

By Representative Bloom

1 A bill to be entitled
2 An act relating to the administration of trusts
3 and estates; amending s. 689.225, F.S.;
4 providing a statement of the rule against
5 perpetuities; amending s. 709.08, F.S.;
6 authorizing certain corporations to serve as an
7 attorney in fact; amending s. 733.707, F.S.;
8 defining the term "right of revocation" with
9 respect to the order of payment of expenses and
10 obligations of an estate; amending s. 737.111,
11 F.S.; revising language with respect to
12 execution requirements for express trusts;
13 providing for the application of the section;
14 amending s. 737.2041, F.S., relating to
15 trustee's attorney's fee; revising procedures
16 for determining attorney's fees; providing for
17 determining fees for an attorney who is
18 retained for limited services; revising the
19 list of services that constitute ordinary
20 services in an initial trust administration;
21 deleting an exception from the applicability of
22 presumptive fees for a corporate fiduciary that
23 serves as a trustee or cotrustee; amending s.
24 737.303, F.S.; revising language with respect
25 to the duty of the trustee to inform and
26 account to beneficiaries to require information
27 to the grantor with respect to certain trusts;
28 amending s. 737.308, F.S.; revising a provision
29 of law governing notice of trust to provide
30 that the clerk shall send a copy of any caveat
31 filed regarding the settlor to the trustee, and

1 the notice of trust to the caveator; providing
2 an exception; amending s. 733.817, F.S.;
3 revising provisions of law with respect to the
4 apportionment of estate taxes; amending s.
5 738.12, F.S.; providing conditions under which
6 a trust beneficiary is considered an income
7 beneficiary; providing an effective date.

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9 Be It Enacted by the Legislature of the State of Florida:
10

11 Section 1. Paragraph (e) is added to subsection (2) of
12 section 689.225, Florida Statutes, to read:

13 689.225 Statutory rule against perpetuities.--

14 (2) STATEMENT OF THE RULE.--

15 (e) Language in a governing instrument is inoperative
16 to the extent that it produces a period of time that exceeds
17 21 years after the death of the survivor of the specified
18 lives, if, in measuring a period from the creation of a trust
19 or other property arrangement, that language seeks to disallow
20 the vesting or termination of any interest or trust beyond,
21 seeks to postpone the vesting or termination of any interest
22 or trust until, or seeks to operate in effect in any similar
23 fashion upon, the later of:

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

29 2. The expiration of a period of time that exceeds or
30 might exceed 21 years after the death of the survivor of lives

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1 in being at the creation of the trust or other property
2 arrangement.

3 Section 2. Subsection (2) of section 709.08, Florida
4 Statutes, is amended to read:

5 709.08 Durable power of attorney.--

6 (2) WHO MAY SERVE AS ATTORNEY IN FACT.--The attorney
7 in fact must be a natural person who is 18 years of age or
8 older and is of sound mind, or a financial institution, as
9 defined in chapter 655, with trust powers, having a place of
10 business in this state and authorized to conduct trust
11 business in this state. A not-for-profit corporation,
12 organized for charitable or religious purposes in this state,
13 which has qualified as a court-appointed guardian prior to
14 January 1, 1996, and which is a tax-exempt organization under
15 26 U.S.C. s. 501(c)(3), may also act as an attorney in fact.
16 Notwithstanding any contrary clause in the written power of
17 attorney, no assets of the principal may be used for the
18 benefit of the corporate attorney in fact, or its officers or
19 directors.

20 Section 3. Subsection (3) of section 733.707, Florida
21 Statutes, is amended to read:

22 733.707 Order of payment of expenses and
23 obligations.--

24 (3) Any portion of a trust with respect to which a
25 decedent who is the grantor has at the decedent's death a
26 right of revocation, as defined in paragraph ~~(e)(c)~~, either
27 alone or in conjunction with any other person, is liable for
28 the expenses of the administration of the decedent's estate
29 and enforceable claims of the decedent's creditors to the
30 extent the decedent's estate is insufficient to pay them as
31 provided in s. 733.607(2).

1 (a) For purposes of this subsection, any trusts
2 established as part of, and all payments from, either an
3 employee annuity described in s. 403 of the Internal Revenue
4 Code of 1986, as amended, an Individual Retirement Account, as
5 described in s. 408 of the Internal Revenue Code of 1986, as
6 amended, a Keogh (HR-10) Plan, or a retirement or other plan
7 established by a corporation which is qualified under s. 401
8 of the Internal Revenue Code of 1986, as amended, shall not be
9 considered a trust over which the decedent has a right of
10 revocation.

11 (b) For purposes of this subsection, any trust
12 described in s. 664 of the Internal Revenue Code of 1986, as
13 amended, shall not be considered a trust over which the
14 decedent has a right of revocation.

15 (c) This subsection shall not impair any rights an
16 individual has under a qualified domestic relations order as
17 that term is defined in s. 414(p) of the Internal Revenue Code
18 of 1986, as amended.

19 (d) For purposes of this subsection, property held or
20 received by a trust to the extent that the property would not
21 have been subject to claims against the decedent's estate if
22 it had been paid directly to a trust created under the
23 decedent's will or other than to the decedent's estate, or
24 assets received from any trust other than a trust described in
25 this subsection, shall not be deemed assets of the trust
26 available for the payment of the expenses of administration of
27 and enforceable claims against the decedent's estate.

28 (e) For purposes of this subsection, a "right of
29 revocation" is a power retained by the decedent, held in any
30 capacity, to:

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1 1. Amend or revoke the trust and revest the principal
2 of the trust in the decedent; or

3 2. Withdraw or appoint the principal of the trust to
4 or for the decedent's benefit.

5 Section 4. Section 737.111, Florida Statutes, is
6 amended to read:

7 737.111 Execution requirements for express trusts.--

8 (1) The testamentary aspects of a trust defined in s.
9 731.201(33), are invalid unless the trust instrument is
10 executed by the settlor with the formalities required for the
11 execution of a will.

12 (2) The testamentary aspects of a trust created by a
13 nonresident of Florida, either before or after this law takes
14 effect, are not invalid because the trust does not meet the
15 requirements of this section, if the trust is valid under the
16 laws of the state or country where the settlor was at the time
17 of execution.

18 (3) The testamentary aspects of an amendment to a
19 trust are invalid unless the amendment is executed by the
20 settlor with the same formalities as a will.

21 (4) For the purposes of this section, the term
22 "testamentary aspects" means those provisions of the trust
23 that dispose of the trust property on or after the death of
24 the settlor other than to the settlor's estate.

25 (5) This section shall not apply to trusts established
26 as part of an employee annuity described in s. 403 of the
27 Internal Revenue Code of 1986, as amended, an Individual
28 Retirement Account as described in s. 408 of the Internal
29 Revenue Code of 1986, as amended, a Keogh (HR-10) Plan, or a
30 retirement or other plan that is qualified under s. 401 of the
31 Internal Revenue Code of 1986, as amended.

1 (6) This section shall not apply to trust instruments
2 executed prior to October 1, 1995.

3 Section 5. Section 737.2041, Florida Statutes, is
4 amended to read:

5 737.2041 Trustee's attorney's fees.--

6 (1) If ~~The attorney retained by~~ the trustee of a trust
7 described in s. 733.707(3) retains an attorney to render legal
8 services in connection with the initial administration of the
9 trust, the attorney is ~~shall be~~ entitled to reasonable
10 compensation for those legal services, ~~rendered in the initial~~
11 ~~administration of the trust~~ payable from the assets of the
12 trust without court order. If the trustee of a trust described
13 in s. 733.707(3) retains an attorney to render legal services
14 in connection with the initial administration of a trust, the
15 trustee and the attorney may agree to compensation that is
16 determined in a manner or amount other than the manner or
17 amount provided in this section. The agreement is not binding
18 upon a person who bears the impact of the compensation unless
19 that person is a party to or otherwise consents to be bound by
20 the agreement. The agreement may provide that the trustee is
21 not individually liable for the attorney's fees and costs.

22 ~~(2) The attorney, the trustee, and persons bearing the~~
23 ~~impact of the compensation may agree to compensation~~
24 ~~determined in a different manner than provided in this~~
25 ~~section.~~

26 ~~(2)(3)~~ Unless otherwise agreed, compensation for
27 ~~ordinary services~~ based upon the value of the trust assets
28 immediately following the settlor's death and the income
29 earned by the trust during initial administration at the rate
30 of 75 percent of the schedule provided in s.
31 733.6171(3)(a)-(h) is presumed to be reasonable total

1 compensation for ordinary services of all attorneys employed
2 generally to advise trustees concerning their duties in
3 initial trust administration.

4 (3) An attorney who is retained to render only limited
5 and specifically defined legal services shall be compensated
6 as provided in the retaining agreement. If the amount or
7 method of determining compensation is not provided in the
8 agreement, the attorney is entitled to a reasonable fee,
9 taking into account the factors set forth in subsection (6).

10 (4) Ordinary services of the attorney in an initial
11 trust administration ~~for a trustee~~ include legal advice and
12 representation concerning the trustee's duties ~~where~~
13 ~~applicable,~~ relating to:

14 (a) Review of the trust instrument and each amendment
15 for legal sufficiency and interpretation.

16 (b) Implementation of substitution of the successor
17 trustee.

18 (c) Persons who must or should be served with required
19 notices and the method and timing of such service.

20 (d) The obligation of a successor to require a former
21 trustee to account.

22 (e) The trustee's duty to protect, insure, and manage
23 trust assets and the trustee's liability relating to these
24 duties.

25 (f) The trustee's duty regarding investments imposed
26 by the prudent investor rule.

27 (g) Contributions due to the personal representative
28 of settlor's estate for payment of administrative expenses or
29 creditor claims and estate taxes.

30 (h) The trustee's obligation to inform and account to
31 beneficiaries and the method of satisfaction of these

1 obligations; the liability of the trust and trustee to the
2 settlor's creditors; the advisability or necessity for probate
3 proceedings to bar creditors; and the contribution
4 requirements to the settlor's probate estate.

5 ~~(i) Creditor procedures and direct payment or~~
6 ~~compromise and satisfaction of claims against the trust~~
7 ~~assets.~~

8 (i)~~(j)~~ Identifying tax returns required to be filed by
9 the trustee, the trustee's liability for payment of taxes, and
10 the due date of returns.

11 (j)~~(k)~~ Obtaining nontaxable certificate and receipt,
12 if not done by a personal representative.

13 (k)~~(l)~~ Order of payment of expenses of administration
14 of the trust, ~~contribution to the settlor's estate or claims~~
15 ~~filed against trust assets,~~ and order and priority of
16 abatement of bequests and legacies in the trust.

17 (l)~~(m)~~ Distribution of income or principal to
18 beneficiaries or funding of further trusts provided in the
19 governing instrument.

20 (m)~~(n)~~ Preparation of any legal documents required to
21 effect distribution.

22 (n)~~(o)~~ Fiduciary duties, avoidance of self-dealing,
23 conflicts of interest, duty of impartiality, and obligations
24 to beneficiaries.

25 (o)~~(p)~~ If there is a conflict of interest between a
26 trustee who is a beneficiary and other beneficiaries of the
27 trust, advice to the trustee on limitations of certain
28 authority of the trustee regarding discretionary distributions
29 or exercise of certain powers and alternatives for appointment
30 of an independent trustee and appropriate procedures.

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1 (p)~~(q)~~ Procedures for trustee's discharge from
2 liability for administration of trust upon termination or
3 resignation.

4 (5) ~~When a corporate fiduciary is serving as trustee~~
5 ~~or cotrustee of a trust described in s. 733.707(3), the~~
6 ~~presumptive fee for ordinary services and the list of what~~
7 ~~constitutes ordinary services in subsections (3) and (4) shall~~
8 ~~not apply, and what constitutes ordinary services and~~
9 ~~reasonable compensation for those services shall instead be~~
10 ~~determined under the particular facts and circumstances~~
11 ~~applicable to that trust.~~In addition to the attorney's fees
12 for ordinary services, the attorney for the trustee shall be
13 allowed further reasonable compensation for any extraordinary
14 service. What is an extraordinary service may vary depending
15 on many factors, including the size of the trust.

16 Extraordinary services may include, but are not limited to:

17 (a) Involvement in a trust contest, trust
18 construction, a proceeding for determination of beneficiaries,
19 a contested claim, elective share proceedings, apportionment
20 of estate taxes, or other adversary proceedings or litigation
21 by or against the trust.

22 (b) Representation of the trustee in audit or any
23 proceeding for adjustment, determination, or collection of any
24 taxes.

25 (c) Tax advice on postmortem tax planning, including,
26 but not limited to, disclaimer, renunciation of fiduciary
27 commission, alternate valuation date, allocation of
28 administrative expenses between tax returns, the QTIP or
29 reverse QTIP election, allocation of GST exemption,
30 qualification for Internal Revenue Code ss. 303 and 6166
31 privileges, deduction of last illness expenses, distribution

1 planning, asset basis considerations, throwback rules,
2 handling income or deductions in respect of a decedent,
3 valuation discounts, special use and other valuation, handling
4 employee benefit or retirement proceeds, prompt assessment
5 request, or request for release of personal liability for
6 payment of tax.

7 (d) Review of estate tax return and preparation or
8 review of other tax returns required to be filed by the
9 trustee.

10 (e) Preparation of decedent's federal estate tax
11 return. If this return is prepared by the attorney, a fee of
12 one-half of 1 percent up to a value of \$10 million and
13 one-fourth of 1 percent on the value in excess of \$10 million,
14 of the gross estate as finally determined for federal estate
15 tax purposes, is presumed to be reasonable compensation for
16 the attorney for this service. These fees shall include
17 services for routine audit of the return, not beyond the
18 examining agent level, if required.

19 (f) Purchase, sale, lease, or encumbrance of real
20 property by the trustee or involvement in zoning, land use,
21 environmental, or other similar matters.

22 (g) Legal advice regarding carrying on of decedent's
23 business or conducting other commercial activity by the
24 trustee.

25 (h) Legal advice regarding claims for damage to the
26 environment or related procedures.

27 (i) Legal advice regarding homestead status of trust
28 real property or proceedings involving the status.

29 (j) Involvement in fiduciary, employee, or attorney
30 compensation disputes.

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1 (k) Considerations of special valuation of trust
2 assets, including discounts for blockage, minority interests,
3 lack of marketability, and environmental liability.

4 (6) Upon petition of any interested person in a
5 proceeding to review the compensation paid or to be paid to
6 the attorney for the trustee, the court may increase or
7 decrease the compensation for ordinary services of the
8 attorney for the trustee or award compensation for
9 extraordinary services if the facts and circumstances of the
10 particular administration warrant. In determining reasonable
11 compensation, the court shall consider all of the following
12 factors giving such weight to each as it may determine to be
13 appropriate:

14 (a) The promptness, efficiency, and skill with which
15 the initial administration was handled by the attorney.

16 (b) The responsibilities assumed by, and potential
17 liabilities of, the attorney.

18 (c) The nature and value of the assets that are
19 affected by the decedent's death.

20 (d) The benefits or detriments resulting to the trust
21 or its beneficiaries from the attorney's services.

22 (e) The complexity or simplicity of the administration
23 and the novelty of issues presented.

24 (f) The attorney's participation in tax planning for
25 the estate, the trust, and the trust's beneficiaries and tax
26 return preparation or review and approval.

27 (g) The nature of the trust assets, the expenses of
28 administration, and the claims payable by the trust and the
29 compensation paid to other professionals and fiduciaries.

30 (h) Any delay in payment of the compensation after the
31 services were furnished.

1 (i) Any other relevant factors.

2 (7) The court may determine reasonable attorney's
3 compensation without receiving expert testimony. Any party
4 may offer expert testimony after notice to interested persons.
5 If expert testimony is offered, an expert witness fee may be
6 awarded by the court and paid from the assets of the trust.
7 The court may, in its discretion, direct from what part of the
8 trust it shall be paid.

9 (8) If a separate written agreement regarding
10 compensation exists between the attorney and the settlor, the
11 attorney shall furnish a copy to the trustee prior to
12 commencement of employment and, if employed, shall promptly
13 file and serve a copy on all interested persons. Neither a
14 separate agreement nor a provision in the trust suggesting or
15 directing the trustee to retain a specific attorney will
16 obligate the trustee to employ the attorney or obligate the
17 attorney to accept the representation, but if the attorney who
18 is a party to the agreement or who drafted the trust is
19 employed, the compensation paid shall not exceed the
20 compensation provided in the agreement.

21 (9) Court proceedings to determine compensation, if
22 required, are a part of the trust administration process, and
23 the costs, including fees for the trustee's attorney, shall be
24 determined by the court and paid from the assets of the trust
25 unless the court finds the attorney's fees request to be
26 substantially unreasonable. The court shall direct from which
27 part of the trust they shall be paid.

28 (10) "Initial trust administration" as used in this
29 section means administration of a trust described in s.
30 733.707(3) during the period which begins with the death of
31 the settlor and ends upon the final distribution of trust

1 assets outright or to continuing trusts created under the
2 trust agreement, but if an estate tax return is required, not
3 until after issuance of an estate tax closing letter or other
4 evidence of termination of the estate tax proceeding. This
5 initial period is not intended to include continued regular
6 administration of the trust.

7 (11) This section shall apply to trusts of settlors
8 who die on or after July 1, 1995.

9 Section 6. Paragraph (c) of subsection (4) of section
10 737.303, Florida Statutes, is amended to read:

11 737.303 Duty to inform and account to
12 beneficiaries.--The trustee shall keep the beneficiaries of
13 the trust reasonably informed of the trust and its
14 administration. The trustee's duty to inform and account
15 includes, but is not limited to, the following:

16 (c) In the case of a trust described in s. 733.707(3),
17 the trustee's duties under paragraph (a) extend only to the
18 grantor ~~or beneficiary~~ or the legal representative of the
19 grantor ~~or beneficiary~~ during the grantor's lifetime.

20 Section 7. Subsections (5), (6), and (7) of section
21 737.308, Florida Statutes, are renumbered as subsections (6),
22 (7), and (8), respectively, and a new subsection (5) is added
23 to said section to read:

24 737.308 Notice of trust.--

25 (5) The clerk shall send a copy of:

26 (a) Any caveat filed regarding the settlor to the
27 trustee; and

28 (b) The notice of trust to any caveator, unless there
29 is a probate proceeding pending and the personal
30 representative and the trustee are the same.

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1 Section 8. Section 733.817, Florida Statutes, is
2 amended to read:

3 (Substantial rewording of section. See
4 s. 733.817, F.S., for present text.)

5 733.817 Apportionment of estate taxes.--

6 (1) For purposes of this section:

7 (a) "Fiduciary" means a person other than the personal
8 representative in possession of property included in the
9 measure of the tax who is liable to the applicable taxing
10 authority for payment of the entire tax to the extent of the
11 value of the property in his possession.

12 (b) "Governing instrument" means a will, trust
13 agreement, or any other document that controls the transfer of
14 an asset on the occurrence of the event with respect to which
15 the tax is being levied.

16 (c) "Gross estate" means the gross estate, as
17 determined by the Internal Revenue Code with respect to the
18 federal estate tax and the Florida estate tax, and as such
19 concept is otherwise determined by the estate, inheritance, or
20 death tax laws of the particular state, country, or political
21 subdivision whose tax is being apportioned.

22 (d) "Included in the measure of the tax" means that
23 for each separate tax that an interest may incur, only
24 interests included in the measure of that particular tax are
25 considered. The term "included in the measure of the tax" does
26 not include any interest, whether passing under the will or
27 not, to the extent the interest is initially deductible from
28 the gross estate, without regard to any subsequent diminution
29 of the deduction by reason of the charge of any part of the
30 applicable tax to the interest. The term "included in the
31 measure of the tax" does not include interests or amounts that

1 are not included in the gross estate but are included in the
2 amount upon which the applicable tax is computed, such as
3 adjusted taxable gifts with respect to the federal estate tax.
4 If an election is required for deductibility, an interest is
5 not "initially deductible" unless the election for
6 deductibility is allowed.

7 (e) "Internal Revenue Code" means the Internal Revenue
8 Code of 1986, as amended from time to time.

9 (f) "Net tax" means the net tax payable to the
10 particular state, country, or political subdivision whose tax
11 is being apportioned, after taking into account all credits
12 against the applicable tax except as provided in this section.
13 With respect to the federal estate tax, "net tax" is
14 determined after taking into account all credits against the
15 tax except for the credit for foreign death taxes.

16 (g) "Nonresiduary devise" means any devise that is not
17 a residuary devise.

18 (h) "Nonresiduary interest" in connection with a trust
19 means any interest in a trust which is not a residuary
20 interest.

21 (i) "Recipient" means, with respect to property or an
22 interest in property included in the gross estate, an heir at
23 law in an intestate estate, devisee in a testate estate,
24 beneficiary of a trust, beneficiary of an insurance policy,
25 annuity, or other contractual right, surviving tenant, taker
26 as a result of the exercise or in default of the exercise of a
27 general power of appointment, person who receives or is to
28 receive the property or an interest in the property, or person
29 in possession of the property.

30 (j) "Residuary devise" has the meaning set forth in s.
31 731.201(30).

1 (k) "Residuary interest," in connection with a trust,
2 means an interest in the assets of a trust which remain after
3 provision for any distribution that is to be satisfied by
4 reference to a specific property or type of property, fund,
5 sum, or statutory amount.

6 (l) "Revocable trust" means a trust as defined in s.
7 731.201(33) created by the decedent to the extent that the
8 decedent had at his or her death the power to alter, amend, or
9 revoke the trust either alone or in conjunction with any other
10 person.

11 (m) "State" means any state, territory, or possession
12 of the United States, the District of Columbia, and the
13 Commonwealth of Puerto Rico.

14 (n) "Tax" means any estate tax, inheritance tax,
15 generation skipping transfer tax, or other tax levied or
16 assessed under the laws of this or any other state, the United
17 States, any other country, or any political subdivision of the
18 foregoing, as finally determined, which is imposed as a result
19 of the death of the decedent, including, without limitation,
20 the tax assessed pursuant to s. 4980A of the Internal Revenue
21 Code. The term also includes any interest and penalties
22 imposed in addition to the tax. Unless the context indicates
23 otherwise, the term "tax" means each separate tax.

24 (o) "Temporary interest" means an interest in income
25 or an estate for a specific period of time or for life or for
26 some other period controlled by reference to extrinsic events,
27 whether or not in trust.

28 (p) "Tentative Florida tax" with respect to any
29 property means the net Florida estate tax that would have been
30 attributable to that property if no tax were payable to any
31 other state in respect of that property.

1 (q) "Value" means the pecuniary worth of the interest
2 involved as finally determined for purposes of the applicable
3 tax after deducting any debt, expense, or other deduction
4 chargeable to it for which a deduction was allowed in
5 determining the amount of the applicable tax. A lien or other
6 encumbrance is not regarded as chargeable to a particular
7 interest to the extent that it will be paid from other
8 interests. The value of an interest shall not be reduced by
9 reason of the charge against it of any part of the tax.

10 (2) An interest in homestead property shall be exempt
11 from the apportionment of taxes if such interest passes to a
12 person to whom inures the decedent's exemption from forced
13 sale under the State Constitution.

14 (3) The net tax attributable to the interests included
15 in the measure of each tax shall be determined by the
16 proportion that the value of each interest included in the
17 measure of the tax bears to the total value of all interests
18 included in the measure of the tax. Notwithstanding the
19 foregoing:

20 (a) The net tax attributable to interests included in
21 the measure of the tax by reason of s. 2044 of the Internal
22 Revenue Code shall be determined in the manner provided for
23 the federal estate tax in s. 2207A of the Internal Revenue
24 Code, and the amount so determined shall be deducted from the
25 tax to determine the net tax attributable to all remaining
26 interests included in the measure of the tax.

27 (b) The foreign tax credit allowed with respect to the
28 federal estate tax shall be allocated among the recipients of
29 interests finally charged with the payment of the foreign tax
30 in reduction of any federal estate tax chargeable to the
31 recipients of the foreign interests, whether or not any

1 federal estate tax is attributable to the foreign interests.
2 Any excess of the foreign tax credit shall be applied to
3 reduce proportionately the net amount of federal estate tax
4 chargeable to the remaining recipients of the interests
5 included in the measure of the federal estate tax.

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

9 1. If the net tax paid to another state is greater
10 than or equal to the tentative Florida tax attributable to the
11 property subject to tax in the other state, none of the
12 Florida tax shall be attributable to that property.

13 2. If the net tax paid to another state is less than
14 the tentative Florida tax attributable to the property subject
15 to tax in the other state, the net Florida tax attributable to
16 the property subject to tax in the other state shall be the
17 excess of the amount of the tentative Florida tax attributable
18 to the property over the net tax payable to the other state
19 with respect to the property.

20 3. Any remaining net Florida tax shall be attributable
21 to property included in the measure of the Florida tax
22 exclusive of property subject to tax in other states.

23 4. The net federal tax attributable to the property
24 subject to tax in the other state shall be determined as if it
25 were located in the state.

26 (d) The net tax attributable to a temporary interest,
27 if any, shall be regarded as attributable to the principal
28 that supports the temporary interest.

29 (4)(a) Except as otherwise effectively directed by the
30 governing instrument, if the Internal Revenue Code including,
31 but not limited to, ss. 2032A(c)(5), 2206, 2207, 2207A, 2207B,

1 and 2603 of the Internal Revenue Code applies to apportion
2 federal tax against recipients of certain interests, all net
3 taxes, including taxes levied by the state attributable to
4 each type of interest, shall be apportioned against the
5 recipients of all interests of that type in the proportion
6 that the value of each interest of that type included in the
7 measure of the tax bears to the total of all interests of that
8 type included in the measure of the tax.

9 (b) The provisions of this subsection do not affect
10 allocation of the reduction in the Florida tax as provided in
11 this section with respect to estates of Florida residents
12 which are also subject to tax in other states.

13 (5) Except as provided above or as otherwise directed
14 by the governing instrument, the net tax attributable to each
15 interest shall be apportioned as follows:

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

17 1. The net tax attributable to nonresiduary devisees
18 shall be charged to and paid from the residuary estate whether
19 or not all interests in the residuary estate are included in
20 the measure of the tax. If the residuary estate is
21 insufficient to pay the net tax attributable to all
22 nonresiduary devisees, the balance of the net tax attributable
23 to nonresiduary devisees shall be apportioned among the
24 recipients of the nonresiduary devisees in the proportion that
25 the value of each nonresiduary devise included in the measure
26 of the tax bears to the total of all nonresiduary devisees
27 included in the measure of the tax.

28 2. The net tax attributable to residuary devisees shall
29 be apportioned among the recipients of the residuary devisees
30 included in the measure of tax in the proportion that the
31 value of each residuary devise included in the measure of the

1 tax bears to the total of all residuary devises included in
2 the measure of the tax.
3 (b) For property passing under the terms of any trust
4 other than a trust created in the decedent's will:
5 1. The net tax attributable to nonresiduary interests
6 shall be charged to and paid from the residuary portion of the
7 trust, whether or not all interests in the residuary portion
8 are included in the measure of the tax. If the residuary
9 portion of the trust is insufficient to pay the net tax
10 attributable to all nonresiduary interests, the balance of the
11 net tax attributable to nonresiduary interests shall be
12 apportioned among the recipients of the nonresiduary interests
13 in the proportion that the value of each nonresiduary interest
14 included in the measure of the tax bears to the total of all
15 nonresiduary interests included in the measure of the tax.
16 2. The net tax attributable to residuary interests
17 shall be apportioned among the recipients of the residuary
18 interests included in the measure of the tax in the proportion
19 that the value of each residuary interest included in the
20 measure of the tax bears to the total of all residuary
21 interests included in the measure of the tax.
22 (c) The net tax attributable to an interest in
23 homestead property which is exempt from apportionment pursuant
24 to subsection (2) shall be apportioned against the recipients
25 of other interests in the estate or passing under any
26 revocable trust in the following order:
27 1. Class I: Recipients of interests not disposed of
28 by the decedent's will or revocable trust which are included
29 in the measure of the federal estate tax.
30
31

1 2. Class II: Recipients of residuary devises and
2 residuary interests that are included in the measure of the
3 federal estate tax.

4 3. Class III: Recipients of nonresiduary devises and
5 nonresiduary interests that are included in the measure of the
6 federal estate tax. The net tax apportioned to a class, if
7 any, pursuant to this paragraph shall be apportioned among the
8 recipients in the class in the proportion that the value of
9 the interest of each bears to the total value of all interests
10 included in that class.

11 (d) In the application of this subsection, paragraphs
12 (a), (b), and (c) shall be applied to apportion the net tax to
13 the recipients of the estate and the recipients of the
14 decedent's revocable trust as if all recipients, other than
15 the estate or trusts themselves, were taking under a common
16 instrument.

17 (e) The net tax imposed under s. 4980A of the Internal
18 Revenue Code shall be apportioned among the recipients of the
19 interests included in the measure of that tax in the
20 proportion that the value of the interest of each bears to the
21 total value of all interests included in the measure of that
22 tax.

23 (f) The net tax that is not apportioned under
24 paragraphs (a), (b), and (c), including, but not limited to,
25 the net tax attributable to interests passing by intestacy,
26 jointly held interests passing by survivorship, insurance,
27 properties in which the decedent held a reversionary or
28 revocable interest, and annuities, shall be apportioned among
29 the recipients of the remaining interests that are included in
30 the measure of the tax in the proportion that the value of
31

1 each such interest bears to the total value of all the
2 remaining interests included in the measure of the tax.

3 (g) If the court finds that it is inequitable to
4 apportion interest, penalties, or both, in the manner provided
5 in paragraphs (a)-(f), the court may assess liability for the
6 payment thereof in the manner it finds equitable.

7 (h)1. To be effective as a direction for payment of
8 tax in a manner different from that provided in this section,
9 the governing instrument must direct that the tax be paid from
10 assets that pass pursuant to that governing instrument, except
11 as provided in this section.

12 2. If the decedent's will provides that the tax shall
13 be apportioned as provided in the decedent's revocable trust
14 by specific reference to the trust, the direction in the
15 revocable trust shall be deemed to be a direction contained in
16 the will and shall control with respect to payment of taxes
17 from assets passing under both the will and the revocable
18 trust.

19 3. A direction in the decedent's will to pay tax from
20 the decedent's revocable trust is effective if a contrary
21 direction is not contained in the trust agreement.

22 4. For a direction in a governing instrument to be
23 effective to direct payment of taxes attributable to property
24 not passing under the governing instrument from property
25 passing under the governing instrument, the governing
26 instrument must expressly refer to this section, or expressly
27 indicate that the property passing under the governing
28 instrument is to bear the burden of taxation for property not
29 passing under the governing instrument. A direction in the
30 governing instrument to the effect that all taxes are to be
31 paid from property passing under the governing instrument

1 whether attributable to property passing under the governing
2 instrument or otherwise shall be effective to direct the
3 payment from property passing under the governing instrument
4 of taxes attributable to property not passing under the
5 governing instrument.

6 5. If there is a conflict as to payment of taxes
7 between the decedent's will and the governing instrument, the
8 decedent's will controls, except as follows:

9 a. The governing instrument shall be given effect with
10 respect to any tax remaining unpaid after the application of
11 the decedent's will.

12 b. A direction in a governing instrument to pay the
13 tax attributable to assets that pass pursuant to the governing
14 instrument from assets that pass pursuant to that governing
15 instrument shall be effective notwithstanding any conflict
16 with the decedent's will, unless the tax provision in the
17 decedent's will expressly overrides the conflicting provision
18 in the governing instrument.

19 (6) The personal representative or fiduciary shall not
20 be required to transfer to a recipient any property in
21 possession of the personal representative or fiduciary which
22 he or she reasonably anticipates may be necessary for the
23 payment of taxes. Further, the personal representative or
24 fiduciary shall not be required to transfer any property in
25 possession of the personal representative or fiduciary to the
26 recipient until the amount of the tax due from the recipient
27 is paid by the recipient. If property is transferred before
28 final apportionment of the tax, the recipient shall provide a
29 bond or other security for his apportioned liability in the
30 amount and form prescribed by the personal representative or
31 fiduciary.

1 (7)(a) The personal representative may petition at any
2 time for an order of apportionment. If no administration has
3 been commenced at any time after 90 days from the decedent's
4 death any fiduciary may petition for an order of apportionment
5 in the court in which venue would be proper for administration
6 of the decedent's estate. Formal notice of the petition for
7 order of apportionment shall be given to all interested
8 persons. At any time after 6 months from the decedent's death,
9 any recipient may petition such court for an order of
10 apportionment.

11 (b) The court shall determine all issues concerning
12 apportionment. If the tax to be apportioned has not been
13 finally determined, the court shall determine the probable tax
14 due or to become due from all interested persons, apportion
15 the probable tax, and retain jurisdiction over the parties and
16 issues to modify the order of apportionment as appropriate
17 until after the tax is finally determined.

18 (8)(a) If the personal representative or fiduciary
19 does not have possession of sufficient property otherwise
20 distributable to the recipient to pay the tax apportioned to
21 the recipient, whether under this section, the Internal
22 Revenue Code, or the governing instrument, if applicable, the
23 personal representative or fiduciary shall recover the
24 deficiency in tax so apportioned to the recipient:

25 1. From the fiduciary in possession of the property to
26 which the tax is apportioned, if any; and

27 2. To the extent of any deficiency in collection from
28 the fiduciary, or to the extent collection from the fiduciary
29 is excused pursuant to subsection (9) and in all other cases,
30 from the recipient of the property to which the tax is
31

1 apportioned, unless relieved of this duty as provided in
2 subsection (9).

3 (b) In any action to recover the tax apportioned, the
4 order of apportionment shall be prima facie correct.

5 (c) In any action for the enforcement of an order of
6 apportionment, the court shall award taxable costs as in
7 chancery actions, including reasonable attorney's fees, and
8 may award penalties and interest on the unpaid tax in
9 accordance with equitable principles.

10 (d) This subsection shall not authorize the recovery
11 of any tax from any company issuing insurance included in the
12 gross estate, or from any bank, trust company, savings and
13 loan association, or similar institution with respect to any
14 account in the name of the decedent and any other person which
15 passed by operation of law on the decedent's death.

16 (9)(a) A personal representative or fiduciary who has
17 the duty under this section of collecting the apportioned tax
18 from recipients may be relieved of the duty to collect the tax
19 by an order of the court finding:

20 1. That the estimated court costs and attorney's fees
21 in collecting the apportioned tax from a person against whom
22 the tax has been apportioned will approximate or exceed the
23 amount of the recovery;

24 2. That the person against whom the tax has been
25 apportioned is a resident of a foreign country other than
26 Canada and refuses to pay the apportioned tax on demand; or

27 3. That it is impracticable to enforce contribution of
28 the apportioned tax against a person against whom the tax has
29 been apportioned in view of the improbability of obtaining a
30 judgment or the improbability of collection under any judgment
31 that might be obtained, or otherwise.

1 (b) A personal representative or fiduciary shall not
2 be liable for failure to attempt to enforce collection if the
3 personal representative or fiduciary reasonably believes it
4 would have been economically impracticable.

5 (10) Any apportioned tax that is not collected shall
6 be reapportioned in accordance with this section as if the
7 portion of the property to which the uncollected tax had been
8 apportioned had been exempt.

9 (11) Nothing in this section shall limit the right of
10 any person who has paid more than the amount of the tax
11 apportionable to such person, calculated as if all apportioned
12 amounts would be collected, to obtain contribution from those
13 who have not paid the full amount of the tax apportionable to
14 them, calculated as if all apportioned amounts would be
15 collected, and that right is hereby conferred. In any action
16 to enforce contribution, the court shall award taxable costs
17 as in chancery actions, including reasonable attorney's fees.

18 (12) Nothing herein contained shall be construed to
19 require the personal representative or fiduciary to pay any
20 tax levied or assessed by any foreign country, unless specific
21 directions to that effect are contained in the will or other
22 instrument under which the personal representative or
23 fiduciary is acting.

24 Section 9. Section 738.12, Florida Statutes, is
25 amended to read:

26 738.12 Underproductive property.--

27 (1)(a) If the total principal of a trust does not in
28 any year yield a net income of at least 3 percent of its
29 market value (including as income the value of any beneficial
30 use of the property by the income beneficiary), the trustee
31 shall pay to the income beneficiary an amount equal to the

1 excess of 3 percent of the value of the principal, based upon
2 the market value at the beginning of the calendar year, over
3 the trust income paid to the income beneficiary in that year.
4 This amount shall be paid to the income beneficiary using the
5 first principal cash available.

6 (b) In the event of a termination or initiation of a
7 trust, or the termination of a beneficial income interest of a
8 trust, for a period of less than 12 months, the amount to be
9 paid to the income beneficiary shall be prorated
10 proportionately with the length of the time of his interest in
11 the trust and in accordance with s. 738.03.

12 (c) For purposes of this subsection, a beneficiary is
13 considered to be an income beneficiary only if the trust
14 instrument is irrevocable and requires that the net income
15 from the trust be paid to the beneficiary. Payment under this
16 subsection may not be made to a beneficiary who may receive
17 trust income only in the discretion of the trustee.

18 (2) Upon the sale of the property the income
19 beneficiary shall not be entitled to any portion of the
20 proceeds of sale, except that any amount determined in
21 subsection (1) that remains unpaid at the time of sale shall
22 be paid therefrom.

23 ~~(3) If by the terms of the trust any portion of the~~
24 ~~income is to be retained by the trustee or disposed of other~~
25 ~~than by payment to an income beneficiary, such portion of the~~
26 ~~amount determined in subsection (1) shall be retained or~~
27 ~~disposed of as provided by the terms of the trust.~~

28 Section 10. This act shall take effect upon becoming a
29 law, except that section 8 of this act shall take effect
30 October 1, 1998, and shall apply to the estates of decedents
31 dying on or after October 1, 1998, and section 9 of this act

1 shall take effect upon becoming law and shall be applicable to
2 all trusts, whenever executed.

3
4 *****

5 HOUSE SUMMARY

6 Provides a statement of the rule against perpetuities.
7 Modifies various statutes regulating the administration
8 of trusts and estates. Authorizes a not-for-profit
9 corporation organized for charitable or religious
10 purposes in this state which has qualified as a
11 court-appointed guardian prior to January 1, 1996, and is
12 a tax-exempt organization to act as an attorney in fact.
13 Defines the term "right of revocation" for purposes of
14 the priority given to the payment of expenses and
15 obligations of a deceased's estate. Revises prescribed
16 requirements for the execution of an expressed trust.
17 Authorizes the trustee of a trust and an attorney to
18 agree to the compensation to be paid to the attorney in
19 an amount different from the amount prescribed in s.
20 737.2041, F.S., for services related to the initial
21 administration of a trust specified in s. 737.707(3),
22 F.S. Provides for determining fees for an attorney who is
23 retained for limited services. Revises a provision of
24 law governing notice of trust to provide that the clerk
25 shall send a copy of any caveat filed regarding the
26 settlor to the trustee and a copy of the notice of trust
27 to the caveator. Revises the list of services of an
28 attorney which constitute ordinary services in an initial
29 trust administration. Deletes an exception from the
30 applicability of presumptive fees for a corporate
31 fiduciary serving as a trustee or cotrustee. Revises the
duty of a trustee to inform and account to beneficiaries
of trusts specified in s. 733.707(3), F.S. Revises
provisions relating to the apportionment of estate taxes.
Provides conditions under which a trust beneficiary is
considered an income beneficiary.