

## CHAPTER 2014-115

### Committee Substitute for Committee Substitute for House Bill No. 405

An act relating to trusts; amending s. 736.0703, F.S.; limiting the liability of excluded trustees; providing that certain duties of trustees do not apply to an excluded trustee in certain circumstances; providing an effective date.

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

Section 1. Subsection (9) of section 736.0703, Florida Statutes, is amended to read:

736.0703 Cotrustees.—

(9) If the terms of a trust instrument provide for the appointment of more than one trustee but confer upon one or more of the trustees, to the exclusion of the others, the power to direct or prevent specified actions of the trustees, the excluded trustees shall act in accordance with the exercise of the power. Except in cases of willful misconduct on the part of the excluded trustee with the authority to direct or prevent actions of the trustees of which the excluded trustee has actual knowledge, an excluded trustee is not liable, individually or as a fiduciary, for any consequence that results from compliance with the exercise of the power, ~~regardless of the information available to the excluded trustees.~~ An The excluded trustee does not have a duty or an ~~trustees are~~ relieved of any obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of the power. The trustee or trustees having the power to direct or prevent actions of the excluded trustees shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power. The provisions of s. 736.0808(2) do not apply if the person entrusted with the power to direct the actions of the excluded trustee is also a cotrustee.

Section 2. This act shall take effect July 1, 2014.

Approved by the Governor June 13, 2014.

Filed in Office Secretary of State June 13, 2014.

**HIGHLIGHTS OF THE FLORIDA  
FAMILY TRUST COMPANY  
LEGISLATION**

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On June 13, 2014, Florida Senate Bills 1238 and 1320 were signed into law creating chapter 662 and providing a framework for the formation and operation of Family Trust Companies in Florida. The purpose of this outline is to highlight notable provisions of the bills and to provide an overview of some of the issues relating to family trust companies that are not apparent from the text of the bills.

I. Background

A. A family trust company (also commonly referred to as a “Private Trust Company”) is an entity owned by members of a family for the purpose of providing trustee and other fiduciary services to family members or trusts created by or for the benefit of family members.

1. The structure of a family trust company is often similar to a public trust company, but the family trust company is formed in a jurisdiction that exempts the company from the regulatory requirements imposed on public trust companies because the family trust company is not providing fiduciary services to the public.
2. Services may include serving as trustee, investment advisor, agent or personal representative, tax planning, tax preparation, and family education.
3. Family trust companies are often created when a family needs an independent trustee, but does not believe that a public trust company will fit their specific circumstances. For example, one or more family or closely-held businesses may be owned by the family trusts.

B. Advantages

1. Family trust companies provide trustee continuity while maintaining flexibility in changing decision-makers. For example, officers, etc. of the family trust company can be changed without changing the trustee of the trust or otherwise disrupting trust operations.

2. Using an entity structure provides liability protection for decision-makers who would otherwise be personally liable if serving as a trustee in their individual capacity. This may attract individuals, such as outside professionals, to serve who otherwise would not be willing to serve if named individually.
3. Family privacy is protected. This includes not only financial privacy, but also privacy for non-financial issues, such as mental or substance abuse issues, that may arise with beneficiaries. Utilizing a family trust company permits these issues to be handled “in-house” without disclosure to outside parties, such as corporate trustees.
4. Family trust companies are free to establish their own fees. They do not have the pressures to generate profits and meet performance targets that public trust companies have.
5. Family trust companies can be used to establish a resident trustee in a particular jurisdiction (such as Florida) to avoid state income tax on trust assets.

C. Disadvantages

1. Administration costs are expensive.
2. Depth of experience in a family trust company may not be as extensive as in a public trust company.
3. Tax issues resulting from the use of a family trust company are unsettled.

D. At least 14 other states currently have legislation authorizing the formation and operation of family trust companies (Alaska, Arkansas, Colorado, Delaware, Louisiana, Mississippi, Nevada, New Hampshire, Oklahoma, Pennsylvania, South Dakota, Tennessee, Virginia, Wyoming). However, not all states are equally popular. The states with clear legislation and favorable trust laws seem to be the most popular (e.g., South Dakota and Nevada).

E. Securities and Exchange Commission (SEC) Registration

1. The SEC regulates “investment advisers” primarily under the Investment Advisers Act of 1940. SEC registration requirements for investment advisers include (1) filing a Form ADV with the SEC, which must be kept current, (2) annual filings with the SEC of an audited balance sheet, (3) undergoing an annual examination by an independent public accountant to verify client assets, and (4) inspections and examinations by SEC staff. 15 U.S.C. § 80b-3.
2. An “investment adviser” is defined as any person or firm who, for compensation, engages in the business of advising others, either directly or

through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities. 15 U.S.C. § 80b-2(a)(11).

3. A family trust company that provides investment services generally falls within the definition of an “investment adviser” and, therefore, would be required to register with the SEC. However, there are two notable exemptions.

- a. On June 22, 2011, the SEC adopted a rule, an excerpt of which is below, to define “family offices” that are excluded from the definition of an investment adviser and thus, are not subject to regulation under the Investment Advisers Act of 1940. SEC Release No. IA-3220; File No. S7-25-10 (June 22, 2011); 17 C.F.R. 275.202(a)(11)(G)-1.

“A family office is a company (including its directors, partners, members, managers, trustees, and employees acting within the scope of their position or employment) that:

(1) Has no clients other than family clients, provided that if a person that is not a family client becomes a client of the family office as a result of the death of a family member or key employee or other involuntary transfer from a family member or key employee, that person shall be deemed to be a family client for purposes of this section for one year following the completion of the transfer of legal title to the assets resulting from the involuntary event;

(2) Is wholly owned by family clients and is exclusively controlled (directly or indirectly) by one or more family members and/or family entities; and

(3) Does not hold itself out to the public as an investment adviser.”

\*\* Note: A family office serving more than one family cannot qualify under this definition.

- b. A family trust company may also avoid SEC registration if it operates under a state charter or license, regardless of whether it qualifies as a “family office” under the SEC definition. In effect, the family trust company is trading SEC regulation for state regulation. 15 U.S.C. §80b-2(a)(11)(A) and §80B-2(a)(2)(C).

- 1) Ch. 662 is drafted with the intent that a licensed family trust company formed and operating under chapter 662 would be exempt from SEC registration.

2) A Florida family trust company serving two families could not qualify under the SEC Family Office definition because SEC rules do not permit multi-family offices.

4. A family trust company that does not provide investment services is not an investment adviser and is not required to register with the SEC.

## II. Effective Date of Florida Legislation

A. October 1, 2015

## III. Existing Family Trust Companies Must Convert to Chapter 662 Family Trust Companies

A. 662.151(3) – “A company in operation as of the effective date of this act that meets the definition of a family trust company shall have 90 days from the effective date of this act to apply for licensure as a licensed family trust company, register as a family trust company or foreign licensed family trust company, or cease doing business in this state.”

B. Deadline to convert is December 29, 2015.

C. Prior to the enactment of chapter 662, an entity seeking to operate as a family trust company in Florida had to either (1) satisfy the regulatory requirements to be a public trust company under chapter 658, or (2) obtain an exemption letter from the Office of Financial Regulation (OFR) to be exempt from the regulatory requirements applicable to a public trust company. The exemption letter process is unfamiliar to most Florida practitioners and the requirements to receive an exemption are not well defined.

D. OFR wants all family trust companies to operate under chapter 662 in order to have a uniform set of rules and to streamline regulation.

## IV. Definition of a Family Trust Company

A. 662.111(12) –“Family trust company” means a corporation or limited liability company that:

(a) Is exclusively owned by one or more family members.

(b) Is organized or qualified to do business in this state.

(c) Acts or proposes to act as a fiduciary to serve one or more family members.

(d) Does not serve as a fiduciary for a person, entity, trust, or estate that is not a family member, except that it may serve as a fiduciary for up to 35 individuals who are not family members if the individuals are current or former employees of the family trust company or one or more trusts, companies, or other entities that are family members.

- B. A Family trust company must be an LLC or corporation formed in Florida or an LLC or corporation formed outside of Florida that is qualified to do business in Florida. It cannot be a partnership, which is consistent with the law of most other states.
- C. There are three types of Family Trust Companies that may operate in Florida:
  - 1. **Licensed Family Trust Company** – A family trust company that operates in accordance with chapter 662 and has been issued a license that has not been revoked or suspended by OFR. § 662.111(16).
  - 2. **Unlicensed Family Trust Company** – A family trust company that operates in accordance with chapter 662 and registers with OFR, but does not apply for a license.
  - 3. **Foreign Licensed Family Trust Company** – A family trust company that is (a) licensed by, and has its principal place of business in the District of Columbia or a state in the U.S. other than Florida, (b) operates in accordance with the family or private trust company laws of its licensing state, (c) is subject to statutory or regulatory mandated supervision by its licensing state, and (d) is not owned by an entity that is organized in or licensed by any foreign country. §662.111(15).

V. The Designated Relative Concept

- A. 662.111(9) – “Designated Relative” means a common ancestor of a family, who may be a living or deceased person, and who is so designated in the application for a license or annual license.
- B. The designated relative establishes the starting point for determining who is a family member, which, in turn, establishes who the family trust company may provide fiduciary services to. Other states, such as New Hampshire and Nevada, utilize the designated relative concept as well.
- C. The designated relative can be changed in the annual renewal filed with OFR.
- D. A licensed family trust company can have up to a maximum of 2 designated relatives. §662.120. This allows two families to join together to operate a single family trust company, which can be very beneficial for families that invest together. However, designated relatives cannot be related within 5 generations. This limitation is intended to prevent a single family from circumventing the limitations on the definition of a “family member”.
- E. An unlicensed family trust company cannot have more than 1 designated relative.
- F. Florida expressly permits two families to operate a single family trust company, which is rare among the other states with family trust company legislation.

VI. Definition of Family Member

A. F.S. § 662.111(11) – “Family member” means:

(a) A designated relative.

(b) A person within the fourth degree of lineal kinship to a designated relative of a family trust company, or a person within the sixth degree of lineal kinship to a designated relative of a licensed family trust company.

(c) A person within the seventh degree of collateral kinship to a designated relative of a family trust company, or a person within the ninth degree of collateral kinship to a designated relative of a licensed family trust company.

(d) The spouse or former spouse of an individual qualifying as a family member and an individual who is within the fifth degree of lineal kinship to that spouse or former spouse.

(e) A family affiliate.

(f) A trust established by a family member if the trust is funded exclusively by one or more family members. A trust to which property has been transferred as a result of a family member’s exercise of a power of appointment shall be deemed established by that family member if all qualified beneficiaries of the appointee trust are family members.

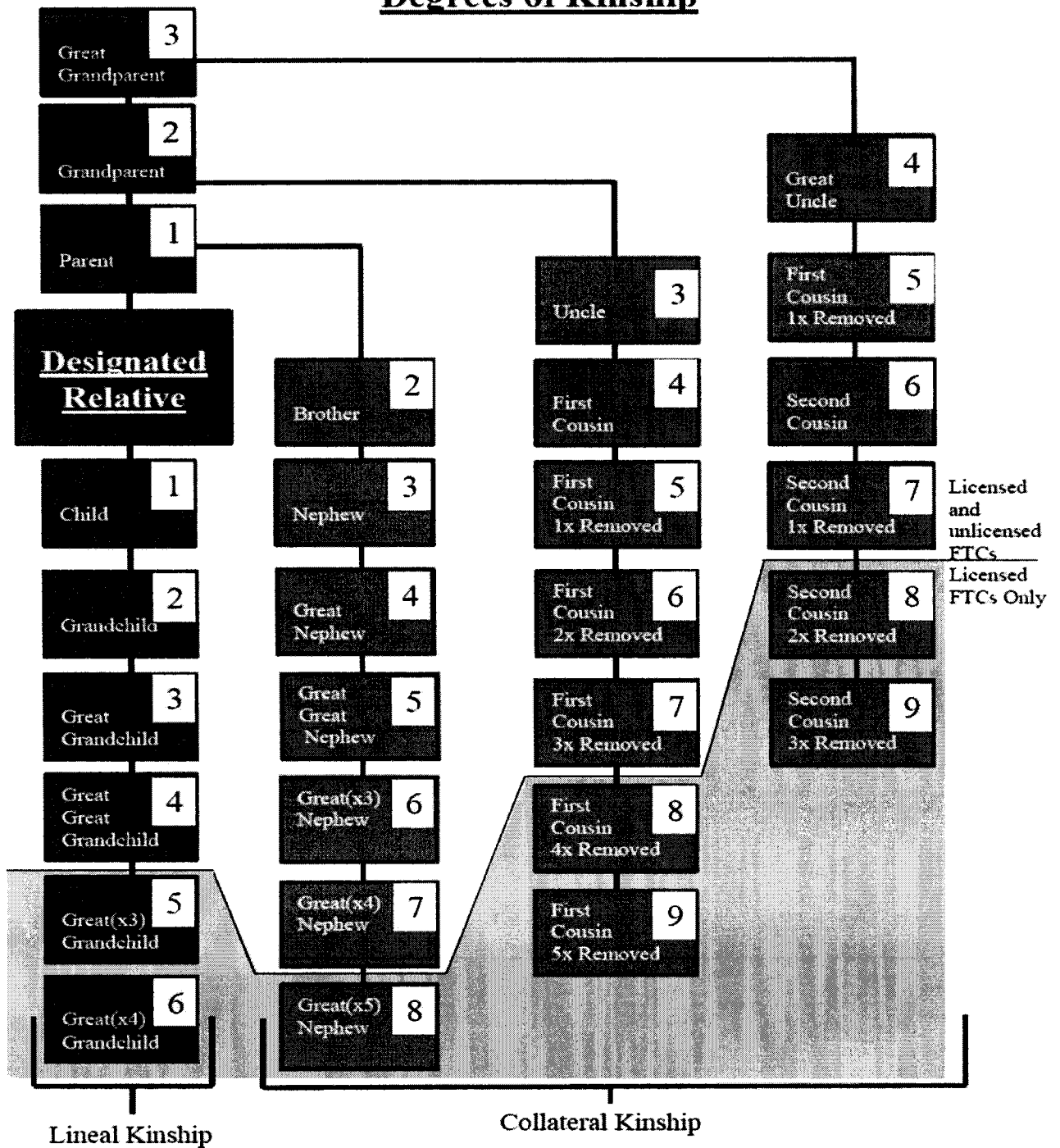
(g) A trust established by an individual who is not a family member if all of the noncharitable qualified beneficiaries of the trust are family members, except that a trust composed exclusively of nonindividual qualified beneficiaries is considered to be a family member if all of the nonindividual qualified beneficiaries are charitable foundations or other charitable entities as described in paragraph (j).

(h) The probate estate of a family member.

(i) The probate estate of an individual who is not a family member if all of the noncharitable beneficiaries of the estate are family members, except that an estate composed exclusively of nonindividual beneficiaries is considered to be a family member if all of the nonindividual beneficiaries are charitable foundations or other charitable entities as described in paragraph (j).

(j) A charitable foundation or other charitable entity in which a majority of the governing body is composed of family members.

## Degrees of Kinship



B. Providing fiduciary services to someone who is not a family member and who is not otherwise included in the class or permissible non-family members under F.S. 662.111(12)(d) is grounds for revocation of a license.

### VII. Requirements for a Family Trust Company and Licensed Family Trust Company

A. Licensed Family Trust Company



1. Satisfy the definition of family trust company. F.S. § 662.111(12); See Section IV above.
2. File application to OFR and pay initial fee of \$10,000. F.S. § 662.121.
3. Minimum capital account of \$250,000 (if one designated relative) or \$350,000 (if two designated relatives), exclusive of organization expenses, which must be composed of cash and/or U.S. Treasury obligations. F.S. § 662.124.
4. Minimum of 3 directors (if a corporation) or 3 directors or managers (if an LLC), at least one of which must be a Florida resident. F.S. § 662.125(2).
5. Principal office physically located in Florida where original or true copies of records and accounts are maintained. F.S. § 662.1225(1)(a).
6. Deposit account with a state-chartered or national financial institution that has a principal branch office in Florida. F.S. § 662.1225(1)(d).
7. Maintain fidelity bonds of at least \$1 million on all active management or, in lieu thereof, increase the minimum capital account by \$1 million. F.S. § 662.126(3).
8. Maintain errors and omissions policy of at least \$1 million on all active management. F.S. § 662.126(4).

**B. Unlicensed Family Trust Company**

1. Satisfy definition of family trust company. F.S. § 662.111(12); See Section IV above.
2. Register with OFR and pay initial fee of \$5,000. F.S. § 662.122.
3. Minimum capital account of \$250,000, exclusive of organization expenses, which must be composed of cash or U.S. Treasury obligations. F.S. § 662.124.
4. Minimum of 3 directors (if a corporation) or 3 directors or managers (if an LLC), at least one of which must be a Florida resident. F.S. § 662.125(2).
5. Principal office physically located in Florida where original or true copies of records and accounts are maintained. F.S. § 662.1225(1)(a).
6. Deposit account with a state-chartered or national financial institution that has a principal branch office in Florida. F.S. § 662.1225(1)(d).
7. No bond or insurance requirements. F.S. § 662.126(6) and (7).

**VIII. Application Process (Licensed) vs. Registration Process (Unlicensed)**

A. F.S. § 662.121 Application for licensed family trust company; fees.

An applicant seeking to operate as a licensed family trust company must file an application with the office on forms prescribed by the office, accompanied by a nonrefundable \$10,000 application fee to be deposited into the Financial Institutions' Regulatory Trust Fund pursuant to s. 655.049 for the purpose of administering this chapter. The application must contain or be accompanied by:

- (1) The name of the proposed licensed family trust company.
- (2) A copy of the articles of incorporation or articles of organization and the bylaws or operating agreement of the proposed licensed family trust company.
- (3) The physical address and mailing address of the proposed licensed family trust company, which must be located in this state.
- (4) A statement describing in detail the services that will be provided to family members by the proposed licensed family trust company.
- (5) The name and biographical information of each individual who will initially serve as a director, officer, manager, or member acting in a managerial capacity of the proposed licensed family trust company.
- (6) The name and biographical information of each individual who owns or has the ability or power to directly or indirectly vote at least 10 percent or more of the outstanding shares, membership interest, or membership units of the proposed licensed family trust company.
- (7) The names of the designated relatives.
- (8) The amount of the initial capital account of the proposed licensed family trust company and the form in which the capital was paid and will be maintained.
- (9) The type and amount of bonds or insurance that will be procured and maintained on directors, officers, managers, or members acting in a managerial capacity or employees pursuant to s. 662.126.
- (10) A statement signed by the applicant, or by the individual signing on behalf of the proposed licensed family trust company, under penalty of perjury, affirming that the following statements are true:
  - (a) The proposed licensed family trust company is not currently transacting business with the general public.
  - (b) No director, officer, manager, or member served as a director, officer, or manager, or acted in a managerial capacity, for a trust company or any other financial institution that had a license issued under the financial institutions codes or by the Federal Government or any other state, the

District of Columbia, a territory of the United States, or a foreign country that was suspended or revoked within the 10 years preceding the date of the application.

(c) No director, officer, manager, or member acting in a managerial capacity has been convicted of, pled guilty or nolo contendere, regardless of whether adjudication of guilt is entered by the court, to a violation of the financial institutions codes, including s. 655.50, chapter 896 (financial transaction offenses), or similar state or federal law or related rule, or to a crime involving fraud, misrepresentation, or moral turpitude.

(d) No director, officer, manager, or member acting in a managerial capacity has had a professional license suspended or revoked within the 10 years preceding the date of the application.

(e) All information contained in the application is true and correct to the best knowledge of the individual signing the application on behalf of the proposed licensed family trust company.

(11) Any other additional information reasonably required by the office.

B. F.S. § 662.122 Registration of a family trust company . . .

(1) A family trust company that is not applying under s. 662.121 to become a licensed family trust company must register with the office before beginning operations in this state. The registration application must:

(a) Provide the name of the designated relative.

(b) State that the family trust company is a family trust company as defined under this chapter and that its operations will comply with ss. 662.1225, 662.125, 662.131, and 662.134.

(c) Provide the current telephone number and street address of the physical location in this state of its principal place of operations where its books and records will be maintained.

(d) List the name and current street address in this state of its registered agent.

C. Annual renewals must be filed on or before January 30<sup>th</sup> each year for both licensed and unlicensed Family Trust Companies. F.S. § 662.128.

1. License renewal application must include \$1,500 fee and a verified statement that (1) the licensed family trust company operated in full compliance with ch. 662, ch. 896, and any related rules or regulations and (2) describes any changes to operations, principal place of business, directors, officers, managers, members acting in a managerial capacity and

designated relatives during the calendar year. The application must also include proof acceptable to OFR that the company satisfies the definition of a family trust company under s. 662.111(12).

2. Registration renewal application must include \$750 fee and a verified statement that it satisfies the definition of a “family trust company” under s. 662.111(12) and that the company has operated in full compliance with ss. 662.1225, 662.125, 662.131 and 662.134, ch. 896, and any related rules or regulations. The application must also include the name of the designated relative.

## IX. Powers of a Family Trust Company

### A. F.S. § 662.130 Powers of Family Trust Companies, Licensed Family Trust Companies, and Foreign Licensed Family Trust Companies

(1) A family trust company and a licensed family trust company may, for its eligible members and individuals:

(a) Act as a sole or co-personal representative, executor, or curator for probate estates being administered in a state or jurisdiction other than this state.

(b) Act as an attorney in fact or agent under a power of attorney, other than a power of attorney governed by chapter 709.

(c) Except as provided in s. 662.131, act within or outside this state as a sole fiduciary or co-fiduciary, including acting as a trustee, advisory agent, assignee, assignee for the benefit of creditors, authenticating agent, bailee, bond or indenture trustee, conservator, conversion agent, custodian, escrow agent, fiscal or paying agent, financial advisor, guardian, investment advisor or manager, managing agent, purchase agent, receiver, registrar, safekeeping or subscription agent, transfer agent, except for public companies, warrant agent, or similar capacities generally performed by corporate trustees, and in so acting possess, purchase, sell, invest, reinvest, safekeep, or otherwise manage or administer the real or personal property of eligible members and individuals.

(d) Exercise the powers of a corporation or limited liability company incorporated or organized under the laws of this state, or qualified to transact business as a foreign corporation or limited liability company under the laws of this state, which are reasonably necessary to enable it to fully exercise, in accordance with commonly accepted customs and usages, a power conferred under this chapter.

(e) Delegate duties and powers, including investment functions under s. 518.112, in accordance with the powers granted to a trustee under chapter 736 or other applicable law, and retain agents, attorneys, accountants,

investment advisers, or other individuals or entities to advise or assist the family trust company, licensed family trust company, or foreign licensed family trust company in the exercise of its powers and duties under this chapter and chapter 736. Such exercise of power may include, but is not limited to, retaining a bank trust department, or a public trust company, other than another family trust company, licensed family trust company, or foreign licensed family trust company.

(f) Perform all acts necessary for exercising the powers enumerated in this section or authorized by this chapter and other applicable laws of this state.

(2) Except as otherwise provided in s. 662.131, a foreign licensed family trust company that is in good standing in its principal jurisdiction may exercise all the trust powers in this state that a Florida family trust company may exercise.

B. F.S. § 662.131 Prohibitions

Notwithstanding any provision of chapter 662, a family trust company, licensed family trust company, or foreign licensed family trust company may not:

(1) Engage in commercial banking; however, it may establish accounts at financial institutions for its own purposes or on behalf of family members to whom it provides services pursuant to this chapter.

(2) Engage in fiduciary services with the public unless licensed pursuant to chapter 658.

(3) Serve as a personal representative or a co-personal representative of a probate estate administered in this state.

(4) Serve as an attorney in fact or agent, including as a co-attorney in fact or co-agent, under a power of attorney pursuant to chapter 709.

C. Serving as Personal Representative

Note that a Florida family trust company can serve as a personal representative or co-personal representative for the estate of a family member administered outside Florida, but not for an estate administered in Florida. Florida generally prohibits nonresidents from serving as personal representative unless they are related to the decedent. There were some concerns raised during the final stages of drafting that permitting a Florida family trust company to serve as a personal representative would open the door to arguments that nonresidents should be permitted to serve, regardless of relation, since a Florida family trust company is only required to have one resident director or manager.

D. Delegation to Bank Trust Department and Public Trust Companies

1. F.S. § 662.130(1)(e) specifically authorizes a family trust company to delegate duties and powers to a bank trust department or public trust company in accordance with chapter 736. Such delegation may be useful where the family trust company wants to focus on administering the family business assets and minimize its investment responsibilities, or if the family trust company wants to delegate certain administrative tasks to a public trust company.

X. Office of Financial Regulation (OFR) has Regulatory Oversight

A. F.S. § 662.141 Examination, investigations, and fees.

The office may conduct an examination or investigation of a family trust company, licensed family trust company, or foreign licensed family trust company at any time it deems necessary to determine whether a family trust company, licensed family trust company, foreign licensed family trust company, or family trust company affiliated person has violated or is about to violate any provision of this chapter or rules adopted by the commission pursuant to this chapter, or any applicable provision of the financial institution codes or rules adopted by the commission pursuant to such codes.

(1) The office shall conduct an examination of a licensed family trust company, family trust company, and foreign licensed family trust company at least once every 18 months.

(2) In lieu of an examination by the office, the office may accept an audit of a family trust company, licensed family trust company, or foreign licensed family trust company by a certified public accountant licensed to practice in this state who is independent of the company, or other person or entity acceptable to the office. If the office accepts an audit pursuant to this subsection, the office shall conduct the next required examination.

(3) The office shall examine the books and records of a family trust company or licensed family trust company as necessary to determine whether it is a family trust company or licensed family trust company as defined in this chapter, and is operating in compliance with ss. 662.1225, 662.125, 662.126, 662.131, and 662.134, as applicable. The office may rely upon a certificate of trust, trust summary, or written statement from the trust company identifying the qualified beneficiaries of any trust or estate for which the family trust company serves as a fiduciary and the qualification of the qualified beneficiaries as permissible recipients of company services. The commission may establish by rule the records to be maintained or requirements necessary to demonstrate conformity with this chapter as a family trust company or licensed family trust company.

(4) The office shall examine the books and records of a foreign licensed family trust company as necessary to determine if it is a foreign licensed trust company as defined in this chapter and is in compliance with ss. 662.1225, 662.125,

662.130(2), 662.131, and 662.134. In connection with an examination of the books and records of the company, the office may rely upon the most recent examination report or review or certification letters or similar documentation issued by the regulatory agency to which the foreign licensed family trust company is subject to supervision. The commission may establish by rule the records to be maintained or requirements necessary to demonstrate conformity with this chapter as a foreign licensed family trust company. The office's examination of the books and records of a foreign licensed family trust company is, to the extent practicable, limited to books and records of the operations in this state.

(5) For each examination of the books and records of a family trust company, licensed family trust company, or foreign licensed family trust company as authorized under this chapter, the trust company shall pay a fee for the costs of the examination by the office. As used in this section, the term "costs" means the salary and travel expenses of field staff which are directly attributable to the examination of the trust company and the travel expenses of any supervisory or support staff required as a result of examination findings. The mailing of payment for costs incurred must be postmarked within 30 days after the receipt of a notice stating that such costs are due. The office may levy a late payment of up to \$100 per day or part thereof that a payment is overdue, unless waived for good cause. However, if the late payment of costs is intentional, the office may levy an administrative fine of up to \$1,000 per day for each day the payment is overdue.

(6) All fees collected under this section must be deposited into the Financial Institutions' Regulatory Trust Fund pursuant to s. 655.049 for the purpose of administering this chapter.

#### B. Mandatory and Discretionary Examinations

1. Examinations are important to family trust companies seeking to avoid SEC registration because of state regulation. There is some concern that if the states do not appear to be actively regulating the family trust companies, then the SEC exemption may be lost.

#### C. Penalties for violations

1. F.S. § 662.143 – Issue cease and desist order
  - a. OFR may issue a cease and desist order if it has reason to believe that the family trust company or family trust company-affiliated person has engaged in conduct that:
    - 1) is a violation of chapter 662, any rule of the commission, any order of OFR, or chapter 896; or
    - 2) is an act or omission that OFR has reason to believe is a breach of trust or fiduciary duty.

2. F.S. § 662.142 – Revoke license
  - a. OFR has discretion to revoke a license for:
    - 1) violations of chapter 662, chapter 896, any rule issued by the commission or an order of OFR;
    - 2) a failure to provide information or documents to OFR upon request; or
    - 3) an act or omission that is judicially determined to be a breach of trust or fiduciary duty by a court of competent jurisdiction.
3. F.S. § 662.145 – Remove Family Trust Company-Affiliated Person
  - a. OFR may remove a family trust company-affiliated person if it has reason to believe that the such person has engaged in conduct that:
    - 1) is a violation of chapter 662 or chapter 896;
    - 2) is a willful violation any rule issued by the commission or order of OFR;
    - 3) is a crime that involves fraud or moral turpitude which constitutes a felony; or
    - 4) is an act or omission that OFR has reason to believe is a breach of trust or fiduciary duty.
4. F.S. §§ 662.141(5) and 662.144 – Monetary fines
  - a. OFR may impose a fine of up to \$100 per day for failure to timely submit an annual renewal or any other required report.
  - b. OFR may impose a fine of up to \$100 per day for the late payment of OFR costs charged to the Family Trust Company for an examination. This fine may be raised to \$1,000 per day if the late payment is found to be intentional.

## XI. Role of Financial Services Commission

- A. F.S. § 662.140 Rules – The commission has authority to adopt rules necessary to carry out the purposes of this chapter.

## XII. Privacy protections (SB 1320)

- A. F.S. § 662.148(2) Public Records Exemption



The following information held by the office is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution:

(a) Any personal identifying information appearing in records relating to a registration, an application, or an annual certification of a family trust company, licensed family trust company, or foreign licensed family trust company.

(b) Any personal identifying information appearing in records relating to an examination of a family trust company, licensed family trust company, or foreign licensed family trust company.

(c) Any personal identifying information appearing in reports of examinations, operations, or conditions of a family trust company, licensed family trust company, or foreign licensed family trust company, including working papers.

(d) Any portion of a list of names of the shareholders or members of a family trust company, licensed family trust company, or foreign licensed family trust company.

(e) Information received by the office from a person from another state or nation or the Federal Government which is otherwise confidential or exempt pursuant to the laws of that state or nation or pursuant to federal law.

(f) An emergency cease and desist order issued under s. 662.143 until the emergency order is made permanent unless the office finds that such confidentiality will result in substantial risk of financial loss to the public.

B. F.S. § 662.148(3) Authorized release of confidential information

Information confidential under (2) may be disclosed by OFR:

1. To authorized representatives of family trust company;
2. To a fidelity insurance company or independent auditor, upon the written consent of the family trust company;
3. To a liquidator, receiver or conservator for family trust company;
4. To any other state, federal or foreign agency responsible for regulation of family trust company;
5. To a law enforcement agency; or
6. Pursuant to a legislative subpoena.

- C. A person who willfully discloses information made confidential and exempt by this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. F.S. § 662.148(5).

### XIII. Tax Considerations in Structuring the Family Trust Company

- A. There is currently a lack of clear guidance. Private letter rulings exist (see e.g., PLR 200523003, 200546055 and 200548035); however, these cannot be relied upon by anyone other than the taxpayer to whom the ruling was issued. Moreover, the IRS stopped issuing letter rulings on family trust companies a few years ago in anticipation of issuing public guidance.
- B. IRS Notice 2008-63 contains a proposed revenue ruling which provides safe harbor guidance on income, gift, estate and GST tax consequences of using a family trust company to serve as the trustee of trusts in which family members are grantors and beneficiaries.
  - 1. IRS stated intent of issuing this proposed revenue ruling is “to confirm certain tax consequences of the use of a private trust company that are not more restrictive than the consequences that could have been achieved by the taxpayer directly, but without permitting a taxpayer to achieve tax consequences through the use of a private trust company that could not have been achieved had the taxpayer acted directly.”
  - 2. The proposed revenue ruling left several issues unresolved. The IRS received numerous comments, including from the Florida Bar Tax Section. To date, the IRS has not issued the final revenue ruling. It is #3 on the IRS priority guidance plan for Gifts and Estates and Trusts for the 3<sup>rd</sup> quarter of the July 2013 to June 2014 plan year.
  - 3. Proposed revenue ruling addresses two situations
    - a. Situation 1 – Private trust company is created in a state that requires a Discretionary Distribution Committee (DDC) to make all decisions regarding discretionary distributions from each trust for which it serves as trustee. In addition, state law has the following “firewalls”:
      - 1) No family member serving on the DDC may participate in making discretionary distribution decisions with respect to any trust of which that person or his or her spouse is either a grantor or a beneficiary, or with respect to any trust of which the beneficiary is a person to whom the family member or his or her spouse owes an obligation of support.
      - 2) Only officers and managers may participate in decisions regarding personnel of private trust company.

- 3) Nothing in state statutes or in company's governing documents may override a more restrictive provision in the trust instrument of a trust for which the private trust company is acting as trustee.
  - 4) No family member may enter into any reciprocal agreement regarding discretionary distributions from any trust for which the private trust company is serving as trustee.
- b. Situation 2 – Private trust company is created in a state that does not have legislation governing the formation and operation of a private trust company. However, the governing documents of the private trust company have the same “firewalls” that are imposed under state law in Situation 1. In addition, the governing documents create an “Amendment Committee”, a majority of which must be neither family members nor related or subordinate to family members, and, by majority vote, can make changes to the governing documents regarding the creation, function or membership of the DDC or the Amendment Committee, and any of the firewalls.
4. Based on the firewalls and the facts in the proposed revenue ruling, which address various family trusts along with family members serving on the DDC and as officers of the company, the IRS ruled that:
- a. The appointment of the private trust company as trustee of the family trusts will not alone cause the value of trust assets to be included in a grantor's gross estate under I.R.C. § 2036(a) or 2038(a);
  - b. The appointment of the private trust company as trustee of the family trusts will not alone cause the value of trust assets to be included in a beneficiary's gross estate under I.R.C. § 2041;
  - c. The appointment of the private trust company as trustee of the family trusts in which the trustee has discretionary power to distribute income and principal to the grantor's descendants will not alone cause the grantor's transfers to the trust to be treated as incomplete gifts under I.R.C. § 2511, or any distribution from the trust to be a gift by any DDC member;
  - d. The appointment of the private trust company as trustee of the family trusts will not alone affect the GST exempt status of the trust under Treas. Reg. § 26.2601-1(b)(1)(i), or change the inclusion ratio; and
  - e. The appointment of the private trust company as trustee of the family trusts will not alone cause the grantor or beneficiary to be

treated as the owner of the trust under I.R.C. §§ 673, 676, 677, or 678. The IRS stated the application of I.R.C. § 674 will depend upon the particular powers of the trustee and may depend on the proportion of the members of the DDC with authority to act with regard to that trust who are related or subordinate to the grantor. The IRS also stated that the operation of the private trust company could cause a grantor to be treated as an owner under I.R.C. § 675; however, it would depend upon the specific facts and circumstances.

## CHAPTER 2014-127

### Committee Substitute for Committee Substitute for House Bill No. 757

An act relating to estates; amending s. 732.806, F.S.; specifying that certain restrictions on gifts to lawyers and persons related to such lawyers apply only to written instruments executed on or after a specified date; providing applicability; amending s. 733.107, F.S.; providing circumstances under which a burden of proof shifts in cases involving undue influence; providing applicability; amending s. 733.808, F.S.; requiring that a directive to apply certain death benefits for the payment of claims and administration expenses be specified in certain instruments; providing for retroactive applicability; amending s. 736.0207, F.S.; establishing which party bears the burden of proof in an action to contest the validity or revocation of a trust; providing applicability; amending s. 736.05053, F.S.; requiring a specific directive for certain assets and death benefits to be used to pay estate expenses; providing for retroactive applicability; amending s. 736.1106, F.S.; providing for the vesting of outright devises in certain trust documents; providing applicability; providing an effective date.

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

Section 1. Subsection (9) is added to section 732.806, Florida Statutes, to read:

732.806 Gifts to lawyers and other disqualified persons.—

(9) This section applies only to written instruments executed on or after October 1, 2013.

Section 2. The changes made by this act to s. 732.806, Florida Statutes, are intended to clarify existing law and are remedial in nature.

Section 3. Section 733.107, Florida Statutes, is amended to read:

733.107 Burden of proof in contests; presumption of undue influence.—

(1) In all proceedings contesting the validity of a will, the burden shall be upon the proponent of the will to establish prima facie its formal execution and attestation. A self-proving affidavit executed in accordance with s. 732.503 or an oath of an attesting witness executed as required in s. 733.201(2) is admissible and establishes prima facie the formal execution and attestation of the will. Thereafter, the contestant shall have the burden of establishing the grounds on which the probate of the will is opposed or revocation is sought.

(2) In any transaction or event to which the presumption of undue influence applies, the presumption of ~~undue influence~~ implements public

policy against abuse of fiduciary or confidential relationships and is therefore a presumption shifting the burden of proof under ss. 90.301-90.304.

Section 4. The changes made by this act to s. 733.107, Florida Statutes, are intended to clarify existing law, are remedial in nature, and apply retroactively to all proceedings pending on or before the effective date of this act and to all cases commenced on or after the effective date of this act.

Section 5. Subsection (4) of section 733.808, Florida Statutes, is amended to read:

733.808 Death benefits; disposition of proceeds.—

(4) Unless the trust agreement, declaration of trust, or will expressly refers to this subsection and directs that it does not apply, death benefits payable as provided in subsection (1), subsection (2), or subsection (3), unless paid to a personal representative under the provisions of subsection (3), shall not be deemed to be part of the decedent's estate, and shall not be subject to any obligation to pay the expenses of the administration and obligations of the decedent's estate or for contribution required from a trust under s. 733.607(2) to any greater extent than if the proceeds were payable directly to the beneficiaries named in the trust.

Section 6. The changes made by this act to s. 733.808, Florida Statutes, are intended to clarify existing law, are remedial in nature, and apply retroactively without regard to the date of the decedent's death.

Section 7. Section 736.0207, Florida Statutes, is amended to read:

736.0207 Trust contests.—

(1) In an action to contest the validity or revocation of all or part of a trust, the contestant has the burden of establishing the grounds for invalidity.

(2) An action to contest the validity of all or part of a revocable trust, or the revocation of part of a revocable trust, may not be commenced until the trust becomes irrevocable by its terms or by the settlor's death. If all of a revocable trust has been revoked, an action to contest the revocation may not be commenced until after the settlor's death. This section does not prohibit such action by the guardian of the property of an incapacitated settlor.

Section 8. The changes made by this act to s. 736.0207, Florida Statutes, apply to all cases commenced on or after the effective date of this act.

Section 9. Subsection (1) of section 736.05053, Florida Statutes, is amended to read:

736.05053 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, property, or the proceeds of the assets or property that are included in the settlor's gross estate for federal estate tax purposes and may not be made from, other than assets proscribed in s. 733.707(3) or death benefits described in s. 733.808(4) unless the trust instrument expressly refers to s. 733.808(4) and directs that it does not apply, that are included in the settlor's gross estate for federal estate tax purposes.

Section 10. The changes made by this act to s. 736.05053, Florida Statutes, are intended to clarify existing law, are remedial in nature, and apply retroactively without regard to the date of the settlor's death.

Section 11. Subsection (5) of section 736.1106, Florida Statutes, is renumbered as subsection (6) and amended, and a new subsection (5) is added to that section, to read:

736.1106 Antilapse; survivorship with respect to future interests under terms of inter vivos and testamentary trusts; substitute takers.—

(5) Unless a contrary intent appears in the trust instrument, subsections (2)-(4) do not apply to an outright devise that vests upon the death of the settlor unless the beneficiary is a grandparent, or a lineal descendant of a grandparent, of the settlor or testator and the beneficiary:

(a) Is dead at the time of the execution of the revocable trust or will;

(b) Fails to survive the settlor or testator; or

(c) Is required by the inter vivos trust or by operation of law to be treated as having predeceased the settlor or testator.

A devise in a revocable trust or a testamentary trust that is to take effect at the death of the settlor or testator does not vest until the death of the settlor or testator.

(6)(5) Subsections (1)-(4) apply to all trusts other than trusts that were irrevocable before the effective date of this code. Sections 732.603, 732.604, and 737.6035, as they exist on June 30, 2007, continue to apply to other trusts executed on or after June 12, 2003. Subsection (5) applies to those trusts that become irrevocable after June 30, 2014.

Section 12. This act shall take effect July 1, 2014.

Approved by the Governor June 13, 2014.

Filed in Office Secretary of State June 13, 2014.