

1 A bill to be entitled
2 An act relating to trust administration; amending s.
3 733.607, F.S.; limiting a personal representative's
4 entitlement to payment from a trust of certain estate
5 expenses and obligations; specifying application of
6 certain criteria in making certain payments from a trust;
7 amending s. 733.707, F.S.; specifying application of
8 additional provisions to liability for certain estate
9 expense and obligation payments from a trust; amending s.
10 736.0206, F.S.; deleting certain notice requirements
11 relating to court review of a trustee's employment of
12 certain persons; authorizing the award of expert witness
13 fees from trust assets rather than requiring the award of
14 such fees; providing a limitation; creating s. 736.04114,
15 F.S.; providing authority for court interpretation of
16 certain trusts not subject to the federal estate tax;
17 specifying trust provision requirements; providing
18 conditions; providing definitions; providing criteria for
19 court interpretation of a trust; providing an exception;
20 authorizing a trustee to take certain actions pending a
21 determination of trust distribution; limiting trustee
22 liability; preserving certain rights to construe a trust;
23 providing for retroactive operation; amending s. 736.0505,
24 F.S.; revising a value criterion for determining the
25 extent of treating the holder of a power of withdrawal as
26 the settlor of a trust; providing criteria for determining
27 who contributed certain trust assets under certain
28 circumstances; amending s. 736.05053, F.S.; requiring

29 application of priorities for pro rata abatement of
 30 nonresiduary trust dispositions together with nonresiduary
 31 devises; amending s. 736.1007, F.S.; deleting authority
 32 for a court to determine an attorney's compensation;
 33 deleting certain expert testimony and fee payment
 34 provisions; deleting requirements for certain court
 35 compensation determination proceedings to be part of a
 36 trust administration process and for court determination
 37 and payment of certain estate costs and fees from trust
 38 assets; providing an effective date.

39
 40 Be It Enacted by the Legislature of the State of Florida:

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 42 Section 1. Subsection (2) of section 733.607, Florida
 43 Statutes, is amended to read:

44 733.607 Possession of estate.—

45 (2) If, after providing for statutory entitlements and all
 46 devises other than residuary devises, the assets of the
 47 decedent's estate are insufficient to pay the expenses of the
 48 administration and obligations of the decedent's estate, the
 49 personal representative is entitled to payment from the trustee
 50 of a trust described in s. 733.707(3), in the amount the
 51 personal representative certifies in writing to be required to
 52 satisfy the insufficiency, subject to the exclusions and
 53 preferences under s. 736.05053. The provisions of s. 733.805
 54 shall apply in determining the amount of any payment required by
 55 this section.

56 Section 2. Subsection (3) of section 733.707, Florida
 57 Statutes, is amended to read:

58 733.707 Order of payment of expenses and obligations.—

59 (3) Any portion of a trust with respect to which a
 60 decedent who is the grantor has at the decedent's death a right
 61 of revocation, as defined in paragraph (e), either alone or in
 62 conjunction with any other person, is liable for the expenses of
 63 the administration and obligations of the decedent's estate to
 64 the extent the decedent's estate is insufficient to pay them as
 65 provided in ss. ~~s.~~ 733.607(2) and 736.05053.

66 (a) For purposes of this subsection, any trusts
 67 established as part of, and all payments from, either an
 68 employee annuity described in s. 403 of the Internal Revenue
 69 Code of 1986, as amended, an Individual Retirement Account, as
 70 described in s. 408 of the Internal Revenue Code of 1986, as
 71 amended, a Keogh (HR-10) Plan, or a retirement or other plan
 72 established by a corporation which is qualified under s. 401 of
 73 the Internal Revenue Code of 1986, as amended, shall not be
 74 considered a trust over which the decedent has a right of
 75 revocation.

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

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

84 (d) For purposes of this subsection, property held or
85 received by a trust to the extent that the property would not
86 have been subject to claims against the decedent's estate if it
87 had been paid directly to a trust created under the decedent's
88 will or other than to the decedent's estate, or assets received
89 from any trust other than a trust described in this subsection,
90 shall not be deemed assets of the trust available to the
91 decedent's estate.

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

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

97 2. Withdraw or appoint the principal of the trust to or
98 for the decedent's benefit.

99 Section 3. Subsections (1), (5), (6), and (7) of section
100 736.0206, Florida Statutes, are amended to read:

101 736.0206 Proceedings for review of employment of agents
102 and review of compensation of trustee and employees of trust.—

103 (1) ~~After notice to all interested persons,~~ The court may
104 review the propriety of the employment by a trustee of any
105 person, including any attorney, auditor, investment adviser, or
106 other specialized agent or assistant, and the reasonableness of
107 any compensation paid to that person or to the trustee.

108 (5) The court may determine reasonable compensation for a
109 trustee or any person employed by a trustee without receiving
110 expert testimony. Any party may offer expert testimony after
111 notice to interested persons. If expert testimony is offered, a

112 reasonable expert witness fee may ~~shall~~ be awarded by the court
 113 and paid from the assets of the trust unless the court finds
 114 that the expert testimony did not assist the court. The court
 115 shall direct from which part of the trust assets the fee shall
 116 be paid.

117 ~~(6) Persons given notice as provided in this section shall~~
 118 ~~be bound by all orders entered on the complaint.~~

119 (6) ~~(7)~~ In a proceeding pursuant to subsection (2), the
 120 petitioner may serve formal notice as provided in the Florida
 121 Probate Rules, and such notice shall be sufficient for the court
 122 to acquire jurisdiction over the person receiving the notice to
 123 the extent of the person's interest in the trust.

124 Section 4. Section 736.04114, Florida Statutes, is created
 125 to read:

126 736.04114 Limited judicial construction of irrevocable
 127 trust with federal tax provisions.-

128 (1) Upon the application of a trustee or any qualified
 129 beneficiary of a trust, a court at any time may construe the
 130 terms of a trust that is not then revocable to define the
 131 respective shares or determine beneficiaries, in accordance with
 132 the intention of the settlor, if a disposition occurs during the
 133 applicable period and the trust contains a provision that:

134 (a) Includes a formula disposition referring to the terms
 135 "unified credit," "estate tax exemption," "applicable exemption
 136 amount," "applicable credit amount," "applicable exclusion
 137 amount," "generation-skipping transfer tax exemption" or "GST
 138 exemption," "marital deduction," "maximum marital deduction,"
 139 "unlimited marital deduction," or "maximum charitable

140 deduction";

141 (b) Measures a share of a trust based on the amount that
142 may pass free of federal estate tax or the amount that may pass
143 free of federal generation-skipping transfer tax;

144 (c) Otherwise makes a disposition referring to a
145 charitable deduction, marital deduction, or another provision of
146 federal estate tax law or federal generation-skipping transfer
147 tax law; or

148 (d) Appears to be intended to reduce or minimize the
149 federal estate tax or generation-skipping transfer tax.

150 (2) For purposes of this section:

151 (a) "Applicable period" means a period beginning January
152 1, 2010, and ending at the end of the day on the earlier of
153 December 31, 2010, or the day before the date that an act
154 becomes a law that repeals or otherwise modifies or has the
155 effect of repealing or modifying s. 901 of The Economic Growth
156 and Tax Relief Reconciliation Act of 2001.

157 (b) A disposition occurs when an interest takes effect in
158 possession or enjoyment.

159 (3) In construing the trust, the court shall consider the
160 terms and purposes of the trust, the facts and circumstances
161 surrounding the creation of the trust, and the settlor's
162 probable intent. In determining the settlor's probable intent,
163 the court may consider evidence relevant to the settlor's intent
164 even though the evidence contradicts an apparent plain meaning
165 of the trust instrument.

166 (4) This section does not apply to a disposition that is
167 specifically conditioned upon no federal estate tax or federal

168 generation-skipping transfer tax being imposed.

169 (5) (a) Unless otherwise ordered by the court, during the
 170 applicable period and without court order, the trustee
 171 administering a trust containing one or more provisions
 172 described in subsection (1) may:

173 1. Delay or refrain from making any distribution.

174 2. Incur and pay fees and costs reasonably necessary to
 175 determine the trustee's duties and obligations, including, but
 176 not limited to, compliance with provisions of existing and
 177 reasonably anticipated future federal tax laws.

178 3. Establish and maintain reserves for the payment of fees
 179 and costs and federal taxes.

180 (b) The trustee shall not be liable for its actions as
 181 provided in this subsection if such actions are made or taken in
 182 good faith.

183 (6) The provisions of this section are in addition to, and
 184 not in derogation of, rights under this code or the common law
 185 to construe a trust.

186 (7) This section is remedial in nature and intended to
 187 provide a new or modified legal remedy. This section shall
 188 operate retroactively to January 1, 2010.

189 Section 5. Paragraph (b) of subsection (2) of section
 190 736.0505, Florida Statutes, is amended, and subsection (3) is
 191 added to that section, to read:

192 736.0505 Creditors' claims against settlor.—

193 (2) For purposes of this section:

194 (b) Upon the lapse, release, or waiver of the power, the
 195 holder is treated as the settlor of the trust only to the extent

196 the value of the property affected by the lapse, release, or
 197 waiver exceeds the greater of the amount specified in:

- 198 1. Section 2041(b)(2) or s. 2514(e); or
- 199 2. Section 2503(b) and, if the donor was married at the
 200 time of the transfer to which the power of withdrawal applies,
 201 twice the amount specified in s. 2503(b),

202
 203 of the Internal Revenue Code of 1986, as amended.

204 (3) Subject to the provisions of s. 726.105, for purposes
 205 of this section, the assets in:

206 (a) A trust described in s. 2523(e) of the Internal
 207 Revenue Code of 1986, as amended, or a trust for which the
 208 election described in s. 2523(f) of the Internal Revenue Code of
 209 1986, as amended, has been made; and

210 (b) Another trust, to the extent that the assets in the
 211 other trust are attributable to a trust described in paragraph
 212 (a),

213
 214 shall, after the death of the settlor's spouse, be deemed to
 215 have been contributed by the settlor's spouse and not by the
 216 settlor.

217 Section 6. Subsection (5) is added to section 736.05053,
 218 Florida Statutes, to read:

219 736.05053 Trustee's duty to pay expenses and obligations
 220 of settlor's estate.—

221 (5) Nonresiduary trust dispositions shall abate pro rata
 222 with nonresiduary devises pursuant to the priorities specified
 223 in this section and s. 733.805, determined as if the

224 beneficiaries of the will and trust, other than the estate or
 225 trust itself, were taking under a common instrument.

226 Section 7. Subsections (7) through (10) of section
 227 736.1007, Florida Statutes, are amended to read:

228 736.1007 Trustee's attorney's fees.—

229 ~~(7) The court may determine reasonable attorney's~~
 230 ~~compensation without receiving expert testimony. Any party may~~
 231 ~~offer expert testimony after notice to interested persons. If~~
 232 ~~expert testimony is offered, an expert witness fee may be~~
 233 ~~awarded by the court and paid from the assets of the trust. The~~
 234 ~~court shall direct from what part of the trust the fee is to be~~
 235 ~~paid.~~

236 (7)-(8) If a separate written agreement regarding
 237 compensation exists between the attorney and the settlor, the
 238 attorney shall furnish a copy to the trustee prior to
 239 commencement of employment and, if employed, shall promptly file
 240 and serve a copy on all interested persons. A separate agreement
 241 or a provision in the trust suggesting or directing the trustee
 242 to retain a specific attorney does not obligate the trustee to
 243 employ the attorney or obligate the attorney to accept the
 244 representation but, if the attorney who is a party to the
 245 agreement or who drafted the trust is employed, the compensation
 246 paid shall not exceed the compensation provided in the
 247 agreement.

248 ~~(9) Court proceedings to determine compensation, if~~
 249 ~~required, are a part of the trust administration process, and~~
 250 ~~the costs, including fees for the trustee's attorney, shall be~~
 251 ~~determined by the court and paid from the assets of the trust~~

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252 ~~unless the court finds the attorney's fees request to be~~
253 ~~substantially unreasonable. The court shall direct from what~~
254 ~~part of the trust the fees are to be paid.~~

255 (8)~~(10)~~ As used in this section, the term "initial trust
256 administration" means administration of a revocable trust during
257 the period that begins with the death of the settlor and ends on
258 the final distribution of trust assets outright or to continuing
259 trusts created under the trust agreement but, if an estate tax
260 return is required, not until after issuance of an estate tax
261 closing letter or other evidence of termination of the estate
262 tax proceeding. This initial period is not intended to include
263 continued regular administration of the trust.

264 Section 8. This act shall take effect July 1, 2010.