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CS/HB 325

2011 Legislature

1 A bill to be entitled
2 An act relating to estates; creating s. 90.5021, F.S.;
3 providing a fiduciary lawyer-client privilege; providing
4 that the section is inapplicable to a specified crime or
5 fraud exception to lawyer-client privilege; amending s.
6 732.102, F.S.; revising provisions relating to the
7 intestate share of a surviving spouse; creating s.
8 732.615, F.S.; providing a right to reform the terms of a
9 will to correct mistakes; creating s. 732.616, F.S.;
10 providing a right to modify the terms of a will to achieve
11 tax objectives; creating s. 733.1061, F.S.; providing for
12 a court to award fees and costs in reformation and
13 modification proceedings either against a party's share in
14 the estate or in the form of a personal judgment against a
15 party individually; amending s. 732.5165, F.S.; clarifying
16 that a revocation of a will is subject to challenge on the
17 grounds of fraud, duress, mistake, or undue influence;
18 amending s. 732.518, F.S.; specifying that a challenge to
19 the revocation of a will may not be commenced before the
20 testator's death; amending s. 733.212, F.S.; providing for
21 notice of fiduciary lawyer-client privilege in a notice of
22 administration; amending s. 736.0207, F.S.; clarifying
23 when a challenge to the revocation of a revocable trust
24 may be brought; amending s. 736.0406, F.S.; providing that
25 the creation of a trust amendment or trust restatement and
26 the revocation of a trust are subject to challenge on the
27 grounds of fraud, duress, mistake, or undue influence;
28 amending s. 736.0813, F.S.; providing for notice of

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29 | fiduciary lawyer-client privilege by a trustee; amending
30 | s. 744.441, F.S.; limiting the circumstances under which a
31 | guardian of an incapacitated person may bring a challenge
32 | to a settlor's revocation of a revocable trust; amending
33 | s. 736.0201, F.S.; clarifying that certain payments by a
34 | trustee from trust assets are not taxation of attorney's
35 | fees and costs subject to a specified Rule of Civil
36 | Procedure; providing effective dates.

37 |
38 | Be It Enacted by the Legislature of the State of Florida:

39 |
40 | Section 1. Section 90.5021, Florida Statutes, is created
41 | to read:

42 | 90.5021 Fiduciary lawyer-client privilege.—

43 | (1) For the purpose of this section, a client acts as a
44 | fiduciary when serving as a personal representative or a trustee
45 | as defined in ss. 731.201 and 736.0103, an administrator ad
46 | litem as described in s. 733.308, a curator as described in s.
47 | 733.501, a guardian or guardian ad litem as defined in s.
48 | 744.102, a conservator as defined in s. 710.102, or an attorney
49 | in fact as described in chapter 709.

50 | (2) A communication between a lawyer and a client acting
51 | as a fiduciary is privileged and protected from disclosure under
52 | s. 90.502 to the same extent as if the client were not acting as
53 | a fiduciary. In applying s. 90.502 to a communication under this
54 | section, only the person or entity acting as a fiduciary is
55 | considered a client of the lawyer.

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56 (3) This section does not affect the crime or fraud
57 exception to the lawyer-client privilege provided in s.
58 90.502(4) (a).

59 Section 2. Effective October 1, 2011, subsections (2) and
60 (3) of section 732.102, Florida Statutes, are amended, and
61 subsection (4) is added to that section, to read:

62 732.102 Spouse's share of intestate estate.—The intestate
63 share of the surviving spouse is:

64 (2) If the decedent is survived by one or more descendants
65 ~~there are surviving descendants of the decedent, all of whom are~~
66 ~~also lineal descendants of the surviving spouse, and the~~
67 surviving spouse has no other descendant, the entire intestate
68 estate the first \$60,000 of the intestate estate, plus one-half
69 ~~of the balance of the intestate estate. Property allocated to~~
70 ~~the surviving spouse to satisfy the \$60,000 shall be valued at~~
71 ~~the fair market value on the date of distribution.~~

72 (3) If there are one or more surviving descendants of the
73 decedent who, ~~one or more of whom~~ are not lineal descendants of
74 the surviving spouse, one-half of the intestate estate.

75 (4) If there are one or more surviving descendants of the
76 decedent, all of whom are also descendants of the surviving
77 spouse, and the surviving spouse has one or more descendants who
78 are not descendants of the decedent, one-half of the intestate
79 estate.

80 Section 3. Effective July 1, 2011, section 732.615,
81 Florida Statutes, is created to read:

82 732.615 Reformation to correct mistakes.—Upon application
83 of any interested person, the court may reform the terms of a

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84 will, even if unambiguous, to conform the terms to the
85 testator's intent if it is proved by clear and convincing
86 evidence that both the accomplishment of the testator's intent
87 and the terms of the will were affected by a mistake of fact or
88 law, whether in expression or inducement. In determining the
89 testator's original intent, the court may consider evidence
90 relevant to the testator's intent even though the evidence
91 contradicts an apparent plain meaning of the will.

92 Section 4. Effective July 1, 2011, section 732.616,
93 Florida Statutes, is created to read:

94 732.616 Modification to achieve testator's tax
95 objectives.—Upon application of any interested person, to
96 achieve the testator's tax objectives the court may modify the
97 terms of a will in a manner that is not contrary to the
98 testator's probable intent. The court may provide that the
99 modification has retroactive effect.

100 Section 5. Effective July 1, 2011, section 733.1061,
101 Florida Statutes, is created to read:

102 733.1061 Fees and costs; will reformation and
103 modification.—

104 (1) In a proceeding arising under s. 732.615 or s.
105 732.616, the court shall award taxable costs as in chancery
106 actions, including attorney's fees and guardian ad litem fees.

107 (2) When awarding taxable costs, including attorney's fees
108 and guardian ad litem fees, under this section, the court in its
109 discretion may direct payment from a party's interest, if any,
110 in the estate or enter a judgment which may be satisfied from
111 other property of the party, or both.

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112 Section 6. Section 732.5165, Florida Statutes, is amended
113 to read:

114 732.5165 Effect of fraud, duress, mistake, and undue
115 influence.—A will is void if the execution is procured by fraud,
116 duress, mistake, or undue influence. Any part of the will is
117 void if so procured, but the remainder of the will not so
118 procured shall be valid if it is not invalid for other reasons.
119 If the revocation of a will, or any part thereof, is procured by
120 fraud, duress, mistake, or undue influence, such revocation is
121 void.

122 Section 7. Section 732.518, Florida Statutes, is amended
123 to read:

124 732.518 Will contests.—An action to contest the validity
125 of all or part of a will or the revocation of all or part of a
126 will may not be commenced before the death of the testator.

127 Section 8. Paragraph (b) of subsection (2) of section
128 733.212, Florida Statutes, is amended to read:

129 733.212 Notice of administration; filing of objections.—

130 (2) The notice shall state:

131 (b) The name and address of the personal representative
132 and the name and address of the personal representative's
133 attorney, and that the fiduciary lawyer-client privilege in s.
134 90.5021 applies with respect to the personal representative and
135 any attorney employed by the personal representative.

136 Section 9. Section 736.0207, Florida Statutes, is amended
137 to read:

138 736.0207 Trust contests.—An action to contest the validity
139 of all or part of a revocable trust, or the revocation of part

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140 of a revocable trust, may not be commenced until the trust
 141 becomes irrevocable by its terms or by the settlor's death. If
 142 all of a revocable trust has been revoked, an action to contest
 143 the revocation may not be commenced until after the settlor's
 144 death., ~~except~~ This section does not prohibit such action by the
 145 guardian of the property of an incapacitated settlor.

146 Section 10. Section 736.0406, Florida Statutes, is amended
 147 to read:

148 736.0406 Effect of fraud, duress, mistake, or undue
 149 influence. ~~A trust is void~~ If the creation, amendment, or
 150 restatement of a the trust is procured by fraud, duress,
 151 mistake, or undue influence, the trust or any part so procured
 152 ~~of the trust is void. if procured by such means, but~~ The
 153 remainder of the trust not procured by such means is valid if
 154 the remainder is not invalid for other reasons. If the
 155 revocation of a trust, or any part thereof, is procured by
 156 fraud, duress, mistake, or undue influence, such revocation is
 157 void.

158 Section 11. Paragraphs (a) and (b) of subsection (1) of
 159 section 736.0813, Florida Statutes, are amended to read:

160 736.0813 Duty to inform and account.—The trustee shall
 161 keep the qualified beneficiaries of the trust reasonably
 162 informed of the trust and its administration.

163 (1) The trustee's duty to inform and account includes, but
 164 is not limited to, the following:

165 (a) Within 60 days after acceptance of the trust, the
 166 trustee shall give notice to the qualified beneficiaries of the
 167 acceptance of the trust, ~~and~~ and the full name and address of the

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168 | trustee, and that the fiduciary lawyer-client privilege in s.
169 | 90.5021 applies with respect to the trustee and any attorney
170 | employed by the trustee.

171 | (b) Within 60 days after the date the trustee acquires
172 | knowledge of the creation of an irrevocable trust, or the date
173 | the trustee acquires knowledge that a formerly revocable trust
174 | has become irrevocable, whether by the death of the settlor or
175 | otherwise, the trustee shall give notice to the qualified
176 | beneficiaries of the trust's existence, the identity of the
177 | settlor or settlors, the right to request a copy of the trust
178 | instrument, ~~and~~ the right to accountings under this section, and
179 | that the fiduciary lawyer-client privilege in s. 90.5021 applies
180 | with respect to the trustee and any attorney employed by the
181 | trustee.

182 |
183 | Paragraphs (a) and (b) do not apply to an irrevocable trust
184 | created before the effective date of this code, or to a
185 | revocable trust that becomes irrevocable before the effective
186 | date of this code. Paragraph (a) does not apply to a trustee who
187 | accepts a trusteeship before the effective date of this code.

188 | Section 12. Subsection (11) of section 744.441, Florida
189 | Statutes, is amended to read:

190 | 744.441 Powers of guardian upon court approval.—After
191 | obtaining approval of the court pursuant to a petition for
192 | authorization to act, a plenary guardian of the property, or a
193 | limited guardian of the property within the powers granted by
194 | the order appointing the guardian or an approved annual or
195 | amended guardianship report, may:

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196 (11) Prosecute or defend claims or proceedings in any
 197 jurisdiction for the protection of the estate and of the
 198 guardian in the performance of his or her duties. Before
 199 authorizing a guardian to bring an action described in s.
 200 736.0207, the court shall first find that the action appears to
 201 be in the ward's best interests during the ward's probable
 202 lifetime. There shall be a rebuttable presumption that an action
 203 challenging the ward's revocation of all or part of a trust is
 204 not in the ward's best interests if the revocation relates
 205 solely to a devise. This subsection does not preclude a
 206 challenge after the ward's death. If the court denies a request
 207 that a guardian be authorized to bring an action described in s.
 208 736.0207, the court shall review the continued need for a
 209 guardian and the extent of the need for delegation of the ward's
 210 rights.

211 Section 13. Subsection (1) of section 736.0201, Florida
 212 Statutes, is amended, and subsection (6) is added to that
 213 section, to read:

214 736.0201 Role of court in trust proceedings.—

215 (1) Except as provided in subsections ~~subsection~~ (5) and
 216 (6) and s. 736.0206, judicial proceedings concerning trusts
 217 shall be commenced by filing a complaint and shall be governed
 218 by the Florida Rules of Civil Procedure.

219 (6) Rule 1.525, Florida Rules of Civil Procedure, shall
 220 apply to judicial proceedings concerning trusts, except that the
 221 following do not constitute taxation of costs or attorney's fees
 222 even if the payment is for services rendered or costs incurred
 223 in a judicial proceeding:

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224 (a) A trustee's payment of compensation or reimbursement
225 of costs to persons employed by the trustee from assets of the
226 trust.

227 (b) A determination by the court directing from what part
228 of the trust fees or costs shall be paid, unless the
229 determination is made under s. 736.1004 in an action for breach
230 of fiduciary duty or challenging the exercise of, or failure to
231 exercise, a trustee's powers.

232 Section 14. Except as otherwise expressly provided in this
233 act, this act shall take effect upon becoming a law and shall
234 apply to all proceedings pending before such date and all cases
235 commenced on or after the effective date.