



# AN OVERVIEW OF THE FLORIDA TRUST CODE

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# INTRODUCTION

Chapter 736, Florida Statutes (the Florida Trust Code) was enacted in 2006 and became effective July 1, 2007.

When enacted, the FTC was comprised of about 40% prior Florida law and about 60% based on the UTC, with almost 1/3 of that 60% revised in some substantive respect.

# ORGANIZATION OF THE FTC

- 13 parts
- 11 of the 13 parts correspond to the UTC

# PART I - GENERAL PROVISIONS AND DEFINITIONS

- Scope

- Applicability

Except as provided in Part XIII or a particular section, the FTC applies retroactively to all Florida trusts, i.e., it applies to all trusts created before, on, or after the effective date.

## Applicability (cont'd.)

With respect to trusts in existence on the effective date (July 1, 2007) –

The FTC does not affect:

- Any act done prior to effective date
- The running of any limitations period that began before the effective date

The FTC applies to:

- All judicial proceedings commenced on or after the effective date

## Applicability (cont'd.)

The FTC applies if:

- The terms of the trust designate Florida as the governing jurisdiction, **AND** there is a sufficient nexus with Florida at the time the trust is created or during its administration.
- There is no designation in the instrument, but the settlor resided in Florida when the trust was created.

Provisions regarding jurisdiction are **MANDATORY**.

# Definitions

(Supplemented by other sections and 731.201)

- “Beneficiary” – includes holder of power of appointment and any person in whose favor a power of appointment has been irrevocably exercised
- “Interests of the beneficiaries”

Amended effective 7-1-18 to mean the beneficial interests intended by the settlor as provided in the terms of a trust.

## Definitions (cont'd.)

(Supplemented by other sections and 731.201)

- “Qualified beneficiary”
  - “living” beneficiaries?
  - *Rachins v. Minassian*, 251 So.3d 919 (Fla. 4th DCA 2018).
- “Settlor” – Anyone who creates or transfers property to a trust



# Default and Mandatory Rules

The provisions of the FTC are default rules that will apply only in the absence of a contrary provision in the terms of the trust.

The mandatory rules in §736.0105 cannot be overridden by the terms of the trust.

## Mandatory Rules (cont'd.)

- Rules relating to the creation of a trust
- Rules containing public policy restrictions
- Rules covering procedural matter
- Rules dealing with court powers
- Rules dealing with the duties of a trustee
- Miscellaneous rules

# **Default & Mandatory Rules and Florida Common Law**

For matters not addressed in the FTC, §736.0106 provides that the Code is supplemented by the common law of trusts and by principles of equity.

# Knowledge, Notice, and Determining/Changing Principal Place of Administration

- When an individual or organization has knowledge of a fact
- Methods of giving notice
- Rules for determining and changing a trust's principal place of administration  
**(MANDATORY RULE)**

# Methods of Notice

Prior to July 1, 2015, the permissible methods of sending a trust accounting or a document to beneficiaries included:

- First-class mail,
- Personal delivery,
- Delivery to the person's last known residence or place of business, or
- A properly directed facsimile or other electronic message.

In 2015, §736.0109 was amended to add posting to a secure electronic account or website.

This statute was further amended effective July 1, 2018, to address some glitches in the new posting provisions.

# Nonjudicial Settlement Agreements

“Interested persons” may enter into a binding, nonjudicial settlement agreement with respect to any matter provided:

- The terms and conditions of the agreement could be approved by a court if approval was sought, and
- The agreement does not produce a result that is not authorized under the FTC.

## PART II – JUDICIAL PROCEEDINGS

Proceedings involving the validity, administration, or distribution of trusts are commenced by filing a complaint and are governed by the Florida Rules of Civil Procedure, EXCEPT

- Proceedings for construction of a testamentary trust may be filed in the probate proceeding;
- If the settlor's estate is being probated, proceedings to review compensation of the trustee or persons employed by the trustee may be brought in the probate proceeding.

## **PART II – JUDICIAL PROCEEDINGS (cont'd.)**

Part II also includes rules regarding:

- Venue
- Review of compensation of trustee
- Employment and review of compensation of agents
- Court approval of actions by a guardian of the property of the settlor



# Prohibition of Trust Contest

- Cannot contest the validity of all or part of a revocable trust or the revocation of *part* of a revocable trust until the trust becomes irrevocable by its terms or the settlor's death.
- Cannot contest the revocation of *all* of a revocable trust until after the settlor's death.
- EXCEPTION: Guardian of the property of the settlor is not prohibited from bringing such actions.

# Jurisdiction

- In rem – A beneficiary is subject to in rem jurisdiction to the extent of the beneficiary's interest in the trust.
- Personal jurisdiction – FTC enumerates conduct that will subject a trustee, beneficiary, or other person to the jurisdiction of the Florida courts.

# PART III - REPRESENTATION

"Representation" refers to the authority of one person to act on behalf of another and to bind the person being represented.

# Categories of Representation

- Fiduciaries and Parents
- Virtual Representatives
- Court-appointed Representatives
- Holders of a Power of Appointment
- Designated Representatives (**MANDATORY RULES** prohibit trustee from serving as a designated representative and restrict when a beneficiary may serve.)

# PART IV - CREATION, VALIDITY, MODIFICATION, AND TERMINATION

A trust may be created by:

- Inter vivos or testamentary transfer,
- A settlor's self declaration of trust, or
- The exercise of a power of appointment in favor of a trustee.

To create a trust a settlor must have the requisite mental capacity and intend to create a trust for a purpose that is lawful, consistent with public policy and possible to achieve.

# Mental Capacity

- Revocable Trust - In a **mandatory** rule, the FTC states that the capacity required to create a *revocable* trust is the same as that needed to execute a will.
- Irrevocable Trust – The FTC is silent.

# Ascertainable Beneficiaries

Although a trust must have ascertainable beneficiaries, those beneficiaries do not need to be alive at the time the trust is created, or can be identified as a class.

3 exceptions:

- Charitable purpose trust
- Trust for care of animals
- Trust for non-charitable purpose

# Execution

- Testamentary trusts
- Inter vivos trusts executed in a jurisdiction other than Florida or by a non-Florida resident
- Trusts containing real property – in writing and signed by the party authorized to create the trust



# Execution Requirements for Testamentary Aspects

Testamentary aspects of revocable trusts created by Florida residents are void unless the trusts are executed with the formalities required for a will in Florida.

- Applies at creation of the trust and to any amendments
- A failure to comply with the execution requirements does not result in the invalidity of the revocable trust; only the testamentary aspects of the trust are void.
- No applicability to trusts created by non-Florida residents whether or not the trust was executed in Florida

# Oral Trusts

- Personal Property
- Revocable Oral Trusts – Generally, should be in writing because of the special issues they present.

# Modification, Termination, and Revocation

- Judicial Modification
- Non-Judicial Modification
- Decanting
- Modification/Termination of Uneconomic Trusts
- Cy Pres
- Reformation to Correct Mistakes
- Trust Division and/or Combination

## PART V – CREDITORS' CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS

- Creditors' claims against a beneficiary of a trust with no spendthrift provision
- Creditors' claims against a beneficiary of a trust with a spendthrift provision

A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

**(MANDATORY RULE)**

# Exception Creditors

- Claims by the State of Florida or the United States to the extent provided in a statute separate from the FTC or under federal law
- Claims by a beneficiary's child, spouse, or former spouse who has a judgment or order for support or maintenance ("last resort")
- Claims by a judgment creditor (e.g., attorney) who provided services for the protection of a beneficiary's interest in the trust ("last resort")

# Exception Creditors & Discretionary Trusts

In *Berlinger v. Casselberry*, 133 So. 3d 961 (Fla. 2d DCA 2013), the Second District held that the former spouse of the beneficiary of a discretionary trust was entitled to a continuing writ of garnishment against the discretionary disbursements made by the trustee because §736.0504 does not specifically prohibit creditors from obtaining writs of garnishment.

# Mandatory Distributions

- A spendthrift provision will not prevent a beneficiary's creditor from attaching or garnishing trust income or principal after it has been distributed to the beneficiary.
- Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may reach a mandatory distribution of principal or income which the trustee is required to make under the terms of the trust.

# Creditors' Claims Against Settlor

- While trust is revocable, the trust property is subject to the claims of the settlor's creditors.
- When trust is irrevocable, a settlor's creditor may reach the amount distributable to or for the settlor.



# Withdrawal Powers

- Creditors of the holder of a power to withdraw trust property may reach the property subject to the power.
- Upon a lapse, release, or waiver of a withdrawal power, the power holder retains the status of trust settlor to the extent the value of the property subject to the lapse, etc., exceeds the greater of the gift tax annual exclusion or the safe harbor for lapses under the federal gift and estate tax laws.

# Expenses & Obligations of Settlor's Estate

- **MANDATORY** requirement that the assets of a deceased settlor's revocable trust are available to pay expenses of administration and obligations of the settlor's estate.
- **MANDATORY** requirement that the trustee of a trust described in §733.707(3) to file a notice of trust.

# PART VI – REVOCABLE TRUSTS

Trusts are revocable by default.

This is a significant change from the law prior to the FTC.

# Consequences of Revocability

- Settlor's creditors may reach trust assets.
- Trust is liable for expenses of administration and obligations of the settlor's estate.
- While a trust is revocable, a trustee's duties are owed exclusively to the settlor.
- Trust is subject to revocation and amendment.

# Method of Revocation or Amendment

- Method specified in the trust instrument
- If the trust does not specify a method for revocation or amendment:

Settlor's later will or codicil expressly revoking the trust or specifically devising property that would otherwise pass according to the trust terms; or

Any other method “manifesting clear and convincing evidence of the settlor's intent” to revoke or amend.

## Method of Revocation or Amendment (cont'd.)

The FTC permits the following other fiduciaries to act on a settlor's behalf with respect to revocation, amendment, or distribution of trust property:

- An agent under a power of attorney – only as authorized by §709.2202
- A guardian of the property – only as authorized in §744.441

# Method of Revocation or Amendment (cont'd.)

For trusts with more than one settlor (i.e., anyone who transfers property to a new or existing trust), the FTC specifies default rules for how the trust may be revoked or amended.

- Generally, each settlor may unilaterally revoke or amend with regard to the portion of the trust property he or she contributed. (Exception to this rule if a trust consists of community property.)
- If a trust is revoked or amended by fewer than all settlors, the trustee must promptly notify the other settlors of that fact.

# Trust Contests

Part VI contains the limitations periods for contesting a trust that was revocable at settlor's death.

EARLIER of:

- The time provided in Chapter 95
- 6 months after trustee sends the person a copy of the trust and a notice informing the person of the trust's existence, the trustee's name and address, and the time allowed for commencing an action



## PART VII – OFFICE OF TRUSTEE

- Accepting or declining the office of trustee
- Resignation of trustee
  - Right to resign is a **MANDATORY** provision
  - 30-days notice to the settlor, co-trustees, and all qualified beneficiaries
  - Unless a co-trustee remains in office or the court orders otherwise, a trustee who has resigned continues to have the duties of a trustee and the powers to protect trust property until a successor accepts the trusteeship

# Removal of Trustee

Statutory grounds for removal include:

- A “serious” breach of trust
- Lack of cooperation among co-trustees that substantially impairs the administration of the trust
- Unfitness, unwillingness or persistent failure to effectively administer the trust

# Removal of Trustee (cont'd.)

(Statutory grounds cont'd.)

- A substantial change of circumstances or removal is requested by all qualified beneficiaries, and the court finds that:
  - Removal of the trustee best serves the interests of all the beneficiaries,
  - Removal is not inconsistent with a material purpose of the trust, and
  - A suitable co-trustee or successor trustee is available

## Removal of Trustee (cont'd.)

- Use of modification provisions to remove a trustee without meeting the requirements of substantial change in circumstances or request of all qualified beneficiaries
- Unless a co-trustee remains in office or the court orders otherwise, a removed trustee has the duties of a trustee and powers necessary to protect trust property until a successor accepts the trusteeship.

# **Delivery of Property by Former Trustee**

A removed or resigning trustee must, within a reasonable time, deliver the trust property within the trustee's possession to the co-trustee, 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.

# Vacancies and Appointment of Successor Trustees

The court has the authority to appoint an additional trustee or special fiduciary whenever the court considers it necessary for the administration of the trust, whether or not a vacancy exists.

# Co-trustees

- Duty of co-trustees to participate in administration of the trust
- Exceptions:
  - Trustee is unavailable
  - Trustee properly delegated performance of a function to another trustee

# Delegation

- Only those functions the settlor did not reasonably expect the trustees to perform jointly may be delegated.
- Even in the absence of a delegation provision in the trust, a co-trustee may delegate the investment decisions to a co-trustee pursuant to §518.112.
- Irrevocable delegations are not permitted.



# Directed Trustee

- The settlor may delegate specific fiduciary functions to one or more co-trustees, to the exclusion of the other(s), by granting that co-trustee the exclusive power to direct or prevent specified actions of other trustees.
- The excluded co-trustee(s) shall act in accordance with the direction, without any duty to review, inquire, investigate, recommend, or evaluate with respect to the direction, and is not liable for complying with the direction unless compliance would result in “willful misconduct.”

# Dissenting Trustee

The FTC permits a majority of trustees to act.

An outvoted, dissenting trustee who joins in an action at the direction of a majority of the trustees is not liable for actions taken by the majority, provided notice of the dissent is given to any co-trustee at or before the time of the action.

# Compensation

- If the trust does not specify the trustee's compensation - reasonable compensation.
- If the trustee's compensation is specified in the trust, the trustee is entitled to the specified compensation, subject to the court's authority to allow more or less compensation if:
  - The trustee's duties are substantially different from those originally contemplated, or
  - The specified compensation is unreasonably low or high.

**(MANDATORY RULE)**

## PART VIII – DUTIES & POWERS OF TRUSTEE

- Duty to administer in good faith (**MANDATORY**)
- Duty of impartiality
- Duty to administer prudently
- Duty to incur only reasonable expenses
- Duty to use special skills
- Duty to control and protect trust property
- Duty to keep accurate records

## Duties (cont'd.)

- Duty not to commingle and to earmark
- Duty to ascertain marketable title
- Duty to enforce and defend claims
- Duty to administer pending outcome of contest or other proceeding
- Duty to expeditiously distribute trust property on termination

## Duties (cont'd.)

- Duty of loyalty
- Duty to redress breaches of former trustee
- Duty to inform and account (**MANDATORY**)

# Duty of Loyalty

As between the trustee and the beneficiaries, a trustee has a duty to administer the trust *solely* in the interests of the beneficiaries.

(This is not a mandatory rule.)

# Voidability of Conflicted Transactions

Voidable per se rule:

A transaction involving trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's personal and fiduciary interests is voidable by an affected beneficiary.



## Voidability of Conflicted Transactions (cont'd.)

Presumptively voidable rule:

A transaction involving trust property entered into by the trustee and persons who have close business or personal ties with the trustee are only *presumed* to be affected by a conflict between the personal and fiduciary interests of the trustee.

# Exceptions to the Duty of Loyalty

- Special rules for corporate trustees and their affiliates
- Payment of reasonable compensation to the trustee and agreements between beneficiary and trustee for compensation
- Transactions between trustee and guardian or fiduciary for estate where trustee is the fiduciary for the guardianship or estate
- Employment of professionals associated with the trustee

# **Exception to the Exception – Payment of Legal Fees & Costs to Defend Breach of Trust Claim**

- The trigger:** The filing of a pleading alleging that a trustee has committed a breach of trust
- The restriction:** The trustee is prohibited from using trust assets to pay attorney's fees and costs to defend those allegations, subject to narrow statutory exceptions in §736.0802(10).

## **Payment of Legal Fees & Costs to Defend Breach of Trust Claim (cont'd.)**

Payment of attorney's fees and costs from trust assets is provisionally authorized if the trustee serves a written notice of intent to pay attorney's fees and costs from assets of the trust upon the qualified beneficiaries before payment is made.

# Payment of Legal Fees & Costs to Defend Breach of Trust Claim (cont'd.)

The written notice of intent must:

- Identify the judicial proceeding.
- Inform the beneficiary of the right to apply to the court for an order:
  - Prohibiting the trustee from using trust assets to pay attorney's fees or costs, and/or
  - Compelling the return of attorney's fees or costs to the trust, whether paid before or after service of the notice of intent.
- Be served by one of the means set forth in the statute.

# Payment of Legal Fees & Costs to Defend Breach of Trust Claim (cont'd.)

If attorney's fees or costs are paid from the assets of the trust without first serving notice of intent on the qualified beneficiaries, the court is **required** to enter an order compelling the return of the payment to the trust (with statutory interest) upon the filing of a motion by a qualified beneficiary.

## **Payment of Legal Fees & Costs to Defend Breach of Trust Claim (cont'd.)**

If the trustee has complied with the statute and served the required notice of intent, a beneficiary MAY be able to prevent a trustee from using trust assets to pay attorney's fees or costs to defend the breach of trust claim.

## **Payment of Legal Fees & Costs to Defend Breach of Trust Claim (cont'd.)**

Notwithstanding the restrictions upon a trustee's use of trust assets to pay attorney's fees and costs incurred in defending allegations of breach of trust, any such payment will be deemed to be authorized (and the trustee will be protected) as to any beneficiary who received a trust disclosure document adequately disclosing the payment and did not file a timely action objecting to the payment.



# Duty to Inform and Account

Duty to keep the qualified beneficiaries reasonably informed of the trust and its administration. (**MANDATORY DUTY**)

## Duty to Inform and Account (cont'd.)

With respect to the qualified beneficiaries of an irrevocable trust:

- Within 60 days after the trustee's acceptance, trustee has a duty to notify them of:
  - The trustee's acceptance of the trust,
  - The full name and address of the trustee, and
  - That the lawyer-client privilege applies with respect to the trustee and any attorney for the trustee.

# Duty to Inform and Account (cont'd.)

- Within 60 days of when the trustee acquires knowledge of the creation of an irrevocable trust or that a formerly revocable trust has become irrevocable, the trustee has a duty to notify the qualified beneficiaries of:
  - The existence of the trust,
  - The identity of the settlor,
  - The right to request a copy of the trust,
  - Their right to receive accountings, and
  - That the lawyer-client privilege applies with respect to the trustee and any attorney for the trustee.

# Duty to Inform and Account (cont'd.)

- Duty to provide a trust accounting to each qualified beneficiary annually and on termination of the trust or on change of the trustee.
- Duty to provide accountings “from the date on which the trustee became accountable.”
- The form and content of the required accounting are detailed in §736.08135. A trustee's final accounting must include a plan of distribution for any undistributed assets shown on the accounting.

## Amendment to 736.08135(3)

This subsection, was recently misconstrued in *Corya v. Sanders*, 155 So. 3d 1279 (Fla. 4th DCA 2015). The erroneous holding has been overruled by Section 6 of Ch. 2018-35, Laws of Florida, to read as follows:

(3) Subsections (1) and (2) govern the form and content of ~~This section applies to~~ all trust accountings rendered for any accounting periods beginning on or after January 1, 2003, and all trust accountings rendered on or after July 1, 2018. This subsection does not affect the beginning period from which a trustee is required to render a trust accounting.

## **Amendment to 736.08135(3) (cont'd.)**

Section 8 of the new law states that this amendment is intended to clarify existing law, is remedial in nature, and applies retroactively to all cases pending or commenced on or after July 1, 2018.

# Trustee Powers

- General powers to achieve the proper investment, management, and distribution of trust property
- Specific powers
- Environmental powers
- Power to delegate to agents
- Power to direct
  - Settlor's power to direct trustee of revocable trust
  - Power of third party (or settlor of irrevocable trust) to direct

# PART IX – TRUST INVESTMENTS

Part IX consists of only 2 sections:

- One incorporates by reference the provisions of Chapter 518, Florida Statutes, and
- The other sets forth special rules for life insurance contracts acquired or retained on the life of a qualified person.



# PART X – LIABILITY OF TRUSTEE AND RIGHTS OF PERSONS DEALING WITH TRUSTEE

- Absent a breach of trust, a trustee is not liable for a loss or depreciation in trust value or for not making a profit.
- On the other hand, with the following exceptions, a trustee is liable for a breach of trust, including a violation (intentional or not) of any of the duties that the trustee owes to a beneficiary.

# Trustee's Protection from Liability

- Trustee acts in reasonable reliance on trust instrument
- Losses resulting from certain unknown external events (e.g., marriage, divorce, death)
- Beneficiary's consent, release, or ratification\*

# Remedies & Damages for Breach of Trust

Courts may impose a remedy for breach of trust from the comprehensive list in §736.1001(2) or may order any other relief found to be appropriate.

# Remedies & Damages for Breach of Trust (cont'd.)

- When damages are awarded for breach of trust, the trustee is liable for the greater of:
  - Any profit the trustee made from the breach and the amount required to restore the trust to what it would have been but for the breach, including lost income, capital gain, or
  - Appreciation that would have resulted from a proper administration.

# Remedies & Damages for Breach of Trust (cont'd.)

- Contribution
- Costs and fees
  - Actions for breach of a fiduciary duty or challenging an exercise/nonexercise of a trustee's power
  - Proceedings to modify, combine, or divide a trust
  - Proceedings in which an attorney has rendered services to the trust
  - Ordinary and extraordinary services rendered in the administration of the trust

# Limitations for Breach of Trust Claims Against a Trustee

Receipt of adequate disclosure of a matter in a “trust disclosure document” (annual, periodic, or final) from the trustee

Applicable limitations periods:

- **6 months** - if the beneficiary has also received a “**limitation notice**” from the trustee that “applies to” the trust disclosure document
- **4 or 5 years** – if the beneficiary did not receive a limitation notice

# **Limitations for Breach of Trust Claims Against a Trustee (cont'd.)**

## **Receipt of a Final Trust Accounting and Statutory Notice (Notwithstanding Lack of Adequate Disclosure)**

If the trustee:

- a. Issues a “final trust accounting” **and**
- b. Gives written notice to the beneficiary that:
  - (i) Trust records are available for examination **and**
  - (ii) 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,

then the limitations period for claims against the trustee for breach of trust will begin to run on the date the beneficiary receives the final trust accounting and notice.

# Limitations for Breach of Trust Claims Against a Trustee (cont'd.)

Applicable limitations period for receipt of final trust accounting and notice:

**4 or 5 years**



# **Limitations for Breach of Trust Claims Against a Trustee (cont'd.)**

## **Actual Knowledge By the Beneficiary of The Facts Upon Which the Claim is Based**

- Beneficiary's actual knowledge must be established by clear and convincing evidence
- Applicable limitations periods - 4 or 5 years

## Actual Knowledge by the Beneficiary ... (cont'd.)

- *Corya v. Sanders*, 155 So. 3d 1279 (Fla. 4th DCA 2015) also held that a beneficiary who has actual knowledge of the existence of the trust and that he or she has not received a trust accounting is time-barred by Chapter 95 from seeking an accounting for any period more than 4 years prior to the filing of the action.

# Amendment to §736.1008(3)

Effective July 1, 2018, §736.1008(3) was amended by adding the following sentence:

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

## **Amendment to §736.1008(3) (cont'd.)**

Section 8 of the new law states that this amendment is intended to clarify existing law, is remedial in nature, and applies retroactively to all cases pending or commenced on or after July 1, 2018.

# **Limitations for Breach of Trust Claims Against a Trustee (cont'd.)**

## **Actual Knowledge By the Beneficiary of**

- The Trustee's Repudiation of the Trust, or**
- The Trustee's Adverse Possession of Trust Assets**

**Applicable limitations period – 4 or 5 years**

# Limitations for Breach of Trust Claims Against a Trustee (cont'd.)

A 10-year limitations or repose period begins to run when:

- The trustee resigns;
- The trust terminates; or
- The fiduciary relationship between the trustee and the beneficiary otherwise ends,

**provided** that the beneficiary had actual knowledge of the existence of the trust and his/her status as a beneficiary throughout the 10-year period.

# **Limitations for Breach of Trust Claims Against a Trustee (cont'd.)**

A 20-year period of limitations or repose begins to run upon the performance of any act or omission by the trustee, provided that the beneficiary has actual knowledge of the existence of the trust and his/her status as a beneficiary throughout the 20-year period.

# Limitations for Breach of Trust Claims Against a Trustee (cont'd.)

A 40-year limitations or repose period begins to run when:

- The trustee resigns;
- The trust terminates; or
- The fiduciary relationship between the trustee and the beneficiary otherwise ends.



# **Limitations for Breach of Trust Claims Against a Trustee (cont'd.)**

The limitations periods set forth in Part X of the FTC are not retroactive.

# Limitations on Direct Actions Against Certain Trusts After Settlor's Death

Direct actions by a creditor of the settlor against a trust described in §733.707(3) (e.g., the settlor's revocable living trust) after the settlor's death are **prohibited**. Such claims must be presented against the settlor's estate as provided in Florida Probate Code and the PR of the settlor's estate may obtain payment from the trustee.

**(MANDATORY RULE)**

# Protections from Liability for Persons (Other Than Beneficiaries) Dealing With the Trustee

- Persons (other than beneficiaries) dealing with the trustee in good faith
- Persons acting in reliance on a certification of trust

**(MANDATORY RULE)**

# PART XI – RULES OF CONSTRUCTION

- Construction of terms of relationship
- Multi-generational class gifts
- Unlawful and intentional killings
- Effect of dissolution of marriage on revocable trust
- Change in securities; accessions; nonademption
- Trust contest penalty clauses (**MANDATORY**)
- Antilapse and substitute takers

## PART XII – CHARITABLE TRUSTS

“Charitable trust” means a trust, or portion of a trust, created for a charitable purpose such as relief of poverty; the advancement of arts, sciences, education, or religion; and the promotion of health, governmental, or municipal purposes.

## Charitable Trusts (cont'd.)

Attorney General may assert the rights of a qualified beneficiary, and he or she also has standing to assert the rights of a qualified beneficiary in any judicial proceeding concerning a charitable trust having its principal place of administration in Florida.

# Charitable Trusts (cont'd.)

Prior to July 1, 2017:

- **Part I** of the FTC provided that the **Attorney General** may assert the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in Florida, but
- **Part XII** required that certain notices, releases, and elections be given to the **state attorney**.
- The FTC contained no guidance as to how the notices, releases, and elections required under Part XII were to be delivered.

## Charitable Trusts (cont'd.)

Amendments effective July 1, 2017:

- Deleted all references to “state attorney” in Part XII and inserted “Attorney General” in its place so that the Attorney General, rather than the state attorney, will receive the notifications, releases, and elections required by Part XII
- Added definition of "delivery of notice"



## Charitable Trusts (cont'd.)

- No duty to send information, accountings, etc., to the Attorney General unless and until he or she asserts the rights of a qualified beneficiary with respect to the trust.
- However, the FTC gives charitable *organizations* expressly designated to receive distributions under the terms of a charitable trust the rights of a qualified beneficiary.
- Settlers have standing to enforce (Part IV)

# PART XIII – MISCELLANEOUS PROVISIONS

- Electronic Records and Signatures
- Severability
- Effective Date (discussed at the beginning of this presentation)