

By the Committees on Banking and Insurance; and Judiciary; and  
Senator Thrasher

597-02814-10

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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; creating s. 736.1211, F.S.; prohibiting state  
40 agencies and local governments from requiring the  
41 disclosure of certain characteristics of persons  
42 associated with certain charitable organizations,  
43 trusts, and foundations; prohibiting state agencies  
44 and local governments from requiring certain private  
45 foundations or trusts to disclose certain  
46 characteristics of persons associated with an entity  
47 receiving monetary or in-kind contributions from the  
48 foundation or trust; prohibiting state agencies and  
49 local governments from requiring that individuals  
50 having certain characteristics be included on the  
51 governing board or as officers of certain charitable  
52 organizations, trusts, or foundations; prohibiting  
53 state agencies and local governments from prohibiting  
54 a person from serving on the board or as an officer  
55 based on the person's familial relationship to other  
56 board members, officers, or a donor; prohibiting state  
57 agencies and local governments from requiring that  
58 certain charitable organizations, trusts, or

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59 foundations distribute funds to or contract with  
60 persons or entities having certain characteristics;  
61 specifying the effect of the act on contracts in  
62 existence before the effective date of the act;  
63 providing effective dates.  
64

65 Be It Enacted by the Legislature of the State of Florida:  
66

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

69 733.607 Possession of estate.—

70 (2) If, after providing for statutory entitlements and all  
71 devises other than residuary devises, the assets of the  
72 decedent's estate are insufficient to pay the expenses of the  
73 administration and obligations of the decedent's estate, the  
74 personal representative is entitled to payment from the trustee  
75 of a trust described in s. 733.707(3), in the amount the  
76 personal representative certifies in writing to be required to  
77 satisfy the insufficiency, subject to the exclusions and  
78 preferences under s. 736.05053. The provisions of s. 733.805  
79 shall apply in determining the amount of any payment required by  
80 this section.

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

83 733.707 Order of payment of expenses and obligations.—

84 (3) Any portion of a trust with respect to which a decedent  
85 who is the grantor has at the decedent's death a right of  
86 revocation, as defined in paragraph (e), either alone or in  
87 conjunction with any other person, is liable for the expenses of

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88 the administration and obligations of the decedent's estate to  
89 the extent the decedent's estate is insufficient to pay them as  
90 provided in ss. ~~s.~~ 733.607(2) and 736.05053.

91 (a) For purposes of this subsection, any trusts established  
92 as part of, and all payments from, either an employee annuity  
93 described in s. 403 of the Internal Revenue Code of 1986, as  
94 amended, an Individual Retirement Account, as described in s.  
95 408 of the Internal Revenue Code of 1986, as amended, a Keogh  
96 (HR-10) Plan, or a retirement or other plan established by a  
97 corporation which is qualified under s. 401 of the Internal  
98 Revenue Code of 1986, as amended, shall not be considered a  
99 trust over which the decedent has a right of revocation.

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

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

108 (d) For purposes of this subsection, property held or  
109 received by a trust to the extent that the property would not  
110 have been subject to claims against the decedent's estate if it  
111 had been paid directly to a trust created under the decedent's  
112 will or other than to the decedent's estate, or assets received  
113 from any trust other than a trust described in this subsection,  
114 shall not be deemed assets of the trust available to the  
115 decedent's estate.

116 (e) For purposes of this subsection, a "right of

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117 revocation" is a power retained by the decedent, held in any  
118 capacity, to:

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

121 2. Withdraw or appoint the principal of the trust to or for  
122 the decedent's benefit.

123 Section 3. Subsections (1), (5), (6), and (7) of section  
124 736.0206, Florida Statutes, are amended to read:

125 736.0206 Proceedings for review of employment of agents and  
126 review of compensation of trustee and employees of trust.-

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

132 (5) The court may determine reasonable compensation for a  
133 trustee or any person employed by a trustee without receiving  
134 expert testimony. Any party may offer expert testimony after  
135 notice to interested persons. If expert testimony is offered, a  
136 reasonable expert witness fee may ~~shall~~ be awarded by the court  
137 and paid from the assets of the trust unless the court finds  
138 that the expert testimony did not assist the court. The court  
139 shall direct from which part of the trust assets the fee shall  
140 be paid.

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

143 (6) ~~(7)~~ In a proceeding pursuant to subsection (2), the  
144 petitioner may serve formal notice as provided in the Florida  
145 Probate Rules, and such notice shall be sufficient for the court

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146 to acquire jurisdiction over the person receiving the notice to  
147 the extent of the person's interest in the trust.

148 Section 4. Effective upon this act becoming a law, section  
149 736.04114, Florida Statutes, is created to read:

150 736.04114 Limited judicial construction of irrevocable  
151 trust with federal tax provisions.—

152 (1) Upon the application of a trustee or any qualified  
153 beneficiary of a trust, a court at any time may construe the  
154 terms of a trust that is not then revocable to define the  
155 respective shares or determine beneficiaries, in accordance with  
156 the intention of the settlor, if a disposition occurs during the  
157 applicable period and the trust contains a provision that:

158 (a) Includes a formula disposition referring to the  
159 "unified credit," "estate tax exemption," "applicable exemption  
160 amount," "applicable credit amount," "applicable exclusion  
161 amount," "generation-skipping transfer tax exemption," "GST  
162 exemption," "marital deduction," "maximum marital deduction,"  
163 "unlimited marital deduction," or "maximum charitable  
164 deduction";

165 (b) Measures a share of a trust based on the amount that  
166 can pass free of federal estate tax or the amount that can pass  
167 free of federal generation-skipping transfer tax;

168 (c) Otherwise makes a disposition referring to a charitable  
169 deduction, marital deduction, or another provision of federal  
170 estate tax or generation-skipping transfer tax law; or

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

173 (2) For the purpose of this section:

174 (a) "Applicable period" means a period beginning January 1,

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175 2010, and ending on the end of the day on the earlier of:

176 1. December 31, 2010; or

177 2. The day before the date that an act becomes law which  
178 repeals or otherwise modifies or has the effect of repealing or  
179 modifying s. 901 of The Economic Growth and Tax Relief  
180 Reconciliation Act of 2001.

181 (b) A "disposition occurs" when an interest takes effect in  
182 possession or enjoyment.

183 (3) In construing the trust, the court shall consider the  
184 terms and purposes of the trust, the facts and circumstances  
185 surrounding the creation of the trust, and the settlor's  
186 probable intent. In determining the settlor's probable intent,  
187 the court may consider evidence relevant to the settlor's intent  
188 even though the evidence contradicts an apparent plain meaning  
189 of the trust instrument.

190 (4) This section does not apply to a disposition that is  
191 specifically conditioned upon no federal estate or generation-  
192 skipping transfer tax being imposed.

193 (5) Unless otherwise ordered by the court, during the  
194 applicable period and without court order, the trustee  
195 administering a trust containing one or more provisions  
196 described in subsection (1) may:

197 (a) Delay or refrain from making any distribution;

198 (b) Incur and pay fees and costs reasonably necessary to  
199 determine its duties and obligations, including compliance with  
200 provisions of existing and reasonably anticipated future federal  
201 tax laws; and

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

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205 The trustee is not liable for its actions as provided in this  
206 subsection which are made or taken in good faith.

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

210 (7) This section is remedial in order to provide a new or  
211 modified legal remedy. This section applies retroactively and is  
212 effective as of January 1, 2010.

213 Section 5. Paragraph (b) of subsection (2) of section  
214 736.0505, Florida Statutes, is amended, and subsection (3) is  
215 added to that section, to read:

216 736.0505 Creditors' claims against settlor.—

217 (2) For purposes of this section:

218 (b) Upon the lapse, release, or waiver of the power, the  
219 holder is treated as the settlor of the trust only to the extent  
220 the value of the property affected by the lapse, release, or  
221 waiver exceeds the greater of the amount specified in:

222 1. Section 2041(b)(2) or s. 2514(e); or

223 2. Section 2503(b) and, if the donor was married at the  
224 time of the transfer to which the power of withdrawal applies,  
225 twice the amount specified in s. 2503(b),

226

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

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

230 (a) A trust described in s. 2523(e) of the Internal Revenue  
231 Code of 1986, as amended, or a trust for which the election  
232 described in s. 2523(f) of the Internal Revenue Code of 1986, as



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233 amended, has been made; and

234 (b) Another trust, to the extent that the assets in the  
235 other trust are attributable to a trust described in paragraph  
236 (a),

237  
238 shall, after the death of the settlor's spouse, be deemed to  
239 have been contributed by the settlor's spouse and not by the  
240 settlor.

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

243 736.05053 Trustee's duty to pay expenses and obligations of  
244 settlor's estate.—

245 (5) Nonresiduary trust dispositions shall abate pro rata  
246 with nonresiduary devises pursuant to the priorities specified  
247 in this section and s. 733.805, determined as if the  
248 beneficiaries of the will and trust, other than the estate or  
249 trust itself, were taking under a common instrument.

250 Section 7. Subsections (7) through (10) of section  
251 736.1007, Florida Statutes, are amended to read:

252 736.1007 Trustee's attorney's fees.—

253 ~~(7) The court may determine reasonable attorney's~~  
254 ~~compensation without receiving expert testimony. Any party may~~  
255 ~~offer expert testimony after notice to interested persons. If~~  
256 ~~expert testimony is offered, an expert witness fee may be~~  
257 ~~awarded by the court and paid from the assets of the trust. The~~  
258 ~~court shall direct from what part of the trust the fee is to be~~  
259 ~~paid.~~

260 (7)-(8) If a separate written agreement regarding  
261 compensation exists between the attorney and the settlor, the

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262 attorney shall furnish a copy to the trustee prior to  
263 commencement of employment and, if employed, shall promptly file  
264 and serve a copy on all interested persons. A separate agreement  
265 or a provision in the trust suggesting or directing the trustee  
266 to retain a specific attorney does not obligate the trustee to  
267 employ the attorney or obligate the attorney to accept the  
268 representation but, if the attorney who is a party to the  
269 agreement or who drafted the trust is employed, the compensation  
270 paid shall not exceed the compensation provided in the  
271 agreement.

272 ~~(9) Court proceedings to determine compensation, if~~  
273 ~~required, are a part of the trust administration process, and~~  
274 ~~the costs, including fees for the trustee's attorney, shall be~~  
275 ~~determined by the court and paid from the assets of the trust~~  
276 ~~unless the court finds the attorney's fees request to be~~  
277 ~~substantially unreasonable. The court shall direct from what~~  
278 ~~part of the trust the fees are to be paid.~~

279 (8) ~~(10)~~ As used in this section, the term "initial trust  
280 administration" means administration of a revocable trust during  
281 the period that begins with the death of the settlor and ends on  
282 the final distribution of trust assets outright or to continuing  
283 trusts created under the trust agreement but, if an estate tax  
284 return is required, not until after issuance of an estate tax  
285 closing letter or other evidence of termination of the estate  
286 tax proceeding. This initial period is not intended to include  
287 continued regular administration of the trust.

288 Section 8. Section 736.1211, Florida Statutes, is created  
289 to read:

290 736.1211 Protections afforded to certain charitable trusts

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291 and organizations.-

292 (1) A charitable organization, private foundation trust,  
293 split interest trust, or a private foundation as defined in s.  
294 509(a) of the Internal Revenue Code may not be required by a  
295 state agency or a local government to disclose the race,  
296 religion, gender, national origin, socioeconomic status, age,  
297 ethnicity, disability, marital status, sexual orientation, or  
298 political party registration of its employees, officers,  
299 directors, trustees, members, or owners, without the prior  
300 written consent of the individual or individuals in question.

301 (2) A private foundation as defined in s. 509(a) of the  
302 Internal Revenue Code, a private foundation trust, a split  
303 interest trust, or a grant-making organization may not be  
304 required by the state or any local government to disclose the  
305 race, religion, gender, national origin, socioeconomic status,  
306 age, ethnicity, disability, marital status, sexual orientation,  
307 or political party registration of any person, or of the  
308 employees, officers, directors, trustees, members, or owners of  
309 any entity that has received monetary or in-kind contributions  
310 from or contracted with the organization, trust, or foundation,  
311 without the prior written consent of the individual or  
312 individuals in question. For purposes of this subsection, a  
313 "grant-making organization" is an organization that makes grants  
314 to charitable organizations but is not a private foundation,  
315 private foundation trust, or split interest trust.

316 (3) A state agency or a local government may not require  
317 that the governing board or officers of a charitable  
318 organization, private foundation trust, split interest trust, or  
319 a private foundation as defined in s. 509(a) of the Internal

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320 Revenue Code include an individual or individuals of any  
321 particular race, religion, gender, national origin,  
322 socioeconomic status, age, ethnicity, disability, marital  
323 status, sexual orientation, or political party registration.  
324 Further, a state agency or a local government may not prohibit  
325 service as a board member or officer by an individual or  
326 individuals based upon their familial relationship to each other  
327 or to a donor or require that the governing board or officers  
328 include one or more individuals who do not share a familial  
329 relationship with each other or with a donor.

330 (4) A charitable organization, private foundation trust,  
331 split interest trust, or any private foundation as defined in s.  
332 509(a) of the Internal Revenue Code may not be required by a  
333 state agency or a local government to distribute its funds to or  
334 contract with any person or entity based upon the race,  
335 religion, gender, national origin, socioeconomic status, age,  
336 ethnicity, disability, marital status, sexual orientation, or  
337 political party registration of the person or of the employees,  
338 officers, directors, trustees, members, or owners of the entity,  
339 or based upon the populations, locales, or communities served by  
340 the person or entity, except as a lawful condition on the  
341 expenditure of particular funds imposed by the donor of such  
342 funds.

343 Section 9. Section 8 of this act does not invalidate  
344 contracts in effect before the effective date of this act.

345 Section 10. Except as otherwise expressly provided in this  
346 act and except for this section, which shall take effect upon  
347 this act becoming a law, this act shall take effect July 1,  
348 2010.