

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Rules Committee

BILL: CS/SB 648

INTRODUCER: Senate Banking and Insurance Committee and Senator Joyner

SUBJECT: Estates

DATE: April 21, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Maclure	JU	Favorable
2.	Burgess	Burgess	BI	Fav/CS
3.	Burgess	Phelps	RC	Pre-meeting
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill establishes standards for privilege of communications between a lawyer and a client acting as a fiduciary. The bill provides that a client acts as a fiduciary when serving as a personal representative, a trustee, an administrator ad litem, a conservator, or an attorney in fact. The bill provides that the notice of administration that must be sent by the personal representative of the estate must include a statement that the fiduciary lawyer-client privilege applies with respect to the personal representative and the attorney employed by the personal representative. The bill provides that the notice that a trustee must provide to qualified beneficiaries must include a statement that the fiduciary lawyer-client privilege applies with respect to the trustee and the attorney employed by the trustee.

Effective October 1, 2011, the bill increases the share a decedent's surviving spouse will receive in an intestate estate to the entire intestate estate when all of the decedent's descendants are also descendants of the surviving spouse and the surviving spouse does not have any other descendants.

Effective July 1, 2011, the bill:

- Permits wills to be reformed for mistake, which would be comparable to an existing provision applicable to testamentary trusts, revocable trusts, and other trusts.
- Allows wills to be modified to achieve the testator's tax objectives where it is not contrary to the testator's probable intent.
- Authorizes a court to award taxable costs, including attorney's fees and guardian ad litem fees, in a proceeding arising to reform a will for mistake or a proceeding for modifications to achieve the testator's tax objectives.

The bill authorizes a challenge to the revocation of a will or trust on the grounds of fraud, duress, mistake, or undue influence after the death of the testator or settlor. The bill limits powers of a guardian to prosecute or defend certain proceedings, to provide that there is a rebuttable presumption that an action challenging the ward's revocation of all or part of a trust is not in the ward's best interest if the revocation relates solely to a devise. This limitation does not preclude a challenge after the ward's death.

The bill provides that Florida Rule of Civil Procedure 1.525 applies to clarify when and under what circumstances a trustee or beneficiary of a trust or attorney must file a motion for attorney's fees and costs incurred in a judicial proceeding concerning a trust, with exceptions. Florida Rule of Civil Procedure 1.525 requires a party seeking costs or attorney's fees to serve a motion within the 30 days that follow the filing of a judgment.

Except as otherwise provided in the bill, it provides an effective date of upon becoming a law and applies to all proceedings pending before such date and all cases commenced on or after the effective date.

This bill creates sections 90.521, 732.615, 732.616, and 733.1061, Florida Statutes. This bill amends sections 732.102, 732.5165, 732.518, 733.312, 736.0207, 736.0406, 736.0813, 744.441, and 736.0201, F.S.

II. Present Situation:

Lawyer-client Privilege

Current statutory provisions for lawyer-client privilege are contained in s. 90.502, F.S., which defines "client" as a person or entity who consults a lawyer to obtain legal services, and provides generally:

- Communication between a lawyer and client is privileged;
- The privilege can be claimed by the client, the guardian of the client, the personal representative of a deceased client, a successor, trustee, or similar representative of an entity;
- The privilege can be asserted by the lawyer, but only on behalf of the client;
- The privilege does not apply if: the services of the lawyer were sought to enable someone to commit a crime; a communication is relevant to an issue between parties who claim through the same deceased client; a communication is relevant to an issue of breach of duty by the lawyer; a communication is relevant to an issue concerning competence of a client executing an attested document for which the attorney is an attesting witness; or a communication is relevant to an issue of common interest between two or more clients.

Surviving Spouse's Intestate Share

In the event of intestacy, when a person dies without a will, the Florida Probate Code provides a default position which establishes a public policy. Intestate provisions are designed to distribute estates in a manner that most decedents would have wanted had they prepared their own wills.¹ If a decedent dies without any descendants, the surviving spouse gets the entire intestate estate. If a decedent dies with lineal descendants who are also descendants of the surviving spouse, the surviving spouse receives the first \$60,000 of the intestate estate and one-half of the balance of the intestate estate.² If the decedent's descendants, one or more of whom are not lineal descendants of the surviving spouse, the intestate estate is divided 50 percent to the surviving spouse and 50 percent to descendants.

Trusts – Reformation of Mistake

Trusts and other donative documents may be reformed due to mistake. Upon application of a settlor or any interested person, the court may reform the terms of a trust, even if ambiguous, to conform the terms to the settlor's intent if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.³ To the contrary, the non-trust provisions of wills may not be reformed due to mistake.⁴ Trusts under a will (testamentary trusts) may be reformed due to mistake, but the non-trust provisions of the same will may not be reformed for mistake.⁵ Deeds of remainder interests and life insurance beneficiary designations, which are documents that have testamentary effect, may be reformed for mistake under Florida law.⁶

Upon application of any interested person, to achieve the settlor's tax objectives the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intent.⁷ In all actions for breach of fiduciary duty or challenging the exercises of, or failure to exercise, a trustee's powers, and in proceedings under ss. 736.410-736.0417, F.S.,⁸ the court shall award

¹ Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Surviving Spouse's Intestate Share (2011) (on file with the Senate Committee on Judiciary).

² Section 732.102, F.S.

³ Section 736.0415, F.S.

⁴ See, e.g., *In re Estate of Barker*, 448 So. 2d 28 (Fla 1st DCA 1984) (Extrinsic evidence of testator's intent regarding revocation of earlier will was not admissible and, without aid of extrinsic evidence, subsequent will was clear as to its meaning and did not preclude distribution of residuary estate to legal heirs who were specifically bequeathed only \$1 each); *In re Mullin's Estate*, 128 So. 2d 617 (Fla. 2d DCA 1961) (Scrivener's mistake in drafting codicil so that residuary legatees were excluded was insufficient reason to revoke probate of an otherwise valid codicil).

⁵ Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Proposed Enactment of sections 732.615, 732.616, and 733.1061, F.S. (2011) (on file with the Senate Committee on Judiciary).

⁶ *Id.*

⁷ Section 736.0416, F.S.

⁸ Proceedings under s. 736.0410, F.S., involve the modification or termination of trusts; proceedings under s. 736.04113, F.S., involve judicial modifications of an irrevocable trust when the modifications is not inconsistent with the settlor's purpose; proceedings under s. 736.04114, F.S., involve proceedings for judicial construction of an irrevocable trust with federal tax provisions; proceedings under s. 736.04115, F.S., involve judicial modification of an irrevocable trust when modification is in the best interests of beneficiaries; proceedings under s. 736.04117, F.S., involve the trustee's power to invade the principal in a trust; proceedings under s. 736.0412, F.S., involve nonjudicial modification of an irrevocable trust; proceedings under s. 736.0413, F.S., involve application of the cy pres doctrine to modify a charitable trust; proceedings under s. 736.0414, F.S., involve the modification or termination of an uneconomic trust; proceedings under s. 736.0415, F.S., involve reformation of a

taxable costs as in chancery actions, including attorney fees and guardian ad litem fees.⁹ When awarding the costs and fees, the court may direct payment from a party's interest or enter a judgment that may be satisfied from other property.

Wills – Post-Death Challenges to the Revocation of a Will or Codicil

A “will” is defined as an “instrument, including a codicil, executed by a person in the manner prescribed by [the Probate Code], which disposes of the person’s property on or after his or her death and includes an instrument which merely appoints a personal representative or revokes or revises another will.”¹⁰ Section 732.5165, F.S., provides that a will is void if the execution is procured by fraud, duress, mistake, or undue influence. Since “will” includes an “instrument revoking a will, Florida law would appear to permit a challenge to a “written instrument” revoking a will on grounds that it was procured by fraud, duress, mistake, or undue influence. There are no reported Florida cases addressing a challenge to the revocation of a will on these grounds.¹¹

Trusts – Challenge of a Revocation or Amendment of Revocable Trust

The creation of a trust may be challenged on the grounds of fraud, duress, mistake, or undue influence in post-death proceedings.¹² The law does not appear to authorize a challenge of a revocation or amendment of a revocable trust on the same grounds.¹³ The Second District Court of Appeal in *Hoffman v. Kohns* allowed a challenge to a revocation of a revocable trust in post-death proceedings on the grounds that the settlor had been subject to undue influence and the court set aside the revocation.¹⁴ The *Hoffman* case was later found to be in conflict with *Genova v. Florida National Bank of Palm Beach County*, where the Fourth District Court of Appeal did not allow a trustee’s challenge to a settlor’s attempted revocation of her revocable trust where the challenge was based on the grounds that the revocation was the product of undue influence.¹⁵ The Fourth District reasoned that the settlor could not be deprived of her right to revoke the trust without a judicial or medical determination of the settlor’s incapacity.¹⁶ The Florida Supreme Court later disapproved *Hoffman*, when it was certified for a conflict with *Genova*.¹⁷ The Florida Supreme Court found that undue influence cannot be asserted as a basis for preventing a competent settlor from revoking a revocable trust.¹⁸

trust to correct mistakes; proceedings under s. 736.0416, F.S., involve modifications to achieve the settlor’s tax objectives; and proceedings under s. 736.0417, F.S., involve proceedings to combine or divide trusts.

⁹ Section 736.1004, F.S.

¹⁰ Section 731.201(40), F.S.

¹¹ Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Revocation of a Will or Revocable Trust is Subject to Challenge (2011) (on file with the Senate Committee on Judiciary).

¹² Section 736.0406, F.S.

¹³ *Hoffman v. Kohns*, 385 So. 2d 1064 (Fla. 2d DCA 1980), and *Florida National Bank of Palm Beach County v. Genova*, 460 So. 2d 895 (Fla. 1984), discussed in Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Revocation of a Will or Revocable Trust is Subject to Challenge (2011) (on file with the Senate Committee on Judiciary).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

In a recent case, a trustee asserting that a settlor had been subject to undue influence sought to challenge a settlor's revocation of an inter vivos revocable trust after the settlor's death. Weeks prior to the settlor's death, she placed her money into a joint account with the person who allegedly asserted undue influence on the settlor.¹⁹ The Fourth District Court of Appeal held that the settlor's revocation of a revocable trust during her lifetime was not subject to a challenge on the ground of undue influence.²⁰ The Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar (RPPTL) argues that once a settlor is dead, the remedies available for a post-death challenge of revocation of trust which could serve as a will substitute should be consistent with the remedies for post-death challenges to the revocation of a will or codicil.²¹

Guardianship

A guardian of the property of an incapacitated settlor may bring an action to contest the validity of all or part of a trust before the trust becomes irrevocable.²² To prosecute or defend claims or proceedings in any jurisdictions for the protection of the estate and of the guardian in the performance of his or her duties, court approval is necessary and may only be obtained upon a finding that the action appears to be in the ward's best interests during the ward's probable lifetime.²³

Attorney's Fees and Costs in Trust Proceedings

Uncertainty exists as to when and under what circumstances a trustee or beneficiary of a trust or attorney must file a motion for attorney's fees and costs incurred in a judicial proceeding concerning a trust.²⁴

III. Effect of Proposed Changes:

Fiduciary Lawyer-client Privilege

The bill creates s. 90.5021, F.S., to establish standards that apply to communications between a lawyer and a client acting as a fiduciary. The bill provides that a client acts as a fiduciary when serving as a personal representative, a trustee, an administrator ad litem, a conservator, or an attorney in fact. A communication between a lawyer and a client acting as a fiduciary is privileged and protected under s. 90.502, F.S., to the same extent as if the client were not acting as a fiduciary. The communication between a lawyer and a client acting as a fiduciary is not privileged if it falls within the exception for crime or fraud, as specified in s. 90.502(4)(a). The bill provides that the notice of administration that must be sent by the personal representative of

¹⁹ *MacIntyre v. Wedell*, 12 So. 3d 273, 273 (Fla. 4th DCA 2009).

²⁰ *Id.*

²¹ Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, *supra*, note 11.

²² Section 736.0207, F.S.

²³ Section 744.441, F.S.

²⁴ The Probate & Trust Litigation Committee of the Real Property, Probate and Trust Law Section of the Florida Bar approved on September 25, 2010, to support a change in Florida law which clarifies the deadline for when and under what circumstances a trustee or beneficiary of a trust or attorney must file a motion for attorney's fees and costs incurred in a judicial proceeding concerning a trust, (2011 Legislative Position Request Form) (on file with the Senate Judiciary Committee).

the estate under s. 733.312(2)(b), F.S., must include a statement that the fiduciary lawyer-client privilege applies with respect to the personal representative and the attorney employed by the personal representative. The bill provides that the notice that a trustee must provide to qualified beneficiaries under s. 736.0813(1)(a), F.S., must include a statement that the fiduciary lawyer-client privilege applies with respect to the trustee and the attorney employed by the trustee.

Surviving Spouse's Intestate Share

Effective October 1, 2011, the bill amends s. 732.102, F.S., to increase the share a decedent's surviving spouse will receive in an intestate estate to the entire intestate estate when all of the decedent's descendants are also descendants of the surviving spouse and the surviving spouse does not have any other descendants. If there are one or more surviving descendants of the decedent who are not lineal descendants of the surviving spouse, then the surviving spouse gets one-half of the intestate estate. If there are one or more surviving descendants of the decedent, all of whom are also descendants of the surviving spouse, and the surviving spouse has one or more descendants who are not descendants of the decedent, the surviving spouse gets one-half of the intestate estate.

Trusts – Reformation of Mistake

Effective July 1, 2011, the bill creates s. 732.615, F.S., to permit wills to be reformed for mistake, which would be comparable to an existing provision applicable to testamentary trusts, revocable trusts, and other trusts.²⁵

Effective July 1, 2011, the bill creates s. 732.616, F.S., to allow wills to be modified to achieve the testator's tax objectives where it is not contrary to the testator's probable intent, which would be comparable to existing provisions applicable to testamentary trusts, revocable trusts, and other trusts.²⁶

Effective July 1, 2011, the bill creates s. 733.1061, F.S., to authorize a court to award taxable costs, including attorney's fees and guardian ad litem fees, in a proceeding arising to reform a will for mistake or a proceeding for modifications to achieve the testator's tax objectives. When awarding the costs and fees, the court may direct payment from a party's interest or enter a judgment that may be satisfied from other property.

Trusts – Challenge of a Revocation or Amendment of Revocable Trust

The bill amends s. 732.5165, F.S., to authorize a challenge to the revocation of a will on the grounds of fraud, duress, mistake, or undue influence.

The bill amends s. 732.518, F.S., to authorize a challenge to the revocation of all or part of a will.

The bill amends s. 736.0207, F.S., to authorize a challenge to the revocation of a revocable trust or part of the revocable trust on the grounds of fraud, duress, mistake, or undue influence on the death of a settlor.

²⁵ Section 736.0415, F.S.

²⁶ Section 736.0416, F.S.

The bill amends s. 736.0406, F.S., to authorize a challenge to the creation, amendment, restatement, or revocation of a trust on the grounds it was procured by fraud, duress, mistake, or undue influence.

The bill amends s. 744.441, F.S., to limit powers of a guardian to prosecute or defend certain proceedings to provide that there is a rebuttable presumption that an action challenging the ward's revocation of all or part of a trust is not in the ward's best interest if the revocation relates solely to a devise. This does not preclude a challenge after the ward's death.

Attorney's Fees and Costs in Trust Proceedings

The bill amends s. 736.0201, F.S., to clarify Florida Rule of Civil Procedure 1.525 applies to clarify when and under what circumstances a trustee or beneficiary of a trust, or attorney must file a motion for attorney's fees and costs incurred in a judicial proceeding concerning a trust. Florida Rule of Civil Procedure 1.525 requires a party seeking costs or attorney's fees to serve a motion within the 30 days that follow the filing of a judgment. The bill specifies two exceptions. It specifies that the following circumstances do not constitute taxation of costs or attorney's fees even if the payment is for services rendered or costs incurred in a judicial proceeding:

- a trustee's payment of compensation or reimbursement of costs to persons employed by the trustee from assets of the trust; or
- a determination by the court directing from what part of the trust fees or costs shall be paid, unless the determination is made in an action for a breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers.

Effective Date and Application

Except as otherwise provided in the bill, it provides an effective date of upon becoming a law and applies to all proceedings pending before such date and all cases commenced on or after the effective date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Banking and Insurance on March 22, 2011

The CS creates s. 90.5021, F.S., to establish standards for privilege of communications between a lawyer and a client acting as a fiduciary. The CS provides that a client acts as a fiduciary when serving as a personal representative, a trustee, an administrator ad litem, a conservator, or an attorney in fact. The CS provides that the notice of administration that must be sent by the personal representative of the estate must include a statement that the fiduciary lawyer-client privilege applies with respect to the personal representative and the attorney employed by the personal representative. The CS provides that the notice that a trustee must provide to qualified beneficiaries must include a statement that the fiduciary lawyer-client privilege applies with respect to the trustee and the attorney employed by the trustee.

B. Amendments:

None.