

**STORAGE NAME:** h1411.rpp  
**DATE:** April 12, 1997

**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
REAL PROPERTY & PROBATE  
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

**BILL #:** HB 1411

**RELATING TO:** The Administration of Trusts and Estates

**SPONSOR(S):** Representative Bloom

**STATUTE(S) AFFECTED:** Amending sections 689.255, 709.08, 733.707, 737.111, 737.2041, 737.303, 737.308, 733.817, and 738.12, Florida Statutes

**COMPANION BILL(S):** CS/SB's 818, 1136, & 1242

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:**

- (1) REAL PROPERTY & PROBATE
- (2)
- (3)
- (4)
- (5)

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**I. SUMMARY:**

HB 1411 makes the following changes relating to the administration of trusts and estates:

- amends the rule against perpetuities;
- amends the durable power of attorney statute to permit certain not-for-profit corporations to act as an attorney in fact;
- provides a definition of revocable trusts;
- clarifies the effective date for the trust execution changes effective October 1, 1995, and also clarifies that the provisions of this section do not apply to specified retirement plans;
- amends provision relating to attorney's fees in representing a trustee;
- removes the words "or beneficiary" from section 737.303(4)(c), Florida Statutes;
- requires the clerk to send a copy of any caveat filed to the trustee and the notice of trust to any caveator, unless there is a probate proceeding pending and the personal representative and the trustee are the same;
- substantial rewording and amendment to section 733.817, Florida Statutes, relating to apportionment of estate taxes, in order to align the state and federal tax codes.
- section 738.12, Florida Statutes, relating to underproductive property, is amended to provide that a beneficiary is an income beneficiary only if the trust instrument is irrevocable and requires that the net income from the trust be paid to the beneficiary.

The bill takes effect upon becoming a law, except that the section on apportionment of estate taxes takes effect October 1, 1998, and applies to the estates of decedents dying on or after

October 1, 1998, and the section on underproductive property takes effect upon becoming law and is applicable to all trusts, whenever executed.

This bill should not have a fiscal impact on state or local governments.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

**Rule Against Perpetuities**

Section 689.225, Florida Statutes, is the "Florida Uniform Statutory Rule Against Perpetuities." Subsection (2) provides a statement of the rule:

A nonvested property interest in real or personal property is invalid unless: when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or the interest either vests or terminates within 90 years after its creation.

A general power of appointment not presently exercisable because of a condition precedent is invalid unless: when the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive; or the condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

A nongeneral power of appointment or a general testamentary power of appointment is invalid unless: when the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or the power is irrevocably exercised or otherwise terminates within 90 years after its creation.

In determining whether a nonvested property interest or a power of appointment is valid, the possibility that a child will be born to an individual after the individual's death is disregarded.

**Probate**

Section 733.707, Florida Statutes, provides for the personal representative's payment of the expenses of the administration and obligations of the estate. Section 733.707(3), Florida Statutes, provides that any portion of a trust with respect to which a decedent who is the grantor has at the decedent's death a right of revocation, *as defined in paragraph (c)*, either alone or in conjunction with any other person, is liable for the expenses of the administration of the decedent's estate and enforceable claims of the decedent's creditors to the extent the decedent's estate is insufficient to pay. Paragraph (c) contains no definitions. During the 1995 Legislative session, this section of law was amended. There were two floor amendments to the bill relating to this section. One of those amendments would have change the reference to paragraph (c), to a reference to paragraph (e), and would have inserted the definition. However, due to an overlap in the amendments this change did not occur.

Section 733.707(3)(a), Florida Statutes, provides that, for purposes of subsection (3), any trusts established as part of, and all payments from either an employee annuity described in s. 403 of the Internal Revenue Code of 1986, as amended, an Individual Retirement Account, as described in s. 408 of the Internal Revenue Code of 1986, as amended, a Keogh (HR-10) Plan, or a retirement or other plan established by a corporation which is qualified under s. 401 of the Internal Revenue Code of 1986, as amended, are not to be considered a trust over which the decedent has a right of revocation.

Section 737.111, Florida Statutes, was enacted in 1995 and took effect October 1, 1995. Ch. 95-401, s. 11, at 3287, Laws of Fla. The section provides that the testamentary aspects of a trust are invalid unless the trust is executed with the formalities required for the execution of a will. Also, the testamentary aspects of an amendment to a trust are invalid unless the amendment is executed with the same formalities as are required for a will. For the purposes of this section, the term "testamentary aspects" means those provisions of the trust that dispose of the trust property on the death of the settlor other than to the settlor's estate. This provision was intended to be prospective only. However, many residents of the state have contacted the House of Representatives after the enactment of this provision, complaining that their attorney's are advising them that their trusts are invalid unless they are re-executed with the formalities required for the execution of a will.

Section 737.303, Florida Statutes, sets out the duty of a trustee to inform and account to beneficiaries. The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. A beneficiary is entitled to a statement of the accounts of the trust annually and upon termination of the trust or upon change of the trustee except that, in the case of a trust described in s. 733.707(3), Florida Statutes, the trustee's duties extend only to the grantor or beneficiary or the legal representative of the grantor or beneficiary during the grantor's lifetime. Section 737.303(4)(e), Florida Statutes, provides that all rights which the section provides to a beneficiary may be asserted by a legal representative or natural guardian of the beneficiary. Notice of the trustee's acceptance of the trust and the statement of accounts provided to a representative of the beneficiary binds the beneficiary.

Section 737.308, Florida Statutes, requires that, upon the death of a settlor of a trust described in s. 737.707(3), the trustee must file a notice of trust with the court of the county of the settlor's domicile and the court having jurisdiction of the settlor's estate. The clerk must file and index the notice of trust in the same manner as a caveat, unless there exists a probate proceeding for the settlor's estate, in which case the notice of trust must be filed in the probate proceeding. The clerk is required to notify the trustee of any probate proceeding and to notify the personal representative of the notice of trust. However, if there is no probate proceeding, but a trust exists and there are caveators, there is no requirement that the clerk send a notice of trust to the caveators, nor must the clerk send the trustee copies of the caveats.

### **Durable Power of Attorney**

Prior to October 1, 1995, the durable power of attorney statute did not prescribe or limit who could serve as an attorney in fact. As amended in 1995, section 709.08(2), Florida Statutes, limits who can serve to either a natural person who is 18 years of age or older

and is of sound mind or a financial institution as defined in Chapter 655 with trust powers. Ch. 95-401, s. 17, at 3292, Laws of Fla.

### **Trustee's Attorney's Fees**

Section 737.2041, Florida Statutes, provides that the attorney retained by the trustee of a trust described in s. 733.707(3), Florida Statutes, is entitled to reasonable compensation for legal services rendered in the initial administration of the trust payable from the assets of the trust without court order. The attorney, the trustee, and persons bearing the impact of the compensation may agree to compensation determined in a different manner than provided in this section.

Compensation for ordinary services based upon the value of the trust assets immediately following the settlor's death and the income earned by the trust during initial administration at the rate of 75 percent of the schedule provided in section 733.6171(3)(a)-(h), Florida Statutes, is presumed to be reasonable compensation for attorneys in initial trust administration. This section provides that ordinary services of the attorney for a trustee include legal advice and representation relating to a list of possible duties of the trustee.

When a corporate fiduciary is serving as trustee or cotrustee, the presumptive fee for ordinary services and the list of what constitutes ordinary services does not apply, and what constitutes ordinary services and reasonable compensation for those services is instead determined under the particular facts and circumstances applicable to that trust. In addition to the attorney's fees for ordinary services, the attorney for the trustee is allowed further reasonable compensation for any extraordinary service. What constitutes an extraordinary service may vary depending on many factors, including the size of the trust. The statute sets forth a list of some services which constitute extraordinary services.

Upon petition of any interested person in a proceeding to review the compensation paid or to be paid to the attorney for the trustee, the court may increase or decrease the compensation for ordinary services of the attorney for the trustee or award compensation for extraordinary services if the facts and circumstances of the particular administration warrant. In determining reasonable compensation, the court is to consider all of a list of factors set forth in the section, giving such weight to each as it may determine to be appropriate.

### **Apportionment of Estate Tax**

Section 733.817, Florida Statutes, provides for apportionment of estate taxes. Any estate or other death tax shall be apportioned in the following manner:

If a part of the estate passed under a will by reference to a specific property or in any other nonresiduary form, exclusive of property over which the decedent had a power of appointment as defined from time to time under the estate tax laws of the United States, the net amount of the tax attributable to it shall be charged to and paid from the residuary estate without requiring contribution from persons receiving the interests, except as otherwise directed by the governing instrument. In the event the residuary estate is insufficient to pay the tax attributable to the interests, any balance of the tax

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shall be equitably apportioned among the recipients of the interests in the proportions that the value of each interest included in the measure of the tax bears to the total of all interests so included, except as otherwise directed by the governing instrument.

If a part of the estate passed under the will as a residuary interest, exclusive of property over which the decedent had power of appointment, the net amount of tax attributable to it shall be equitably apportioned among the residuary beneficiaries in the proportions that the value of the residuary interest of each included in the measure of the tax bears to the total of all residuary interests so included, except as otherwise directed by the governing instrument. When a residuary interest is a temporary interest, the tax attributable to it shall be charged to corpus and not apportioned between temporary and remainder interests.

If a part of the property concerning which the tax is levied or assessed is held under the terms of any trust created inter vivos, then, unless the governing instrument directs otherwise:

If any portion of the trust is directed to pass or to be held in further trust by reference to a specific property, or type of property, fund, sum, or statutory amount, or in any other nonresiduary form, the net amount of the tax attributable to that portion must be charged to and paid from the corpus of the residuary share of the trust without requiring contribution from the nonresiduary interest or the persons receiving or benefiting from that interest. If the residuary portion of the trust is insufficient to pay the tax attributable to all nonresiduary interests, any balance of the tax must be equitably apportioned among the recipients of those interests in the proportions that the value of each interest included in the measure of the tax bears to the total of all interest so included.

The net amount of the tax directly attributable to the residuary share of the trust, if any, must be charged as follows: the net amount of the tax attributable to each residuary temporary interest must be charged to that portion of residuary principal that supports the temporary interest without apportionment, and the net amount of the tax attributable to the balance of the residuary share must be equitably apportioned among the residuary beneficiaries, by charge to the corpus of their interest in the proportions that the value of the residuary interest of each included in the measure of the tax bears to the total of all residuary interests included.

Real property or mobile home homesteads that are exempt from execution by law shall be exempt from apportionment of taxes. Persons taking an interest in the homesteads shall not be liable for apportionment of taxes on account of the homesteads. The net amount of the tax attributable to homestead property shall be paid from other assets of any trust or the estate subject to administration in the order as directed by the governing instrument or, absent this direction, in the following order:

Property not disposed of by the will or trust.

Property passing as the residuary estate.

Property not specifically or demonstratively devised.

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Property specifically or demonstratively devised.

The balance of the net amount of the tax shall be equitably apportioned among, and paid by, the recipients and beneficiaries of the properties or interests, in the proportion that the value of the property or interest of each included in the measure of the tax bears to the total value of all the properties and interests included in the measure of the tax, except as otherwise directed by the governing instrument. With respect to a temporary interest not in trust, the amount charged to the recipients or beneficiaries shall not be apportioned between temporary and remainder interests but shall be charged to and paid out of the corpus of the property or fund, except as otherwise directed by the governing instrument.

Nothing contained in this section shall be construed to require the personal representative or other concerned fiduciary to pay any estate, inheritance, or other death taxes levied or assessed by any foreign country, unless specific directions to that effect are contained in the will or other instrument under which the fiduciary is acting.

A direction against apportionment under this section may be explicit or implicit from the terms of the governing instrument, but must be clear and unequivocal; provided, however, that an implicit direction against apportionment is not sufficient to avoid the apportionment under state or applicable federal law unless the court also finds that the testator considered and made a deliberate and informed decision about the burden of taxation.

No personal representative or other fiduciary shall be required to transfer any property until the amount of any tax due from the transferee is paid or, if the apportionment of tax has not been determined, until adequate security is furnished for the payment. The fiduciary shall not be required to distribute assets that he reasonably anticipates may be necessary to pay any state or federal taxes.

After the amount of all estate, inheritance, and death taxes is finally determined, the personal representative or other fiduciary shall petition for an order of apportionment and shall give formal notice of the petition and the hearing to all interested persons.

### **Underproductive Property**

Section 738.12, Florida Statutes, provides for underproductive trust property. If the total principal of a trust does not in any year yield a net income of at least 3 percent of its market value (including as income the value of any beneficial use of the property by the income beneficiary), the trustee shall pay to the income beneficiary an amount equal to 3 percent of the value of the principal, based upon the market value at the beginning of the calendar year. This amount shall be paid to the income beneficiary using the first principal cash available.

In the event of a termination or initiation of a trust, or the termination of a beneficial income interest of a trust, for a period of less than 12 months, the amount to be paid to the income beneficiary shall be prorated proportionately with the length of the time of his interest in the trust. Upon the sale of the property the income beneficiary shall not be entitled to any portion of the proceeds of sale, except any amount previously owing and unpaid from the 3 percent of principal computation above sale shall be paid therefrom.

If by the terms of the trust any portion of the income is to be retained by the trustee or disposed of other than by payment to an income beneficiary, such portion of the amount

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determined in the 3 percent of principal computation above shall be retained or disposed of as provided by the terms of the trust.

**B. EFFECT OF PROPOSED CHANGES:**

HB 1411 makes several changes relating to the administration of trusts and estates. The bill amends the rule against perpetuities, to provide that certain language in a governing instrument is inoperative to the extent that it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives, if in measuring a period from the creation of a trust or other property arrangement, the provision operates according to the specified subparagraphs.

The bill amends the durable power of attorney statute to permit certain not-for-profit corporations to act as an attorney in fact. A definition of revocable trusts which was inadvertently left out of the 1995 Legislation, is provided in the bill. The bill clarifies the effective date for the trust execution changes effective October 1, 1995, and also clarifies that the provisions of this section do not apply to specified retirement plans. The bill corrects a glitch, removing the words "or beneficiary" from section 737.303(4)(c), Florida Statutes.

The bill amends provision relating to attorney's fees in representing a trustee.

The bill requires the clerk to send a copy of any caveat filed to the trustee and the notice of trust to any caveator, unless there is a probate proceeding pending and the personal representative and the trustee are the same. This fills a void with regard to a lack of notice when there is no probate estate, yet there are creditors, and a trust from which the creditors may be able to recover.

The bill substantially rewords and amends section 733.817, Florida Statutes, relating to apportionment of estate taxes, in order to align the state and federal tax codes. This section applies only if the will does not provide for the handling of taxes.

Section 738.12, Florida Statutes, relating to underproductive property, is amended to provide that a beneficiary is an income beneficiary only if the trust instrument is irrevocable and requires that the net income from the trust be paid to the beneficiary. Payment under this subsection may not be made to a beneficiary who may receive trust income only in the discretion of the trustee.

The bill takes effect upon becoming a law, except that the section on apportionment of estate taxes takes effect October 1, 1998, and applies to the estates of decedents dying on or after October 1, 1998, and the section on underproductive property takes effect upon becoming law and is applicable to all trusts, whenever executed.

**C. APPLICATION OF PRINCIPLES:**

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

The bill changes the law relating to trusts and estate administration. This will have an affect on disputes in this area.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

The bill requires clerks of court to send a copy of any caveat filed to the trustee and the notice of trust to any caveator, unless a probate proceeding is pending and the personal representative and the trustee are the same. Current law does not require this.

(3) any entitlement to a government service or benefit?

See (2) above.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.



b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

The bill permits certain not-for-profit corporations to act as an attorney in fact. This will permit individuals to seek assistance from these corporations through a durable power of attorney. This is not currently available.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

The bill effects trusts and estates and the beneficiaries of trusts and estates, therefore, it does effect rights and obligations between family members as specified.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

**D. SECTION-BY-SECTION RESEARCH:**

**Section 1.**

Section 689.225(2), Florida Statutes, relating to the rule against perpetuities, is amended to provide that language in a governing instrument is inoperative to the extent that it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives, if, in measuring a period from the creation of a trust or other property arrangement, that language seeks to disallow the vesting or termination of any interest or trust beyond, seeks to postpone the vesting or termination of any interest or trust until, or seeks to operate in effect in any similar fashion upon, the later of:

The expiration of a period of time not exceeding 21 years after the death of a specified life or the survivor of specified lives, or upon the death of a specified life or the death of the survivor of specified lives in being at the creation of the trust or other property arrangement; or

The expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement.

The new language is intended to coordinate with the Internal Revenue Service (IRS) position with respect to application of generation skipping transfer tax issues to trusts. The generation skipping tax provisions of the IRS were adopted in Florida in 1995.

**Section 2.**

The bill amends section 709.08, Florida Statutes, to provide that a not-for-profit corporation, organized for charitable or religious purposes, which has qualified as a court-appointed guardian prior to January 1, 1996, and which is a tax-exempt 26 U.S.C. 501(c)(3) corporation, may act as an attorney in fact if the assets of the principal are not used in any way for the benefit of the corporation. It is unclear why this provision is limited to specified not-for-profit corporations who were appointed as a guardian prior to January 1, 1996.

**Section 3.**

The bill amends section 733.707, Florida Statutes, by inserting the missing definition of the term "right of revocation." The term is defined as a power retained by the decedent, held in any capacity, to: amend or revoke the trust and revest the principal of the trust in the decedent; or withdraw or appoint the principal of the trust to or for the decedent's benefit.

**Section 4.**

The bill amends section 737.111, Florida Statutes, to provide that it does not apply to trusts established as part of an employee annuity, an Individual Retirement Account, a Keogh Plan, or a retirement plan. The bill also establishes that the section does not apply to trust instruments executed prior to October 1, 1995.

**Section 5.**

The bill amends section 737.2041, Florida Statutes, to provide that a trustee and an attorney may agree to compensation different from that provided in the section. The agreement is not binding upon a person who bears the impact of the compensation unless that person is a party to the agreement "or otherwise consents to be bound by the agreement."

Compensation based upon the value of the trust assets and the income earned during initial administration is presumed to be reasonable *total* compensation for ordinary services for *all* attorneys employed to advise the trustee during initial trust administration. If a trustee retains an attorney for limited, specific legal services, compensation is to be as provided in the agreement. If the agreement does not specify compensation, it is to be determined by the factors set out in the subsection providing for court determination of reasonable attorney compensation. Finally, the bill deletes references to corporate fiduciaries, thus subjecting corporate fiduciary trustees to the same provisions as other trustees.

**Section 6.**

The bill amends section 737.303(4)(c), Florida Statutes, by deleting the term beneficiary, thereby requiring that the trustee give the annual report and other specified reports only to the grantor during the grantor's lifetime.

**Section 7.**

The bill amends section 737.308, Florida Statutes, concerning the trustee's duty to file a notice of trust upon the death of the settlor to require that the clerk send a copy of any caveat filed regarding the settlor to the trustee, and send the notice of trust to any caveator, unless there is a probate proceeding pending and the personal representative and the trustee are the same. This provides a link between the trustee and the caveator when there is no probate estate.

**Section 8.**

The bill substantially rewords and amends section 733.817, Florida Statutes.

Section 733.817(1)(a)-(g), Florida Statutes, amends the definitions of the following terms: governing instrument, included in the measure of the tax, temporary interest, and value. This section creates definitions for the following terms: fiduciary, gross estate, internal revenue code, net tax, nonresiduary devise, nonresiduary interest, recipient, residuary devise, residuary interest, revocable trust, state, tax, and tentative Florida tax.

Section 733.817(2), Florida Statutes, provides that an interest in homestead property shall be exempt from the apportionment of taxes if the interest passes to a person to whom inures the decedent's exemption from forced sale under the State Constitution.

Section 733.817(3), Florida Statutes, provides that the net tax attributable to the interests included in the measure of each tax shall be determined by the proportion that the value of each interest included in the measure of the tax bears to the total value of all interests included in the tax measure. However:

- (a) The net tax attributable to interests included by reason of s. 2044 of the Internal Revenue Code (IRC) shall be determined as provided in the IRC and the amount so

determined shall be deducted from the tax to determine the net tax attributable to all remaining interests.

(b) The foreign tax credit shall be allocated among the recipients of interests finally charged with the payment of the foreign tax in reduction of any federal estate tax chargeable to the recipients of the foreign interests, whether or not any federal estate tax is attributable to the foreign interests.

(c) The reduction in the Florida tax on the estate of a Florida resident for tax paid to other states shall be allocated as follows:

1. If the net tax paid on a property to another state is greater than or equal to the tentative Florida tax attributable to the property, none of the Florida tax is attributable to the property.
2. If the net tax paid on a property to another state is less than the tentative Florida tax attributable to the property, the net Florida tax attributable to the property is the excess of the tentative Florida tax over the tax payable to the other state.
3. Any remaining net Florida tax shall be attributable to property included exclusive of property taxable in other states.
4. The net federal tax attributable to the property subject to tax in the other state must be determined as if it were located in the state.

(d) The tax attributable to a temporary interest is regarded as attributable to the principal that supports the temporary interest.

(4) Except as otherwise effectively directed by the governing instrument, if the IRC applies to apportion federal tax against recipients of certain interests, all net taxes, including taxes levied by the state attributable to each type of interest, shall be apportioned against the recipients of all interests of that type in the proportion that the value of each interest of that type included in the measure of the tax bears to the total of all interests of that type included in the measure of the tax. The provisions of this subsection do not affect allocation of the reduction in the Florida tax as provided in this section regarding estates of Florida residents which are also subject to tax in other states.

(5) Except as provided above or as otherwise directed in the governing documents, the net tax attributable to each interest shall be apportioned as follows:

(a) For property passing under the decedent's will:

1. The net tax attributable to nonresiduary devisees shall be charged to and paid from the residuary estate. If the residuary estate is insufficient to pay the net tax attributable to all nonresiduary devisees, the balance of the tax shall be apportioned among the recipients of the nonresiduary devisees.
2. The net tax attributable to residuary devisees shall be apportioned among the recipients of residuary devisees.

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(b) For property passing under the terms of a trust other than a trust created by the decedent's will:

1. The net tax attributable to nonresiduary interests shall be charged to and paid from the residuary portion of the trust. If the residuary portion is insufficient to pay the net tax attributable to all nonresiduary devisees, the balance of the tax shall be apportioned among the recipients of the nonresiduary interests.

2. The net tax attributable to residuary interests shall be apportioned among the recipients of the residuary interests.

(c) The net tax attributable to an interest in homestead property shall be apportioned against the recipients of other interests in the estate or passing under any revocable trust.

(d) This apportionment is to be made as if all recipients were taking under a common instrument.

(e) The net tax imposed under s. 4980A of the IRC shall be apportioned among the recipients of the interests included in the measure of that tax in the proportion that the value of the interest of each bears to the total value of all interests included in the measure.

(f) The net tax that is not apportioned under paragraphs (a), (b), and (c), shall be apportioned among the recipients of the remaining interests that are included in the measure of the tax in the proportion that the value of each such interest bears to the total value of all the remaining interests included in the measure of the tax.

(g) If a court finds it inequitable to apportion the tax as directed by the statutes, it may assess liability for the payment of taxes in the manner it finds equitable.

(h) To be effective as a direction for payment of tax in a manner different from that provided, the governing instrument must direct that the tax be paid from assets which pass pursuant to the governing instrument except as provided in this section.

(6) A personal representative or fiduciary is not to be required to transfer to a recipient any property which he or she reasonably anticipates may be necessary for payment of taxes nor to transfer any property until the amount of taxes due from the recipient is paid by the recipient.

(7) The personal representative may petition at any time for an order of apportionment. If no administration has been commenced at any time after 90 days from the decedent's death, any fiduciary may petition for an order of apportionment in the court in which venue would be proper for administration.

(8) If the personal representative or fiduciary does not have possession of sufficient property otherwise distributable to the recipient to pay the tax apportioned to the recipient, the personal representative or fiduciary is to recover the deficiency from the fiduciary in possession of the property to which the tax is proportioned or from the recipient.

(9) A personal representative or fiduciary who has the duty of collecting the apportioned tax may be relieved of this duty by order of the court upon specified findings.

(10) Any apportioned tax that is not collected shall be reapportioned as if the portion of the property to which the uncollected tax had been apportioned was exempt.

(11) Nothing in this section shall limit the right of any person who has paid more than the amount of the tax apportionable to that person, to obtain contribution from those who have not paid the full amount of their portion of the tax.

(12) Nothing herein shall be construed to require the personal representative or fiduciary to pay any tax levied or assessed by any foreign country, unless specific directions to that effect are contained in the will or other instrument.

### **Section 9.**

The bill amends section 738.12, Florida Statutes, on underproductive trust property. Under the bill, if the total principal of a trust does not in any year yield a net income of at least 3 percent of its market value, instead of the trustee paying the income beneficiary an amount equal to 3 percent of the value of the principal, based upon the market value at the beginning of the calendar year, the trustee would pay the income beneficiary an amount equal to the excess of 3 percent of the value of the principal, based upon the market value at the beginning of the calendar year, over the trust income paid to the income beneficiary in that year.

The bill adds that, for purposes of the 3 percent calculation, a beneficiary is considered to be an income beneficiary only if the trust instrument is irrevocable and requires that the net income from the trust be paid to the beneficiary. Payment under this subsection may not be made to a beneficiary who may receive trust income only in the discretion of the trustee.

The bill deletes the existing language on retention of a portion of the income by the trustee.

### **Section 10.**

The bill takes effect upon becoming a law, except that the section on apportionment of estate taxes takes effect October 1, 1998, and applies to the estates of decedents dying on or after October 1, 1998, and the section on underproductive property takes effect upon becoming law and is applicable to all trusts, whenever executed.

## **III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:**

### **A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:**

#### **1. Non-recurring Effects:**

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

Unknown.

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

Unknown.

2. Recurring Effects:

The bill requires clerks of court to send a copy of any caveat filed to the trustee and to send the notice of trust to any caveator, unless there is a probate proceeding pending and the personal representative and the trustee are the same. Currently, this does not occur. It is unclear what impact this will have on the clerks of court.

3. Long Run Effects Other Than Normal Growth:

Unknown.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Unknown.

2. Direct Private Sector Benefits:

Certain not-for-profit corporations will be able to act as attorneys in fact. This is currently prohibited. The bill clarifies that the provisions requiring that trusts containing testamentary aspects be executed with the formalities of a will are prospective only. This should stop the current practice of some attorneys who are recommending that their clients have their existing trust instruments redrawn to comply with the law as changed in 1995.

3. Effects on Competition, Private Enterprise and Employment Markets:

Unknown.



D. FISCAL COMMENTS:

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Article VII, Section 18 of the Florida Constitution provides in part:

(a) No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the legislature has determined that such law fulfills an important state interest and unless: . . .

If the fiscal impact is insignificant, then the proposed law is exempt from the mandates provision. HB 1411 requires clerks of court to send a copy of any caveat filed to the trustee, and the notice of trust to any caveator, unless there is a probate proceeding pending and the personal representative and the trustee are the same. Currently, the clerk must file and index the notice of trust and caveat, unless there exists a probate proceeding for the settlor's estate in which case the notice of trust must be filed in the probate proceeding and the clerk must send a copy to the personal representative.

It is unclear at this time what the fiscal impact of this provision will be.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

The bill amends section 709.08, Florida Statutes, to provide that a not-for-profit charitable corporation, organized for charitable or religious purposes, which has qualified as a court-appointed guardian prior to January 1, 1996, and which is a tax-exempt 26 U.S.C. 501(c)(3) corporation, may act as an attorney in fact if the assets of the principal are not used in any way for the benefit of the corporation. It is unclear why this provision is limited to not-for-profit charitable corporations who were appointed as a guardian prior to January 1, 1996.

The bill provides that the amendments to the underproductive trust property section are to be applicable to all trusts, whenever executed. Article I, s. 10, Florida Constitution, prohibits the retroactive application of a statute when the application would impair the obligations of existing contracts. Therefore, this provision may be subject to constitutional challenge.

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**DATE:** April 12, 1997

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VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

VII. SIGNATURES:

COMMITTEE ON REAL PROPERTY & PROBATE:

Prepared by:

Legislative Research Director:

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P.K. Jameson

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