup>

\* \* \* \* \*

**731.303 Representation.**—In the administration of or in judicial proceedings involving estates of decedents ~~or trusts~~, the following apply:

- (1) Persons are bound by orders binding others in the following cases:
- (a) 1. Orders binding the sole holder or all coholders of a power of revocation or a general, special, or limited power of appointment, including one in the form of a power of amendment or revocation to the extent that the power has not become unexercisable in fact, bind all persons to the extent that their interests, as persons who may take by virtue of the exercise or nonexercise of the power, are subject to the power.
2. Paragraph (a)1. does not apply to:
- a. Any matter determined by the court to involve fraud or bad faith by the trustee;
- b. A power of a trustee to distribute trust property; or

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<sup>228</sup> Source: F.S. § 731.201 revised.

Revisions:

- Reference to chapter 736 inserted in introductory clause.
- New definition of power of appointment added.

c. A power of appointment held by a person while the person is the sole trustee.

- (b) To the extent there is no conflict of interest between them or among the persons represented:
    - 1. Orders binding a guardian of the property bind the ward.
    - 2. Orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will, in establishing or adding to a trust, in reviewing the acts or accounts of a prior fiduciary, and in proceedings involving creditors or other third parties. However, for purposes of this section, a conflict of interest shall be deemed to exist when each trustee of a trust that is a beneficiary of the estate is also a personal representative of the estate.
    - 3. Orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate, in actions or proceedings by or against the estate.
  - (c) An unborn or unascertained person, or a minor or any other person under a legal disability, who is not otherwise represented is bound by an order to the extent that person's interest is represented by another party having the same or greater quality of interest in the proceeding.
- (2) Orders binding a guardian of the person shall not bind the ward.
- (3) In proceedings involving the administration of estates ~~or trusts~~, notice is required as follows:
- (a) Notice as prescribed by law shall be given to every interested person, or to one who can bind the interested person as described in paragraph (2)(a) or paragraph (1)(b). Notice may be given both to the interested person and to another who can bind him or her.
  - (b) Notice is given to unborn or unascertained persons who are not represented pursuant to paragraph (1)(a) or paragraph (1)(b) by giving notice to all known persons whose interests in the proceedings are the same as, or of a greater quality than, those of the unborn or unascertained persons.

- (4) If the court determines that representation of the interest would otherwise be inadequate, the court may, at any time, appoint a guardian ad litem to represent the interests of an incapacitated person, an unborn or unascertained person, a minor or any other person otherwise under a legal disability, or a person whose identity or address is unknown. If not precluded by conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.
- ~~(5) When a sole holder of a coholder of a general, special, or limited power of appointment, including an exercisable power of amendment or revocation over property in an estate or trust, is bound by:~~
- ~~(a) Agreements, waivers, consents, or approvals; or~~
- ~~(b) Accounts, trust accountings, or other written reports that adequately disclose matters set forth therein,~~
- ~~then all persons who may take by virtue of, and whose interest are subject to, the exercise or nonexercise of the power are also bound, but only to the extent of their interests which could otherwise be affected by the exercise or nonexercise of the power.~~
- (5) The holder of a power of appointment over property not held in trust may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power. Representation under this subsection does not apply to:
- a. Any matter determined by the court to involve fraud or bad faith by the trustee;
- b. A power of a trustee to distribute trust property; or
- c. A power of appointment held by a person while the person is the sole trustee.<sup>229</sup>

### 732.513 Devises to trustee.—

<sup>229</sup> Source: F.S. § 731.303 revised.

Revisions:

- “In trusts” removed from introductory clause and subsection (3).
- Final sentence appended to subsection (1)(a).
- Subsection (2) revised to permit representation by guardians of the person when no guardian of the property has been appointed.
- Subsection (5) revised.

Note: The addition to subsection (1)(a) tracks similar language in F.S. § 736.301(1).

- (2) The devise shall not be invalid for any or all of the following reasons:
- (a) Because the trust is amendable or revocable, or both, by any person.
  - (b) Because the trust has been amended or revoked in part after execution of the will or a codicil to it.
  - ~~(c) Because the trust instrument or any amendment to it was not executed in the manner required for wills.~~
  - (ec) Because the only res of the trust is the possible expectancy of receiving, as a named beneficiary, a devise under a will or death benefits as described in s. 733.808, and even though the testator or other person has reserved any or all rights of ownership in the death benefit policy, contract, or plan, including the right to change the beneficiary.
  - (ed) Because of any of the provisions of s. 689.075.

\* \* \* \* \*

**732.603 Antilapse; deceased devisee; class gifts.**—Unless a contrary intention appears in the will:

- (1) ~~If a devisee or a beneficiary of a trust created by a will who is a grandparent, or a lineal descendant of a grandparent, of the testator:~~
- ~~(a) Is dead at the time of the execution of the will or at the termination of a trust interest created by a will,~~
  - ~~(b) Fails to survive the testator, or~~
  - ~~(c) Is required by the will or by operation of law to be treated as having predeceased the testator,~~
- ~~then the descendants of the devisee or beneficiary take per stirpes in place of the deceased devisee or beneficiary. A person who would have been a devisee under a class gift if that person had survived the testator shall be a devisee for purposes of this section whether that person died before or after the execution of the will.~~
- (2) ~~If a devisee or a beneficiary of a trust created by a will who is not a grandparent, or a descendant of a grandparent, of the testator:~~
- ~~(a) Is dead at the time of the execution of the will or at the termination of a trust interest created in a will,~~

~~(b) Fails to survive the testator, or~~

~~(c) Is required by the will to be treated as having predeceased the testator,~~

~~then the testamentary disposition to the devisee or beneficiary shall lapse unless an intention to substitute another appears in the will.~~

(1) Unless a contrary intent appears in the will, if a devisee who is a grandparent, or a descendant of a grandparent, of the testator:

(a) Is dead at the time of the execution of the will,

(b) Fails to survive the testator, or

(c) Is required by the will or by operation of law to be treated as having predeceased the testator,

then a substitute gift is created in the devisee's surviving descendants. They take per stirpes the property to which the devisee would have been entitled had the devisee survived the testator.

(2) Where a power of appointment is exercised by will, unless a contrary intent appears in the document creating the power of appointment or in the testator's will, if an appointee who is a grandparent, or a descendant of a grandparent, of the donor of the power:

(a) Is dead at the time of the execution of the will or the creation of the power,

(b) Fails to survive the testator, or

(c) Is required by the will, the document creating the power, or by operation of law to be treated as having predeceased the testator,

then a substitute gift is created in the appointee's surviving descendants. They take per stirpes the property to which the appointee would have been entitled had the appointee survived the testator. Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an object of a power for the object, a surviving descendant of a deceased object of a power of appointment can be substituted for the object whether or not the descendant is an object of the power.

(3) In the application of this section:

(a) Words of survivorship, such as in a devise or appointment to an individual "if he survives me," or to

"my surviving children," are a sufficient indication of an intent contrary to the application of subsections (1) and (2). Words of survivorship used by the donor of the power, such as in a power to appoint to an individual "if he survives the donee," or a power to appoint to the donee's "then surviving children," are a sufficient indication of an intent contrary to the application of subsection (2).

(b) "Appointment" includes an alternative appointment and an appointment in the form of a class gift.

(c) "Appointee" includes (i) a class member if the appointment is in the form of a class gift, and (ii) an individual or class member who was deceased at the time the testator executed his or her will as well as an individual or class member who was then living but who failed to survive the testator.

(d) "Devise" also includes an alternative devise and a devise in the form of a class gift.

(e) "Devisee" also includes (i) a class member if the devise is in the form of a class gift, and (ii) an individual or class member who was deceased at the time the testator executed his or her will as well as an individual or class member who was then living but who failed to survive the testator.

(4) This section applies only to outright devises and appointments. Devises and appointments in trust, including to a testamentary trust, are subject to s. 736.926.

#### **732.604 Failure of testamentary provision.—**

- (1) Except as provided in s. 732.603, if a devise other than a residuary devise fails for any reason, it becomes a part of the residue.
- (2) Except as provided in s. 732.603, if the residue is devised to two or more persons, the share of a residuary devisee that fails for any reason and the devise to one of the residuary devisees fails for any reason, that devise passes to the other residuary devisee, or to the other residuary devisees in proportion to their interests of each in the remaining part of the residue.<sup>230</sup>

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<sup>230</sup> Source: UPC § 2-604(b).



**732.611 Devises to multi-generation classes to be per stirpes.**—Unless the will provides otherwise, all devises to descendants, issue, and other multi-generation classes shall be per stirpes.

**733.212 Notice of administration; filing of objections.—**

- (1) The personal representative shall promptly serve a copy of the notice of administration on the following persons who are known to the personal representative:
  - (a) The decedent's surviving spouse;
  - (b) Beneficiaries;
  - (c) The trustee of any trust described in s. 733.707(3) and each qualified beneficiary of the trust as defined in s. ~~737.303(4)(b)~~ 736.103(14), if each trustee is also a personal representative of the estate; and
  - (d) Persons who may be entitled to exempt property

in the manner provided for service of formal notice, unless served under s. 733.2123. The personal representative may similarly serve a copy of the notice on any devisees under a known prior will or heirs or others who claim or may claim an interest in the estate.

\* \* \* \* \*

**738.104 Trustee's power to adjust.—**

\* \* \* \* \*

- (8) With respect to a trust in existence on January 1, 2003:
  - (a) A trustee shall not have the power to adjust under this section until the statement required in subsection (9) is provided and either no objection is made or any objection which is made has been terminated.
    1. An objection is made if, within 60 days after the date of the statement required in subsection (9), a super majority of the ~~trust~~-qualified beneficiaries deliver to the trustee a written objection to the application of this section to such trust. An objection shall be deemed to be delivered to the trustee on the date the objection is mailed to the mailing address listed in the notice provided in subsection (9).

2. An objection is terminated upon the earlier of the receipt of consent from a super majority of ~~trust~~ eligible beneficiaries of the class that made the objection, or the resolution of the objection pursuant to paragraph (c).
- (b) An objection or consent under this section may be executed by a legal representative or natural guardian of a beneficiary without the filing of any proceeding or approval of any court.
  - (c) If an objection is delivered to the trustee, then the trustee may petition the circuit court for an order quashing the objection and vesting in such trustee the power to adjust under this section. The burden will be on the objecting beneficiaries to prove that the power to adjust would be inequitable, illegal, or otherwise in contravention of the grantor's intent. The court may award costs and attorney's fees relating to the trustee's petition in the same manner as in chancery actions. When costs and attorney's fees are to be paid out of the trust, the court may, in its discretion, direct from which part of the trust they shall be paid.
  - (d) If no timely objection is made or if the trustee is vested with the power to adjust by court order, the trustee may thereafter exercise the power to adjust without providing notice of its intent to do so unless, in vesting the trustee with the power to adjust, the court determines that unusual circumstances require otherwise.
  - (e)
    1. If a trustee makes a good faith effort to comply with the notice provisions of subsection (9), but fails to deliver notice to one or more beneficiaries entitled to such notice, neither the validity of the notice required under this subsection nor the trustee's power to adjust under this section shall be affected until the trustee has actual notice that one or more beneficiaries entitled to notice were not notified. Until the trustee has actual notice of the notice deficiency, the trustee shall have all of the powers and protections granted a trustee with the power to adjust under this chapter.
    2. When the trustee has actual notice that one or more beneficiaries entitled to notice under subsection (9) were not notified, the trustee's power to adjust under this section shall cease until all beneficiaries who are entitled to such notice, including those who were previously provided with such notice, are notified and given

the opportunity to object as provided for under this subsection.

- (f) The objection of a super majority of eligible beneficiaries under this subsection shall be valid for a period of 1 year after the date of the notice set forth in subsection (9). Upon expiration of the objection, the trustee may thereafter give a new notice under subsection (9).
  - (g) Nothing in this section is intended to create or imply a duty of the trustee of a trust existing on January 1, 2003, to seek a power to adjust pursuant to this subsection or to give the notice described in subsection (9) if the trustee does not desire to have a power to adjust under this section, and no inference of impropriety shall be made as the result of a trustee not seeking a power to adjust pursuant to this subsection.
- (9) (a) A trustee of a trust in existence on January 1, 2003, that is not prohibited under subsection (3) from exercising the power to adjust shall, any time prior to initially exercising the power, provide to all ~~reasonably ascertainable current~~ eligible beneficiaries described in ~~s. 737.303(4)(b)1. and all reasonably ascertainable remainder beneficiaries described in s. 737.303(4)(b)2.~~ a statement containing the following:
1. The name, telephone number, street address, and mailing address of the trustee and of any individuals who may be contacted for further information;
  2. A statement that unless a super majority of the eligible beneficiaries objects to the application of this section to the trust within 60 days after the date the statement pursuant to this subsection was served, s. 738.104, shall apply to the trust; and
  3. A statement that, if s. 738.104, applies to the trust, the trustee will have the power to adjust between income and principal and that such a power may have an effect on the distributions to such beneficiary from the trust.
- (b) The statement may contain information regarding a trustee's fiduciary obligations with respect to the power to adjust between income and principal under this section.
  - (c) The statement referred to in this subsection shall be served informally, in the manner provided in the

Florida Rules of Civil Procedure relating to service of pleadings subsequent to the initial pleading. The statement may be served on a legal representative or natural guardian of a beneficiary without the filing of any proceeding or approval of any court.

(d) For purposes of subsection (8) and this subsection:

1. Eligible beneficiaries means:

a. If at the time the determination is made there is one or more beneficiaries described in s. 736.103(14)(c), the beneficiaries described in s. 736.103(14)(a) and (c); or

b. If there is no beneficiary described in s. 736.103(14)(c), the beneficiaries described in s. 736.103(14)(a) and (b).

2. ~~a-A~~ "super majority of the ~~trust~~ eligible beneficiaries" means:

a. If at the time the determination is made there is one or more beneficiaries described in s. 736.103(14)(c), at least two-thirds in interest of the ~~reasonably ascertainable current~~ beneficiaries described in s. ~~737.303(4)(b)1-736.103(14)(a), or two-thirds in interest of the reasonably ascertainable qualified beneficiaries described in 736.103(14)(b), or two-thirds in interest of the reasonably ascertainable remainder~~ beneficiaries described in s. ~~737.303(4)(b)2-736.103(14)(c), if the interests of the beneficiaries are reasonably ascertainable; otherwise, it means two-thirds in number of either such class; or~~

b. If there is no beneficiary described in s. 736.103(14)(c), at least two-thirds in interest of the beneficiaries described in s. 736.103(14)(a) or two-thirds in interest of the beneficiaries described in s. 736.103(14)(b), if the interests of the beneficiaries are reasonably ascertainable; otherwise, it means two-thirds in number of either such class.

\* \* \* \* \*

**738.1041 Total return unitrust.—**

\* \* \* \* \*

- (4) All determinations made pursuant to sub-subparagraph (2)(b)2.b. shall be conclusive if reasonable and made in good faith. Such determination shall be conclusively presumed to have been made reasonably and in good faith unless proven otherwise in a proceeding commenced by or on behalf of a person interested in the trust within the time provided in s. ~~736.905~~ ~~737.307~~. The burden will be on the objecting interested party to prove that the determinations were not made reasonably and in good faith.

\* \* \* \* \*

**738.202 Distribution to residuary and remainder beneficiaries.—**

\* \* \* \* \*

- (5) The value of trust assets shall be determined on an asset-by-asset basis and shall be conclusive if reasonable and determined in good faith. Determinations based on appraisals performed within 2 years before or after the valuation date shall be presumed reasonable. The value of trust assets shall be conclusively presumed to be reasonable and determined in good faith unless proven otherwise in a proceeding commenced by or on behalf of a person interested in the trust within the time provided in s. ~~736.905~~~~737.307~~.

**744.331 Procedures to determine incapacity.—**

\* \* \* \* \*

- (6) **Order determining incapacity.**—If, after making findings of fact on the basis of clear and convincing evidence, the court finds that a person is incapacitated with respect to the exercise of a particular right, or all rights, the court shall enter a written order determining such incapacity. A person is determined to be incapacitated only with respect to those rights specified in the order.

\* \* \* \* \*

- (b) When an order determines that a person is incapable of exercising delegable rights, the court must consider and find whether there is an alternative to guardianship which will sufficiently address the problems of the incapacitated person. A guardian must be appointed to exercise the incapacitated person's delegable rights unless the court finds there is an

alternative. A guardian may not be appointed if the court finds there is an alternative to guardianship which will sufficiently address the problems of the incapacitated person. In any order declaring a person incapacitated the court must find that alternatives to guardianship were considered and that no alternative to guardianship will sufficiently address the problems of the ward.

\* \* \* \* \*

(f) Upon the filing of a verified statement by an interested person stating:

1. That he or she has a good faith belief that the alleged incapacitated person's trust, trust amendment, or durable power of attorney is invalid; and

2. A reasonable factual basis for that belief, the trust, trust amendment, or durable power of attorney shall not be deemed to be an alternative to the appointment of a guardian. The appointment of a guardian does not limit the court's power to determine that certain authority granted by a durable power of attorney is to remain exercisable by the attorney in fact. When an order is entered which determines that a person is incapable of exercising delegable rights, a guardian must be appointed to exercise those rights.

#### **744.361 Powers and duties of guardian.—**

\* \* \* \* \*

(6) A guardian who is given authority over any property of the ward shall:

(a) Protect and preserve the property and invest it prudently as ~~defined in s. 737.302~~provided in chapter 518, apply it as provided in s.744.397, and account for it faithfully.

**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:

\* \* \* \* \*

- (11) Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the guardian in the performance of his or her duties. Before authorizing a guardian to bring an action described in s. 736.207, the court shall first find that the action appears to be in the ward's best interests during the ward's probable lifetime. If the court denies a request that a guardian be authorized to bring an action described in s. 736.207, the court shall review the continued need for a guardian and the extent of the need for delegation of the ward's rights.

\* \* \* \* \*

- (18) When the ward's will evinces an objective to obtain a United States estate tax charitable deduction by use of a split interest trust (as that term is defined in s. ~~736.931~~~~737.504~~), but the maximum charitable deduction otherwise allowable will not be achieved in whole or in part, execute a codicil on the ward's behalf amending said will to obtain the maximum charitable deduction allowable without diminishing the aggregate value of the benefits of any beneficiary under such will

**744.462 Determination regarding alternatives to guardianship.**—Any judicial determination concerning the validity of the ward's durable power of attorney, trust, or trust amendment shall be promptly reported in the guardianship proceeding by the guardian of the property. If the instrument has been judicially determined to be valid, or if after the appointment of a guardian a petition is filed alleging that there is an alternative to guardianship which will sufficiently address the problems of the ward, the court shall review the continued need for a guardian and the extent of the need for delegation of the ward's rights. .

**APPENDIX A:  
CHAPTER 737 TO CHAPTER 736 CORRELATION TABLE**

<b>Ch 737</b>	<b>FTC (Ch 736)</b>
.101	.108
.105	.112
.106	.925
.111	.403
.115	n/a
.116	.408
.201	.201
.202	.204
.203	.205
.2035	.9043; .9045
.204	.206
.2041	.9047
.205	.201(1)
.206	.406
.2065	.207
.207	.928
.208	.8165
.209	.914
.301	.801, .802, .105(2)(b)
.302	.804, .806
.303	.813, .105(2)(p), (q), (r) and (s)
.3035	.8135
.304	.702
.305	.108(4)
.3053	.8147
.3054	.5053
.3055	.8105
.306	.910
.3061	.9103
.307	.905
.308	.5055
.401	.105, .815
.402(1)	.815
.402(2)(a)	.816(1)
.402(2)(b)	.816(2)
.402(2)(c)	.816(1)
.402(2)(d)	.816(8)
.402(2)(e)	.816(4)
.402(2)(f)	.815(1)(b)2
.402(2)(g)	.802, .816(6)
.402(2)(h)	.816(3), .816(5), .816(7), .816(14)
.402(2)(i)	.816(10)
.402(2)(j)	.816(10)



<b>Ch 737</b>	<b>FTC (Ch 736)</b>
.402(2)(k)	.816(11)
.402(2)(l)	.816(11)
.402(2)(m)	.816(12)
.402(2)(n)	.816(9)9a)
.402(2)(o)	.816(9)(c)
.402(2)(p)	.816(9)(c), .816(8)
.402(2)(q)	.816(9)(b) [securities only]***
.402(2)(r)	.816(13)
.402(2)(s)	.816(7)
.402(2)(t)	.816(15)
.402(2)(u)	.816(16)
.402(2)(v)	.816(17)
.402(2)(w)	.816(22)
.402(2)(x)	.816(23)
.402(2)(y)	.816(21)
.402(2)(z)	.816(24)
.402(2)(aa)	.816(25)
.402(2)(bb)	.417
.402(3)	.414
.402(4)	.814
.4025	.8163
.403(1)	.4113(4), .417
.4031	.4113, .4115
.4032	.412
.4033	.904
.404	.703
.405	.912
.406	.954, .956
.501	.931
.502	.932
.503	.933
.504	.934
.505	.935
.506	.936
.507	.937
.508	.938
.509	.939
.510	.940
.511	.941
.512	.942
.6035	.926
.621	.921
.622	.927
.623	.922
.624	.923
.625	.924
.626	n/a

.627

.904

**APPENDIX B:  
CHAPTER 736 TO CHAPTER 737 CORRELATION TABLE**

<b>FTC (Ch 736)</b>	<b>Ch 737</b>
.101	
.102	
.103	
.104	
.105(1)	.401
.105(2)(b)	.301
.105(2)(i)	.111
.105(2)(j)	
.106	
.107	
.108	.101
.108(4)	.305
.109	
.110	
.111	
.112	.105
.201	.201
.201(1)	.205
.202	
.203	
.204	.202
.205	.203
.206	.204
.207	.2065
.301	
.302	
.303	
.304	
.305	
.306	
.401	
.402	
.403	.111
.404	
.405	
.406	.206
.407	
.408	.116
.409	
.410	
.4113	.4031
.4115	.4031

.412	.4032
<b>FTC (Ch 736)</b>	<b>Ch 737</b>
.413	
.414	.402(3)
.415	
.416	
.417	.402(2)(bb), .403(1)
.501	
.502	
.503	
.504	
.505	
.5053	.3054
.5055	.308
.506	
.507	
.601	
.602	
.603	
.604	.208
.701	
.702	.304
.703	.404
.704	
.705	
.706	
.707	
.708	
.709	
.801	.301
.802	.301, .402(2)(g), .403(2)
.803	
.804	.302
.805	
.806	.302
.807	
.808	
.809	
.810	
.8105	.3055
.811	
.812	
.8125	.306
.813	.303
.8135	.3035
.814	.412(4)
.8147	.3053
.815	.401

.815(1)(b)2	.402(2)(f)
.8155	.402(4)
<b>FTC (Ch 736)</b>	<b>Ch 737</b>
.816(1)	.402(2)(a), .402(2)(c)
.816(2)	.402(2)(h)
.816(10)	.402(2)(k), .402(2)(l)
.816(11)	.402(2)(m)
.816(12)	.402(2)(r)
.816(13)	.402(2)(h)
.816(14)	.402(2)(t)
.816(15)	.402(2)(u)
.816(16)	.402(2)(v)
.816(3)	.402(2)(e)
.816(4)	.402(2)(h)
.816(5)	.402(2)(g)
.816(6)	.402(2)(h), .402(2)(s)
.816(7)	.402(2)(d), .402(2)(p)
.816(8)(a)	.402(2)(n)
.816(8)(b)	.402(2)(q)
.816(8)(c)	.402(2)(o), .402(2)(p)
.816(20)	.402(2)(y)
.816(21)	.402(2)(w)
.816(22)	.402(2)(x)
.816(23)	.402(2)(z)
.816(24)	.402(2)(aa)
.8163	.4025
.8165	.208
.817	
.901	.302
.9021	
.9022	
.903	
.904	.4033, .627
.9043	.2035
.9045	.2035, .627
.9047	.2041
.905	.307
.906	
.907	
.908	
.909	
.910	.306
.9103	.3061
.911	
.912	.405
.913	
.914	.209
.921	.621

.922	.623
<b>FTC (Ch 736)</b>	<b>Ch 737</b>
.923	.624
.924	.625
.925	.106
.926	.6035
.927	.622
.928	.207
.931	.501
.932	.502
.933	.503
.934	.504
.935	.505
.936	.506
.937	.507
.938	.508
.939	.509
.940	.510
.941	.511
.952	
.953	
.954	.406
.956	.406

## APPENDIX C: EFFECTIVE DATES

The Code has an effective date of July 1, 2007. Conforming amendments to section in other chapters are effective as of the same date. By default, section 736.956 provides that the provisions of the Code apply to all trusts whenever created. However, a few provisions of the Code explicitly provide for a different effective date. The sections with special effective date provisions are listed in the following table:

<b>Section</b>	<b>Title or topic</b>	<b>Effective date:</b>
736.403	Trusts created in other jurisdictions; formalities required for revocable trusts	Trusts created after the effective date of the Code.
736.411 5	Judicial modification of irrevocable trust when modification is in best interest of beneficiaries	Inapplicable to trusts created before January 1, 2001. Revocable trusts are deemed created at the time they become irrevocable.
736.412	Nonjudicial modification of irrevocable trust	Inapplicable to trusts created before January 1, 2001. Revocable trusts are deemed created at the time they become irrevocable.
736.813	Duty to inform and account	In general, applies only to trust accountings rendered for accounting periods beginning on or after January 1, 2008. Paragraphs (1)(a) and (b) do not apply to trustees who accept a trusteeship before the effective date of the Code or to trusts that are irrevocable before that date.
736.813 5	Trust accountings	Applies only to trust accountings rendered for accounting periods beginning on or after January 1, 2003.
736.816 3	Powers of trustees relating to environmental or human health laws or to trust property contaminated with hazardous or toxic substances; liability	Does not apply to trusts created before July 1, 1995, unless the trust is amended to incorporate the provisions of the section.

736.905	Limitations on proceedings against trustees	Applies to trust accountings for accounting periods beginning on or after January 1, 2008, and to written reports, other than trust accountings, received by a beneficiary on or after January 1, 2008.
<b>Section</b>	<b>Title or topic</b>	<b>Effective date:</b>
736.928	Penalty clause for contest	Applies to trusts created on or after October 1, 1993. Revocable trusts are treated as created when the right of revocation terminates.