

SAMPLE TRUST FORMS

Drafting Florida trusts now that the new Florida Trust Code is in effect. Time to update your forms. Here are some suggestions.

By David F. Powell, professor, Florida State University School of Law, and Tye J. Klooster attorney, Katten Muchin Rosenman LLP, Chicago

These are the sample trust form provisions referenced in the February 2008 article “Drafting Florida Trusts” by Powell and Klooster. *Trusts & Estates* editors have not edited these sample provisions either for content or for style and do not vouchsafe their efficacy. The authors offer these form provisions merely as fodder for practitioners’ consideration. These form provisions do not constitute tax advice by the author or from *Trusts & Estates* magazine and should not be treated as such.

FORM #1

“**Mandatory State Law Provisions.** Applicable state law, including, while applicable, Florida Statutes § 736.0105(2), may provide certain mandatory and non-waivable provisions that apply to each trust created under this trust instrument. The Settlor hereby acknowledges the applicability of these provisions.”

FORM #2

“Applicable Law.

(a) **Validity.** The validity of each trust created under this trust instrument shall be determined in accordance with the laws of the State of Florida, as the Settlor is a domiciliary of the State of Florida as of the date this trust is created.

(b) **Construction.** This trust instrument shall be construed in accordance with the laws of the State of Florida, as a sufficient nexus to the State of Florida within the meaning of Florida Statutes § 736.0107(1) exists as of the date this trust is created.

(c) **Administration.**

(i) **Initial Applicable Law.** Initially, each trust created under this trust instrument shall be administered in accordance with the laws of the State of Florida, as a sufficient connection to the State of Florida within the meaning of Florida Statutes § 736.0108(1) exists as this trust is created.

(ii) **Waiver of Duty to Determine Appropriate Place of Administration.** Notwithstanding the provisions of Florida Statutes § 736.0108(4), with respect to each trust created under this trust instrument, the Trustee shall have no continuing duty to administer the trust at a place appropriate to its purposes and its administration.

(iii) **Transfer of Principal Place of Administration.** The Trustee, without court approval, may amend this subsection in order to change the jurisdiction whose law governs the administration of any trust created under this trust instrument and may amend any other provision of this trust instrument for the purpose of qualifying any trust under this trust instrument to be governed by the law of another jurisdiction. The jurisdiction whose law governs the administration of any trust may be the same as the situs of such trust. Notwithstanding the provisions of Florida Statutes § 736.0108(6), the Trustee is not required to notify the qualified beneficiaries of the trust in exercising the power granted to the Trustee by this subsection.”¹

FORM #3

“Purpose of Trust and Intent of Settlor Regarding Trust Modification. The Settlor appreciates that, do to changing circumstances, it may at some point in the future be desirable from the perspective of a beneficiary to seek the amendment of this trust instrument. Notwithstanding this possibility, it is the Settlor’s intent and belief that the best interests of the trust beneficiaries are served by the current provisions of this trust instrument and it is therefore the Settlor’s hope and desire that those provisions remain in effect notwithstanding the contrary views of the trust beneficiaries.

FORM #4

“Discretionary Termination by Trustee. If at any time any trust created under this trust instrument is, in the sole judgment of the Trustee, of the aggregate principal value of One Hundred Thousand Dollars (\$100,000.00) or less, or if the Trustee’s compensation for services rendered exceeds fifty percent (50%) of the net income of the trust, the Trustee (other than a Restricted Trustee) may, but need not, terminate the trust and distribute the trust estate to the beneficiary or beneficiaries then receiving or entitled to receive the net income from the trust, in proportionate shares. The authority granted to the Trustee by this Section may be exercised without notice to the qualified beneficiaries of the trust.”

¹ Christopher W. Boyett, *Oh, the Places I’d Go (Choice of Law, Governing Law, & the Principal Place of Administration Under the Florida Trust Code)*, Drafting Trusts Under the New Florida Trust Code, Fla. Bar. CLE (2007).

FORM #5

“Merger of Trusts. Without notice to the qualified beneficiaries, . . . *insert form merger provisions.*”

“Combination of Trusts. Without notice to the qualified beneficiaries, . . . *insert form merger provisions.*”

FORM #6

“Without notice to the qualified beneficiaries, a Trustee authorized to make distributions to or for the benefit of the beneficiary may, by an instrument in writing, signed and acknowledged by the Trustee and filed with the records of the trust, instead exercise the power by appointing all or part of the principal of such trust subject to the power in favor of a Trustee (who may, but need not, be the Trustee exercising such power) of another trust for the benefit of one (1) or more of such persons under the same trust instrument or under a different trust instrument, provided such exercise otherwise complies with the provisions of Florida Statutes § 736.04117(1)(a); [provided, however, such other trust must be upon substantially the same trusts, terms and conditions as said trust created hereunder;] provided, [further,] however, the Trustee is hereby authorized to shorten the period after which such trust hereunder is to terminate pursuant to the provision herein entitled “Accumulations and Perpetuities”, if necessary, to effectuate such appointment.”

FORM #7

“Self-Dealing by Trustee. With respect to each trust created under this trust instrument, the Settlor’s selection of the Trustee was made with full knowledge that the selection may create a conflict of interest between a Trustee’s fiduciary duties to a beneficiary and the Trustee’s individual account with respect to the sale, encumbrance or other transactions involving the investment or management of trust property. In accordance with the provisions of F.S. § 736.0802(2)(a), the Settlor directs that, notwithstanding these conflicts the Trustee may:

(a) participate in the exercise of any and all rights and powers granted the Trustee with respect to the trust estate;

(b) the exercise any and all rights and powers with the respect to the retention, continuation, termination or disposition of any business entity in which the trust holds an interest regardless of the fact that the Trustee is a fiduciary or owns interests in the same business entity; and

(c) make loans to, receive loans from, sell, purchase or exchange assets in a transaction with (i) the Personal Representative of the Settlor's estate and any trust settled by the Settlor, (ii) any one (1) or more persons related to the Settlor, and/or (iii) the Trustee as fiduciary of any other trust or estate."²

FORM #8

“Transactions With the Trustee’s Relatives and Affiliates. With respect to each trust created under this trust instrument, the Trustee may make loans to, receive loans from, sell, purchase or exchange any portion of the trust estate with (a) any one (1) or more persons who may be related to the Trustee, (b) an officer, director, employee, agent or attorney of the Trustee, and/or (c) a corporation, partnership, limited liability company or other business entity in which the Trustee has a financial interest.”³

FORM #9

“Trust Opportunities. With respect to each trust created under this trust instrument, the Trustee may renounce any interest or expectancy of the trust in any one (1) or more business opportunities presented to the Trustee and the Trustee is not prohibited from participating in these business opportunities as a result of such renunciation.”⁴

FORM #10

Language similar to the following could be considered to authorize such investments:

“Corporate Trustees and Affiliated Services. With respect to each trust created under this trust instrument, the Settlor, by specific reference to F.S. § 736.0802(5)(e)(2), authorizes any Corporate Trustee to invest in any investment instrument owned or controlled by such Corporate Trustee or its affiliate and to engage any affiliate to render services to such trust, provided such Corporate Trustee, subject to the other provisions of this trust instrument (including Section 15.9 of Article XV hereof relating to waiver of the prudent investor rule), otherwise complies with the provisions of F.S. § 736.0802(5). Such investments or engagements may be made without notice to the qualified beneficiaries of such trust and without application and approval by court order. As used in this subsection, the term ‘affiliate’ shall have the meaning ascribed to such term in

² Tami F. Conetta, *Settlor, May I? (Drafting Trustee Powers Considering the Duties of Loyalty, Impartiality, & Statutory Authorization for Self-Dealing)*, 2.4 – 2.7, *Drafting Trusts Under the New Florida Trust Code*, Fla. Bar. CLE (2007) (Conetta, *Settlor, May I?*).

³ *Id.* at 2.7-2.8.

⁴ *Id.* at 2.8.

F.S. § 736.0103(2) and the term ‘investment instrument’ shall have the meaning ascribed such term in FS § 660.25.”⁵

Language similar to the following could be considered to prohibit such investments:

“Corporate Trustees and Affiliated Services. With respect to each trust created under this trust instrument, notwithstanding the provisions of F.S. § 736.0802(5), a Corporate Trustee is hereby prohibited from investing in any investment instrument owned or controlled by such Corporate Trustee or its affiliate and from engaging any affiliate to render services to such trust. As used in this subsection, the term ‘affiliate’ shall have the meaning ascribed to such term in F.S. § 736.0103(2) and the term ‘investment instrument’ shall have the meaning ascribed such term in FS § 660.25.”⁶

FORM #11

Language similar to the following could be considered to authorize double fees:

“Compensation and Expenses. Any party who is acting in a fiduciary capacity pursuant to any trust created under this trust instrument is entitled to a fair and just compensation for services rendered in that capacity, and the party shall also be entitled to reimbursement from the trust estate for all reasonable expenses incurred in the management and distribution of the trust, all without reduction for any other compensation paid to the fiduciary, an affiliate of the fiduciary or any other person or entity. Any person or entity affiliated with any party who is acting in a fiduciary capacity pursuant to this trust instrument with respect to any trust is entitled to receive from the trust a fair and just compensation for services rendered to the trust, without reduction for any other compensation paid the fiduciary, an affiliate of the fiduciary or any other person or entity.”⁷

Language similar to the following could be considered to prohibit double fees:

“Compensation and Expenses. Any party who is acting in a fiduciary capacity pursuant to any trust created under this trust instrument is entitled to a fair and just compensation for services rendered in that fiduciary capacity, and that party shall also be entitled to reimbursement from the trust estate for all reasonable expenses incurred in the management and distribution of the trust. If a fiduciary participates in the decision to invest in any investment instrument (as defined in FS § 660.25) owned or controlled by the fiduciary or an affiliate of the fiduciary or to engage any affiliate of the fiduciary to render services to the trust, the fiduciary shall credit against the compensation the fiduciary may otherwise be entitled pursuant to the provisions of this Section the amount of all fees, compensation or commissions paid from the trust estate to the

⁵ *Id.* at 2.13 – 2.14.

⁶ *Id.*

⁷ *Id.* at 2.14 – 2.15.

fiduciary or an affiliate of the fiduciary for investing in those investment instruments or for rendering those services.”⁸

FORM #12

“Discretionary Distributions. With respect to each trust created under this trust instrument, it is the Settlor’s desire that the Trustee exercise its discretionary powers to benefit the current beneficiary of the trust, rather than any remaindermen, even to the extent of terminating the trust by distributing the entire trust estate to the beneficiary at any point in time following the creation of the trust and thereby eliminating the contingent interest of any remaindermen. Accordingly, with respect to each trust created under this trust instrument, the Trustee may disregard the interests of the remaindermen in making discretionary distributions to a current beneficiary. If there is more than one current beneficiary, distributions may be made to all or any one or more of them in such equal or unequal proportions and amounts as the Trustee, in its discretion may determine, including distributing all or nothing to any one or more of the beneficiaries, and there shall be no adjustment among the beneficiaries by reason of any distribution. The determination of the amount of net income or principal of a trust to be distributed to or for the benefit of a beneficiary is in the sole discretion of the Trustee.”

FORM #13

The drafter could consider language similar to the following with respect to employment of agents:

“(n) to employ persons, including, but not limited to, attorneys, accountants, investment advisors, 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; and to do all of the foregoing without notice to the qualified beneficiaries of such trust”

The drafter could consider language similar to the following with respect to delegation of authority:

“(z) at any time and from time to time, and subject to revocation at any time, to delegate the authorities, discretions and powers or any of them conferred upon a fiduciary under this trust instrument to any person or persons and/or entity or entities, without notice to the qualified beneficiaries of the trust; provided, any delegation or revocation of a delegations is to be

⁸ *Id.*

evidenced by a written instrument, signed and delivered to the person, persons, entity or entities to whom the delegation is made;”

FORM #14

“15.23 **Duty to Inform and Account.** If required by applicable law, and subject to the provisions of Section 15.24 of this Article with respect to the appointment of representatives, the Trustee shall:

(a) within sixty (60) days after acceptance of the trust, give notice to the qualified beneficiaries of the acceptance of the trust and the full name and address of the Trustee;

(b) within sixty (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 death of the Settlor or otherwise, give notice to the qualified beneficiaries of the trust’s existence, the identity of the Settlor, the right to request a copy of the trust instrument, and the right to accountings;

(c) upon reasonable request, provide a qualified beneficiary with a complete copy of the trust instrument;

(d) in the case of an irrevocable trust, provide a trust accounting, as set forth in F.S. § 736.08135, to each qualified beneficiary annually and on termination of the trust or on change of the Trustee; and

(e) upon reasonable request, provide a qualified beneficiary with relevant information about the assets and liabilities of the trust and the particulars relating to administration;

provided, however, while a trust is revocable, the Trustee’s duties pursuant to this Section extend only to the Settlor.”

FORM #15

“(iii) to compromise and adjust claims arising out of any the policy or contract, upon terms and conditions as the Trustee, in the Trustee’s sole discretion, may deem best, and the decisions of the Trustee shall be binding and conclusive upon all persons beneficially interested in the trust;”

FORM #16

“**Not a Fiduciary**. The powers herein granted to the Appointing Person are granted to the Appointing Person individually, not in a fiduciary capacity, and the Appointing Person is not liable to any person or entity regardless of the manner in which the Appointing Person chooses to exercise (or fail to exercise) the powers.”

FORM #17

Note that the following form is for a Revocable Trust:

“15.24 **Special Representation Provisions**. The following provisions apply to each irrevocable trust created under this trust instrument.

(a) **Representation by Holder of Power of Appointment**. Notwithstanding any provision of this trust instrument to the contrary, with respect to each trust created under this trust instrument, the Trustee may provide the accountings and notices to be given by the Trustee pursuant to the provisions of Section 15.23 of this Article to the holder of a power of appointment of trust principal, whether a limited power of appointment or a general power of appointment, and the holder of the power of appointment shall represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

(b) **Designated Representative**.

(i) **Provisions While Designated Representative is Acting**. Subject to the provisions of subsection 15.24(a) of this Article, but notwithstanding any other provision in this trust instrument to the contrary, with respect to each trust created under this trust instrument for which a Designated Representative is then acting:

(A) **Role of Designated Representative**. The Trustee may provide the accountings and notices, if any, to be given by the Trustee pursuant to the provisions of Section 15.23 of this Article, to the Designated Representative of the trust and the Designated Representative shall represent and bind the qualified beneficiaries of the trust.

(B) **Relinquishment of Powers**. All or any part of the rights and powers conferred on the Designated Representative pursuant to the provisions of this subsection may be relinquished at any time or from time to time by the Designated Representative by notice in writing delivered to the Trustee of the trust to which such release relates.

(C) **Non-Fiduciary Duty of Designated Representative.** The powers granted to the Designated Representative in this subsection are granted to the Designated Representative individually, not in a fiduciary capacity, and the Designated Representative shall not 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.

(ii) **Provisions While No Designated Representative is Acting.** During any period or periods that no Designated Representative is acting with respect to the trust, the Trustee shall provide the accountings and notices to be given by the Trustee pursuant to the provisions of Section 15.23 of this Article, to the qualified beneficiaries of the trust.

(iii) **Designation of Initial Designated Representative.** The Settlor's spouse may designate one (1) or more persons or a Business Entity to act as the initial Designated Representative of each trust created under this trust instrument which is irrevocable.

(iv) **Appointment of Successor Designated Representatives.** In the event of the death, resignation, refusal, failure or inability of any person to act as Designated Representative of any trust, the successor Designated Representative shall be such one (1) or more persons or a Business Entity, or any combination thereof, designated by name or appointed in accordance with a plan of successor Designated Representatives established by the following persons, in the order named:

(A) the Settlor's spouse;

(B) a person who has attained thirty (30) years of age with respect to any Discretionary Trust of which said person is the beneficiary and each trust created therefrom; then

(C) the then acting non-Corporate Designated Representative of such trust, or a majority of the then acting non-Corporate Designated Representatives;

provided, however, that any such designation or plan shall be effective only to supplement and not to contravene any previous designation or plan which has not been revoked or cancelled pursuant to the provisions of this subsection, or any subsequent plan established by a person in a prior position on the above list. The power to establish a 'plan of successor Designated Representatives' includes the authority to designate another person or persons with the power to name successor Designated Representatives or to create additional plans of successor Designated Representatives, and is exercisable whether or not an actual vacancy

in the position of Designated Representative exists at the time of the exercise. Except as may be otherwise provided to the contrary in this subsection, the power to designate successor Designated Representatives and to create a plan of successor Designated Representatives includes the power to leave a vacancy in the position of Designated Representative unfilled.

(v) **Method of Appointing Successor Designated Representatives.**

In the exercise of the power to designate successor Designated Representatives of the trusts held pursuant to this trust instrument, different successor Designated Representatives may be designated or appointed for each or any trust. Any designation may be made, or plan established, by an instrument in writing signed by the holder of the power and delivered to the then acting individual Trustee and to each party in a prior position on the list contained in subsection 15.24(b)(iv) of this Article, and if there is no then acting individual Trustee, to the current beneficiary of the trust for which a successor Designated Representative is being designated or to which the plan relates, or by the valid Will of the holder admitted to probate in any jurisdiction. The holder of the power may, at any time or from time to time, revoke any designation made, or amend or cancel any plan established either by the holder of the power, by a person in a lower position on the list contained in subsection 15.24(b)(iv) of this Article or by a predecessor Designated Representative. Any revocation, amendment or cancellation is to be made in the same manner as is provided above for making a designation or establishing a plan; provided, however, that no revocation, amendment or cancellation is effective to remove any then acting Designated Representative. Upon any revocation, amendment or cancellation, the holder of the power to designate successor Designated Representatives of the trusts held pursuant to this trust instrument have the same powers with respect to designating successor Designated Representatives by name or establishing a plan in the manner provided above, as if such power had never been exercised.

(vi) **Release of Powers to Appoint Successor Designated Representatives.** The power to appoint successor Designated Representatives granted pursuant to the provisions of this subsection may be completely and irrevocably released at any time with respect to any one (1) or more trusts by an instrument in writing signed by the holder of the power and delivered to the then acting individual Trustee and to each party on the list contained in subsection 15.24(b)(iv) of this Article, and if there is no acting individual Trustee, to the beneficiary of the trust with respect to which the release relates.

(vii) **Designated Representatives of Discretionary Trusts.** With respect to each Discretionary Trust, subject to any plan of successor Designated Representatives created pursuant to the provisions of subsections 15.24(b)(iv)(A) or 15.24(b)(iv)(B) of this Article, but notwithstanding any other provision in this trust instrument to the contrary, on the date on which the beneficiary of the trust

has attained thirty (30) years of age, or upon creation of the trust, if subsequent thereto, the Designated Representative of the trust shall be such one (1) or more persons or a Business Entity, or any combination thereof, as shall be designated by name by the beneficiary by an instrument in writing signed by the beneficiary and delivered to the person(s) and/or entity so designated.

(viii) **Appointment of Successor Designated Representatives in Default of Designation.** In the event of a vacancy in the position of Designated Representative of any trust which is not otherwise filled pursuant to the provisions of this Article, the following, one (1) at a time and in the order named, shall act as successor Designated Representative:

(A) John Doe; then

(B) Jane Doe.

(ix) **Successor Designated Representatives.** Except as provided to the contrary in this subsection or by a plan of successor Designated Representatives created pursuant to the provisions of this subsection, upon the termination and final distribution of any trust under this trust instrument (a 'Terminating Trust'), the initial Designated Representative(s) of each new and separate trust created from such Terminating Trust (herein referred to as a 'New Trust') shall be those person(s) and/or entity(ies) who were serving as Designated Representative(s) of the Terminating Trust on the date of the termination and final distribution of the Terminating Trust and who are living or in existence (as the case may be) upon creation of each New Trust."

FORM #18

Reimbursement for Income Tax Liability. With respect to each trust created under this trust instrument, the Trustee is authorized, in the sole discretion of the Trustee, at any time and from time to time, to distribute an amount equal to the tax on trust net income and/or principal of the trust which is payable by the Settlor from the net income and/or principal of the trust to the Settlor or directly to the taxing authorities."

FORM #19

Note that this form is for an irrevocable trust.

**“CERTIFICATION OF
JOHN DOE DELTA TRUST U/A/D 7/1/07**

The undersigned certifies and declares as follows:

1. Pursuant to the provisions of a certain Trust Agreement dated July 1, 2007 (the “Trust Agreement”), by and between John Doe, as Settlor, and Jane Doe and James Smith, as Co-Trustees, the John Doe Delta Trust (the “Delta Trust”) was created.

2. The Delta Trust is in existence as of the date of this certification.

3. Jane Doe, 123 Elm Street, Chicago, Illinois 60661 [(312) 987-6543], and James Smith, 456 Main Street, Chicago, Illinois 60606 [(312) 123-4567], are currently serving as the sole Co-Trustees of the Delta Trust.

4. A true and correct copy of Article XV of the Trust Agreement, which contains the powers, rights and duties of the Co-Trustees of the Delta Trust, is attached.

5. The Delta Trust is irrevocable.

6. With respect to the authority of Co-Trustees to sign and whether all or less than all Co-Trustees are required in order to exercise powers of the Trustee, Section 15.16 of Article XV of the Trust Agreement provides as follows:

‘(a) **Majority Vote to Govern.** Subject to the provisions of Articles XVI and XVII, if at any time, there are three (3) or more Co-Trustees acting as Trustee of a trust, any decision made to act or to refrain from acting by a majority of the Co-Trustees who are qualified to vote on such decision shall be deemed to be the decision of all of the Co-Trustees, without the imposition of any liability for such decision on a Co-Trustee who does not agree thereto.

(b) **Disagreement as to Distribution.** Subject to the provisions of Articles XVI and XVII, if at any time the Co-Trustees eligible to vote with respect to any discretionary distribution of income or principal shall be evenly divided concerning whether to make a distribution, such distribution shall not be made and the Co-Trustee or Co-Trustees favoring such distribution shall incur no liability therefrom.

(c) **Single Signatory.** Any one (1) Trustee may sign checks, agreements or other documents on behalf of the trust and such signature shall bind the trust in the same manner as though the check, agreement or other document had been signed by all then

acting Trustees, and no person dealing with the signing Trustee is obligated to inquire as to the acquiescence of the other Trustees to an action by the signing Trustee.’

7. Title to trust property shall be taken as follows: “*Jane Doe and James Smith, not individually but solely as Co-Trustees of the John Doe Delta Trust U/A/D 7/1/07*”.

8. The Delta Trust has not been revoked, modified or amended in any manner that would cause the representations contained in this certification of trust to be incorrect.

9. Pursuant to the provisions of Section 736.1017(2) of the Florida Trust Code, a certification of trust may be signed by any Trustee.

10. Pursuant to the provisions of Section 736.1017(4) of the Florida Trust Code, a certification of trust need not contain the dispositive terms of a trust.

11. Pursuant to the provisions of Section 736.1017(6) of the Florida Trust Code, a person who acts in reliance on a certification of trust without knowledge that the representations contained in the certification 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.

12. Pursuant to the provisions of Section 736.1017(7) of the Florida Trust Code, 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.

John Doe Delta Trust U/A/D 7/1/07

Dated

Jane Doe, not individually but solely as Co-Trustee”