

By the Committee on Judiciary; and Senator Thrasher

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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
7 trust; amending s. 733.707, F.S.; specifying
8 application of additional provisions to liability for
9 certain estate expense and obligation payments from a
10 trust; amending s. 736.0206, F.S.; deleting certain
11 notice requirements relating to court review of a
12 trustee's employment of certain persons; authorizing
13 the award of expert witness fees from trust assets
14 rather than requiring the award of such fees;
15 providing a limitation; creating s. 736.04114, F.S.;
16 providing for interpretation of trusts not subject to
17 the federal estate tax; providing conditions;
18 providing definitions; providing criteria for a court
19 interpreting a trust; providing an exception; allowing
20 a trustee to take certain actions pending a
21 determination of trust distribution; limiting trustee
22 liability; providing for interpretation; providing for
23 retroactive effect; amending s. 736.0505, F.S.;
24 revising a value criterion for determining the extent
25 of treating the holder of a power of withdrawal as the
26 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

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

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

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

45 733.607 Possession of estate.—

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

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

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59 733.707 Order of payment of expenses and obligations.—

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

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

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

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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 for
98 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 and
102 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.

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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
135 "unified credit," "estate tax exemption," "applicable exemption
136 amount," "applicable credit amount," "applicable exclusion
137 amount," "generation-skipping transfer tax exemption," "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 can pass free of federal estate tax or the amount that can pass
143 free of federal generation-skipping transfer tax;

144 (c) Otherwise makes a disposition referring to a charitable
145 deduction, marital deduction, or another provision of federal

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146 estate tax or generation-skipping transfer tax law; or

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

149 (2) For the purpose of this section:

150 (a) "Applicable period" means a period beginning January 1,
151 2010, and ending on the end of the day on the earlier of:

152 1. December 31, 2010; or

153 2. The day before the date that an act becomes law which
154 repeals or otherwise modifies or has the effect of repealing or
155 modifying s. 901 of The Economic Growth and Tax Relief
156 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 or generation-
168 skipping transfer tax being imposed.

169 (5) 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 (a) Delay or refrain from making any distribution;

174 (b) Incur and pay fees and costs reasonably necessary to

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175 determine its duties and obligations, including compliance with
176 provisions of existing and reasonably anticipated future federal
177 tax laws; and

178 (c) Establish and maintain reserves for the payment of
179 these fees and costs and federal taxes.

180

181 The trustee is not liable for its actions as provided in this
182 subsection which are made or taken in 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 order to provide a new or
187 modified legal remedy. This section applies retroactively and is
188 effective as of 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),

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

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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 Revenue
207 Code of 1986, as amended, or a trust for which the election
208 described in s. 2523(f) of the Internal Revenue Code of 1986, as
209 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),

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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 of
220 settlor's estate.—

221 (5) Nonresiduary trust dispositions shall abate pro rata
222 with nonresiduary devisees 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~~

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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~~
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

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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.