

Stewardship Trust Findings:

What is a Stewardship Trust?

A Stewardship Trust is a trust established to hold the controlling interest in a business and ensure the underlying business is accomplishing the business purpose of its owner. This could include providing a certain compensation level to its employees, sourcing its product from a local community, or preventing large entities from purchasing and redirecting the vision of the business among other things.

Stewardship Trusts typically have (i) a Trust Enforcer who serves as the “qualified beneficiary,” (ii) a Stewardship Trust Committee which typically consists of three or more individuals that ensure the enumerated purposes of the trust are carried out, and (iii) a trustee who follows the direction of the stewardship trust committee and trust enforcer. This governance structure allows for the protection of the business founder’s vision.

What States Have Adopted More Direct Stewardship Trust Statutes?

Oregon has enacted more robust legislation specifically directed towards Stewardship Trusts as a legal concept. South Dakota and Delaware permit purpose trusts to exist in perpetuity but are not as direct on a Stewardship Trust statute with a guided framework. Illinois is currently attempting to pass legislation which utilized Oregon’s statute as a base but includes additions that coincide with aspects of Illinois law.

Are businesses utilizing Stewardship Trusts?

Yes. Patagonia and Hobby Lobby are notable companies that utilized Stewardship Trusts. The trend has continued to progress and more companies have begun to implement a Stewardship Trust structure making it an emerging tool in business succession.

Does Florida Currently Allow for Stewardship Trusts?

Florida currently allows for there to be a noncharitable trust without an ascertainable beneficiary. Fla. Stat. Section 736.0409. While this would allow for the formation of a Stewardship Trust there are two issues that remain (1) the rule against perpetuities period still applies (i.e. 1,000 years) and (2) a judge is able to force a distribution of excess funds that the court deems is exceeds the amount required for its intended use. In the event a judge finds there is an excess funding, and if a remainder beneficiary is not clearly identified, such amount would be returned to the settlor, or the settlor’s estate which could undo potential estate and gift tax planning the settlor would have done.

What is a Stewardship Trust for Tax Purposes?

It is our understanding that practitioners have treated Stewardship Trusts as complex trusts for income tax purposes, however there is no current guidance by the IRS confirming this result.

What Type of Entity Should a Stewardship Trust Hold?

In order to avoid potential tax issues with trapping income in the Stewardship Trust, a Florida benefit corporation taxed as a C Corp. is the best asset for a Stewardship Trust to hold. There may be additional issues regarding utilizing a traditional Florida for profit corporation because other shareholders holding non-controlling units may still have a claim against the company that could frustrate the potentially non-financial purposes of the business.

What Are the Concerns With Fiduciary Liability of A Stewardship Trust?

The Stewardship Committee, the Trust Enforcer and the Trustee all act as fiduciaries. The statute would be constructed in a way so as to reduce trustee liability. Stewardship Committee and Trust Enforcer liability would require additional contemplation to ensure the liability is properly addressed so as to not extend protection beyond what is reasonable.

Why Should Florida Adopt the Stewardship Trust Statutory Framework?

Florida can adopt the framework in order to encourage Florida businesses considering this structure to utilize Florida law. It also provides additional tools that can be used within the State to make it a more attractive legal venue for business development by providing additional business succession options.

Potential Litigation?

There is not currently active litigation on the use or enforcement of a Stewardship Trust. It is possible that litigation can arise depending on whether the “purpose” is enforceable legally, or the shareholders feel that enforcement of the purpose decreases their overall investment.

736.____ - Stewardship Trust

(1) A stewardship trust may be created under this section for a business purpose without a definitive or ascertainable beneficiary. The business purpose may seek economic or noneconomic benefits. A stewardship trust established under this section must:

(a) Be in a written instrument signed with the same formalities required for the execution of a trust under this chapter.

(b) Expressly declare that the trust is a stewardship trust within the meaning of this section.

(c) Have a "business purpose." If the trust holds a "business interest" within the meaning of this section then the stated purpose within the trust shall be deemed to constitute a "business purpose" within the meaning of this section.

(2) A stewardship trust may hold any business interest. For purposes of this section a "business interest" means an ownership interest of any corporation, partnership, limited partnership, cooperative, limited liability company, limited liability partnership, limited liability limited partnership, or joint venture.

(3) A stewardship trust may be enforced by one or more trust enforcers appointed in the terms of the trust, and the terms of the trust may provide a process for appointing successor trust enforcers. If at any time no person is acting as trust enforcer or designated to act, the court shall appoint one

RM:6724080:1

or more trust enforcers. Each trust enforcer shall enforce the purpose and the terms of the trust and shall exercise authority as a fiduciary. If more than one person is acting as a trust enforcer, and no provision of the trust provides otherwise action may be taken by a majority of the persons acting as trust enforcers. A trust enforcer is not a beneficiary of a trust created pursuant to this section, but a trust enforcer has the rights of a qualified beneficiary, in addition to any qualified beneficiary as defined under s. 736.0103.

(4) A stewardship trust must have a trust stewardship committee with at least three natural persons as members. Each member of the trust stewardship committee shall exercise authority as a fiduciary. The terms of the trust may appoint the initial members of the trust stewardship committee and may provide a process for appointing successor members. In order for the trust stewardship committee to act, a vacancy on the trust stewardship committee must be filled if the trust stewardship committee has fewer than three members.

(5) A vacancy on the trust stewardship committee that is required to be filled must be filled in the following order of priority:

(a) By a person designated in the terms of the trust or selected through a process provided in the terms of the trust;

(b) By a person appointed by unanimous agreement of the trust enforcers; or

(c) By a person appointed by the court.

(6) Unless the terms of the trust provide otherwise and except as provided in subsections (7)(c) and (12) of this section, the trust stewardship committee may take action by a majority vote of its members.

(7) Unless the terms of the trust provide otherwise, the trust stewardship committee has the power, in carrying out the purposes of the trust and after notice to the trust enforcers, to:

(a) Remove a trustee, with or without cause;

(b) Appoint one or more successor trustees or co-trustees;

(c) Remove a member of the stewardship committee, by unanimous vote of all other members of the trust stewardship committee; and

(d) Direct distributions from the trust.

(8) The trust stewardship committee shall be treated as a trustee for purposes of any trust modification under s. 736.0410, 736.04113, 736.04114, 736.04115, 736.0412, 736.0414, 736.0415 and 736.0417. The trust stewardship

committee shall also be considered an "interested person" within the meaning of s. 736.0111.

(9) Unless the trust agreement provides otherwise, a member of the trust stewardship committee or a trust enforcer may resign:

(a) After at least 30 days' notice to the trustee, all trust enforcers and all members of the trust stewardship committee; or

(b) At any time with the approval of a court.

(10) The trustee must send a trust accounting, within the meaning of s. 736.08135, to the trust stewardship committee and to the trust enforcers at least annually showing receipts and disbursements and listing trust property and liabilities. The trust stewardship committee and the trust enforcer may waive their rights to a trust accounting, or withdraw a waiver previously given. Waivers and withdrawals of waivers under this paragraph must be in writing and are effective only with respect to trust accountings for future periods. The trust stewardship committee shall keep the trustee and the trust enforcers reasonably informed about the administration of the trust and of the material facts necessary for the trustee to comply with the trustee's duties under s. 736.0813 and for the trust enforcers to protect the purposes of the trust.

(11) A trustee of a stewardship trust shall act in accordance with a direction from the trust stewardship committee unless the action is manifestly contrary to the terms of the trust or the trustee knows that the action would constitute a breach of a fiduciary duty that the trust stewardship committee, the trust enforcer or the trustee owes to the trust. A trustee is not liable for actions taken or not taken in reliance on documents provided by the trust stewardship committee or the trust enforcer.

(12) Unless the terms of the trust provide otherwise, the trust stewardship committee and the trust enforcers, acting together, may modify or terminate a stewardship trust by unanimous agreement of the members of the trust stewardship committee and unanimous agreement of the trust enforcers.

(13) Upon termination of a stewardship trust, the trustee shall distribute all remaining trust property as the terms of the trust provide, or if the terms of the trust do not provide for complete distribution of the property, as a court determines to be consistent with the purposes for which the trust was created.

(14) A person serving as a trustee may not serve as a trust enforcer or as a member of the trust stewardship committee, and a person serving as a trust enforcer may not serve as a member of the trust stewardship committee.

(15) This section does not apply to trusts created pursuant to s. 607.0730.

(16) A stewardship trust may be enforced in perpetuity notwithstanding s. 689.225.

(17) Notwithstanding the provisions of s. 518.11 or s. 736.0804, with respect to any business interest, a trustee, the trust stewardship committee and the trust enforcer have no duty to:

(a) Determine whether any business interest is, or remains, a proper investment;

(b) Investigate the financial strength of the business interest; or

(c) Diversify any such business interest or the assets of the trust with respect to such business interest.

(18) A trust stewardship committee member is not liable to the beneficiaries of the trust or any other person for any loss sustained with respect to a business interest held by a trust established under this section unless:

(a) The stewardship committee member breached or failed to perform his or her duties as a trust stewardship committee member; and

(b) The stewardship committee member's breach of, or failure to perform, his or her duties constitutes:

1. A violation of the criminal law, unless the stewardship committee member had reasonable cause to believe his or her

RM:6724080:1

conduct was lawful or had no reasonable cause to believe his or her conduct was unlawful. A judgment or other final adjudication against a stewardship committee member in any criminal proceeding for violation of the criminal law estops that stewardship committee member from contesting the fact that his or her breach, or failure to perform, constitutes a violation of the criminal law, but does not estop the stewardship committee member from establishing that he or she had reasonable cause to believe that his or her conduct was lawful or had no reasonable cause to believe that his or her conduct was unlawful;

2. A transaction from which the stewardship committee member derived an improper personal benefit, directly or indirectly; or

3. Recklessness or an act or omission that was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

(c) For the purposes of this section, the term:

1. "Recklessness" means the acting, or omission to act, in conscious disregard of a risk:

a. Known, or so obvious that it should have been known, to the stewardship committee member; and

b. Known to the stewardship committee member, or so obvious that it should have been known, to be so great as to make it

RM:6724080:1

highly probable that harm would follow from such action or omission.

(19) A trustee is not liable to the beneficiaries of the trust or any other person for any loss sustained with respect to a business interest held by a trust established under this section unless the trustee knowingly acted in a manner contrary to the business purpose of the trust.

(20) A trust enforcer is not liable to the beneficiaries of the trust or any other person for any loss sustained with respect to a business interest held by a trust established under this section unless the trust enforcer's act or failure to act resulted in a frustration of the business purpose of the trust.

(21) The provisions of s. 736.1401 - s. 736.1416 shall not apply to a trust established under this section.