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 Committee on Judiciary

BILL:	SB 872
INTRODUCER:	Senator Hukill
SUBJECT:	Estates
DATE:	March 9, 2015
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	**Pre-meeting**
2.			BI	
3.			RC	

I. Summary:

SB 872 amends the Florida Probate Code and the Florida Trust Code to revise provisions governing the areas of attorney fees and costs, lawyers serving as fiduciaries, personal representatives and notices of administration, and the apportionment of estate taxes. The bill:

- Authorizes a court to assess attorney fees and costs against one or more persons' part of an estate or trust in proportions it finds just and proper in estate and trust proceedings and to direct payment for assessments against a portion of an estate from a trust under certain circumstances.
- Provides factors that a court may consider when assessing costs and attorney fees against a person's share of an estate or trust in estate and trust proceedings.
- Prohibits compensation to an attorney or certain persons for fiduciary services unless special circumstances exist or a written disclosure is executed by the client before the execution of the document.
- Revises requirements regarding the time to make objections to the validity of a will, qualifications of a personal representative, the venue, or jurisdiction of a court in estate proceedings;
- Requires that personal representatives who are not qualified at the time of appointment resign or be removed by the court and have their letters of administration revoked;
- Extends personal liability for attorney fees and costs in a removal proceeding to personal representatives who do not know but should have known of facts requiring them to immediately resign or provide notice of ineligibility to serve as personal representative to interested persons.
- Substantially revises current law regarding the allocation and apportionment of estate taxes to update the statute for consistency with changes in federal estate tax laws, codify case law governing estate tax apportionment, and address gaps in the current statutory apportionment framework.

II. Present Situation:

The Florida Probate Code and the Florida Trust Code govern the administration of estates and trusts under Florida law.[1] The codes establish the procedures for collecting and distributing the assets to the beneficiaries of wills and trusts. This bill amends statutes in the codes that involve:

- Attorney fees and costs;
- Lawyers serving as fiduciaries;
- Personal representatives and notices of administration; and
- The apportionment of estates taxes.

Assessing Attorney Fees and Costs for Estates and Trusts

The probate[2] and trust[3] codes provide that an attorney who has rendered services to an estate or trust may be awarded reasonable compensation from the estate or trust for those services. The statutes further provide that the court, in its discretion, may direct from what part of the estate[4] or trust[5] those fees, as well as costs,[6] may be paid.

Case law interpreting the assessment of attorney fees and costs under the Probate Code, however, is in conflict. The Fourth District Court of Appeal has interpreted the statute to mean that the trial court must find bad faith, wrongdoing, or frivolousness to assess attorney fees and costs against a part of the estate.[7] The Fifth District Court of Appeal, however, does not require a finding of frivolousness to assess attorney fees and costs against a portion of the estate.[8] In a Florida Supreme Court case involving an unsuccessful will dispute and the assessment of fees and costs against a portion of an estate, the Court noted that the trial court has "discretion to direct that the resulting costs and attorney fees be charged against the contestant's bequest under the will."[9]

The Real Property, Probate, and Trust Law Section of The Florida Bar has noted that the lack of detailed statutory factors for courts to consider when exercising discretion to assess attorney fees and costs has created inconsistent results in the application of the law. The section has noted that a detailed but flexible standard would provide courts direction and would result in a more consistent application of the law.[10]

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[1] The Florida Probate Code is contained in chs. 731 through 735, F.S., and the Florida Trust Code is contained in ch. 736, Florida Statutes.
[2] Section 733.106(3), F.S.
[3] Section 736.1005(1), F.S.
[4] Section 733.106(4), F.S.
[5] Section 736.1005(2), F.S.
[6] Section 733.106(4), F.S. authorizes the court, in probate, to direct from what portion of the probate estate the costs are to be paid. Section 736.1006(2), F.S., authorizes the court, in its discretion, to direct from what part of the trust the costs shall be paid.
[7] *Levin v. Levin*, 67 So. 3d 429 (Fla. 4th DCA 2011).
[8] *Williams v. King*, 711 So. 2d 1285 (Fla. 5th DCA 1998).
[9] *Carman v. Gilbert*, 641 So. 2d 1323, 1326 (Fla. 1994).
[10] The Real Property, Probate, & Trust Law Section of The Florida Bar, *Legislative White Paper: Proposed F.S. 733.106(4), 736.1005(2), and 736.1006(2)* (2015) (on file with the Senate Committee on Judiciary).

Lawyers Serving as Fiduciaries

The law currently provides that a personal representative who is a member of The Florida Bar and provides legal services administering an estate is allowed a fee for the personal representative services and a fee for his or her legal services.[11] While there is no statutory or ethical prohibition against lawyers preparing documents that appoint themselves as fiduciaries, it is important for lawyers to document any disclosure made to a client so as to avoid future allegations that they overreached or were involved in improper conduct.[12]

Personal Representatives and Notice of Administration

Personal Representatives

A personal representative is a person or business entity[13] appointed by a circuit court to administer a decedent's estate. If an individual serves as a personal representative, he or she must be at least 18 years old, have full capacity,[14] and be a resident of Florida[15] at the time of the death of the person whose estate he or she is administering.[16] A person is not qualified to serve as a personal representative if he or she has been convicted of a felony and is mentally or physically unable to perform the duties of a personal representative.[17]

Notice of Administration and Filing of Objections

Section 733.212, F.S., establishes, among other things, a list of people upon whom the personal representative must serve a copy of the notice of administration and specific information that the notice of administration must contain. Section 733.212(2)(c), F.S., specifies a 3 month time frame for filing objections to the validity of the will, the qualifications of the personal representative, the venue, or the jurisdiction of the court.

Apart from detailing what the notice of administration must contain, s. 733.212(3), F.S., is directed to a person on whom the notice is served and who wants to file an objection. It provides that any interested person upon whom a notice of administration is served must object by filing a petition on or before the date that is 3 months after he or she is served with a copy of the notice of administration or be forever barred from asserting an objection to:

- The validity of the will;
- The qualifications of the personal representative;
- The venue; or
- The jurisdiction of the court.

[11] Section 733.617(6), F.S.

[12] The Real Property, Probate, & Trust Law Section of The Florida Bar, *White paper: Proposed Legislation Regarding Lawyers Serving as Fiduciaries* (2015) (on file with the Senate Committee on Judiciary).

[13] See s. 733.305, F.S., for a list of business entities authorized to serve. Generally, those entities are certain trust companies and banking and savings institutions.

[14] Section 733.302, F.S., states that the person is "sui juris." Black's Law Dictionary defines "sui juris" as being independent, of full age and capacity, and possessing full social and civil rights.

[15] A non-resident of the state may qualify if he or she is a legally adopted child or adoptive parent of the decedent, related by lineal consanguinity, one of certain enumerated relatives of the decedent, or the spouse of a person otherwise qualified to be the personal representative. Section 733.304, F.S.

[16] Section 733.302, F.S.

[17] Section 733.303, F.S.

In the recent case of *Hill v. Davis*,[18] the Florida Supreme Court addressed whether an objection to the qualifications of a personal representative is barred by the 3 month deadline. The Court held that s. 733.212(3), F.S., bars an objection that the personal representative[19] was never qualified to serve in that capacity if the objection was not timely filed. The Court, however, created an exception to the 3 month deadline "except where fraud, misrepresentation, or misconduct with regard to the qualifications is not apparent on the face of the petition or discovered within the statutory time frame."[20] Some attorneys believe that this exception created by the Supreme Court could, as written, be expanded to apply to objections to the validity of a will, jurisdiction, or venue unless clarifying language is added to limit the 3 month exception.[21]

Apportionment of Estate Taxes

Just as Florida's intestate successions laws function as a default mechanism to distribute property that was not properly devised in a will, s. 733.817, F.S., provides default rules for determining the apportionment of an estate tax among the various interests when the decedent has not otherwise specified. Section 733.817, F.S., governs:

- The apportionment of estate taxes if a decedent has not effectively provided for the apportionment of those taxes; and
- The collection of the tax.

The estate tax apportionment statute has not been substantially revised in many years and needs updating and clarification to address federal estate tax laws enacted after the statute was last amended. Changes also need to be made to address tax issues that are not currently covered in the existing statute. Under current federal law, the estate tax only applies to an estate valued in excess of $5,430,000.[22] Florida does not have a state level estate tax. However, when estate taxes are due to the federal government or to another state from a Florida decedent, s. 733.817, F.S., determines how much tax is attributable to each interest affected by the tax. The statute also determines who is charged with payment of the tax attributable to various interests affected by the tax, determines whether a decedent has effectively directed against statutory apportionment and resolves conflicting apportionment provisions in governing instruments

Estate Tax

According to the Internal Revenue Service, an estate tax is a tax on your right to transfer property at your death. The tax is generally computed by assessing the fair market value of all properties owned or controlled by the decedent at his or her death, which is the "gross estate," and then subtracting certain allowable deductions, which is the "taxable estate." The value of

[18] *Hill v. Davis*, 70 So. 3d 572 (Fla. 2011).
[19] Section 733.3101, F.S., states that any time a personal representative knows or should have known that he or she is not qualified, the personal representative shall promptly file and serve a notice setting forth the reasons. Whoever fails to comply with that requirement shall be personally liable for costs, including attorney fees incurred in a removal proceeding, if he or she is removed.
[20] *Id*., at 573.
[21] The Real Property, Probate, & Trust Law Section of The Florida Bar, *Legislative White Paper: Regarding Objections to Probate and Qualifications of Personal Representatives* (2015) (on file with the Senate Committee on Judiciary).
[22] This amount applies to the 2015 tax year. The value is adjusted annually for inflation. 26 U.S.C. s. 2010(c)(3) and Rev. Proc. 2014-61, 2014-47 I.R.B. 860.

lifetime taxable gifts is added to this amount and the tax is computed. The tax is then reduced by the available unified credit.[23]

Background Information on the Apportionment of Estate Taxes, s. 733.817, F.S.

The statute generally provides for a modified equitable apportionment system. Property interests generally bear their share of the taxes with the exception that there are special provisions for property passing under a will or trust and for protected homestead. Residuary interests passing under a will or trust are first charged with taxes on non-residuary interests, then with taxes on residuary interests themselves, with the non-residuary interests bearing their pro rata share of any remaining taxes. The decedent's probate estate and revocable trust are generally charged with the estate tax on protected homestead. Property qualifying for the marital and charitable deduction does not bear any part of the tax unless it is charged with the payment of tax on other property as a part of the residuary under the will or trust. The default apportionment provisions apply only if the decedent does not direct otherwise. The statute provides rules for determining whether a decedent has overridden the default rules.[24]

For an analysis of specific provisions in the current statute and how those provisions are changed by this bill, please see the "Effect of Proposed Changes" section of this bill analysis.

III. Effect of Proposed Changes:

Assessing Attorney Fees and Costs for Estates and Trusts (Sections 1, 9, and 10)

The bill amends the following three statutes relating to the assessment of attorney fees and costs against a person's part of an estate or trust.

Sections 733.106 F.S. – Costs and Attorney Fees in Probate Matters (Section 1)

The bill amends this section to provide that if costs and attorney fees are to be paid from the estate under any of four statutes[25] permitting the payment of attorney fees, the court has discretion to direct from which part of the estate the fees shall be paid. If the court directs an assessment against a person's part of an estate and the part is insufficient to completely pay the assessment, the court may direct that the payment be made from the person's part of a trust, if any, if a pourover will[26] is involved and the matter is interrelated with the trust.

The court is also authorized, to direct that all or any part of the costs and attorney fees to be paid from an estate may be assessed against one or more persons' part of the estate in the proportions that the court finds to be fair and just.

[23] http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Estate-Tax. Last visited March 7, 2015.
[24] Email from Pamela O. Price, Attorney, Florida Real Property, Probate, & Tax Law Section of The Florida Bar (March 6, 2015) (on file with the Senate Committee on Judiciary).
[25] Those sections are ss. 733.106, 733.6171, 736.1005, or 736.1006, F.S.
[26] A pourover will is defined as "a will giving money or property to an existing trust." BLACK'S LAW DICTIONARY (7th ed. 1999).

In exercising its discretion to assess attorney fees and costs, the court may consider:

- The relative impact an assessment will have on the estimated value of each person's part of the estate;
- The amount of costs and attorney fees to be assessed against someone's part of the estate;
- The extent to which a person whose part of the estate is to be assessed actively participated in the proceeding;
- The potential benefit or harm to a person's part of the estate;
- The relative strength or weakness of the merits of the claims, defenses, or objections, if any, that were asserted by someone whose part of the estate is to be assessed;
- Whether the person to be assessed was a prevailing party with regard to any claims, defenses, or objections;
- Whether the person whose part is to be assessed unjustly caused an increase in the costs and attorney fees that were incurred by the personal representative or another interested person in the proceeding; and
- Any other relevant fact, circumstance, or equity.

In an effort to resolve the varying statutory interpretations between the different district courts of appeal, the statute is amended to provide that a court does not need to find that the person whose part is to be assessed engaged in bad faith, wrongdoing, or frivolousness.

Section 736.1005, F.S. - Attorney Fees for Services to the Trust (Section 9)

The bill amends this section to provide that if attorney fees are to be paid under any of three statutes,[27] the court, in its discretion, may direct from what part of the trust the fees shall be paid.

The court is also authorized, to direct that all or any part of the attorney fees to be paid from a trust may be assessed against one or more persons' part of the trust in the proportions that the court finds to be just and fair.

The statute then tracks, in almost identical amendatory language as that set out above for s. 733.106, F.S., the factors the court may consider in its discretion when assessing attorney fees for services to the trust. The court may also assess a person's part of the trust without finding that he or she engaged in bad faith, wrongdoing, or frivolousness.

Section 736.1006, F.S. – Costs in Trust Proceedings (Section 10)

The bill amends this section to provide that, if costs are to be paid from certain trusts,[28] all or part of the costs may be assessed against one or more persons' part of the trust in the proportions the court finds to be just and proper. The statute then provides that the court, in its discretion, may consider the newly enumerated factors in s. 736.1005(2), F.S.

[27] Sections 736.1005(1), 726.1007(5)(a), or 733.106(4)(a), F.S.

[28] The bill cross-references trust proceedings under this statute or under "s. 736.106(4)(a)" but the second reference is a technical error because that statute does not exist. The reference needs to be corrected to read "s. 733.106(4)(a)."

Lawyers Serving as Fiduciaries (Sections 6 and 8)

This bill amends s. 733.617, F.S., relating to the compensation of personal representatives, and s. 736.0708, F.S., relating to the compensation of trustees. The bill provides that an attorney, or person related to the attorney, is not entitled to receive compensation for serving as a fiduciary if the attorney prepared or supervised the execution of a will or trust unless the attorney or person appointed is related to the client or the attorney discloses to the client in writing before the will or trust is signed that:

- Subject to certain limited exceptions, most family members, persons who are residents of Florida, including friends, and corporate fiduciaries are eligible to serve as a fiduciary;
- Any person, including an attorney, who serves as a fiduciary is entitled to receive reasonable compensation for his or her personal representative services; and
- Compensation payable to the fiduciary is in addition to any attorney fees payable to the attorney or the attorney's firm for legal services.

The client must execute a written statement acknowledging that the disclosures were made before the execution of the will or trust. The written acknowledgement must be a separate writing from the will or trust but may be annexed to the will or trust. It may be executed before or after the execution of the will or trust.

An attorney is deemed to have prepared or supervised the execution of a will or trust if the preparation or the supervision of the execution of the will or trust was performed by an employee or attorney employed by the same firm as the attorney when the will was executed.

The bill defines the term "related" and copies the language found in s. 732.806, F.S., the "Gifts to lawyers and other disqualified persons." An employee or attorney employed by the same firm as the attorney when the will or trust instrument is executed is deemed to be related to the attorney.

This statute applies to all appointments, including nominations as a successor or alternate fiduciary, and to all powers to appoint that the attorney may exercise if they are used to appoint the attorney.

The failure to obtain a written acknowledgement for the testator or settlor does not disqualify a personal representative or trustee from serving or affect the validity of the will or trust document. Accordingly, an attorney may serve without the signed acknowledgment, but he or she will not be compensated by the fiduciary.

The statute provides a written acknowledgement form that is deemed to comply with the disclosure requirements provided in this section.

This subsection applies to each nomination or appointment made pursuant to a will or trust which is executed or amended on or after October 1, 2015, by a resident of Florida.

Personal Representatives and Notices of Administration (Sections 2, 3, 4, and 5)

The bill amends ss. 733.212(2)(c), 733.212(3), and 733.2123, F.S., to remove the 3 month limitation period for objections to be raised about the qualifications of a personal representative after service of a notice of administration.[29]

The bill amends s. 733.212(3), F.S., to remove objections to the qualifications of a personal representative from the provisions of the notice of administration. The section is also amended to permit an extension of time for filing an objection to the validity of the will, the venue, or the jurisdiction of the court for estoppel based solely on a misstatement by the personal representative regarding the time period within which an objection must be filed. The amendatory language clarifies that the time period may not be extended for any other reason, including affirmative representation, failure to disclose information, or misconduct by the personal representative or any other person. The subsection is also amended to create the outermost boundary by which an objection must be filed. That limit is the earlier of the entry of an order of final discharge of the personal representative or 1 year after service of the notice of administration.

The bill amends s. 733.2123, F.S., to remove "qualifications of the personal representative" from the list of objections that must be filed within the limitations period of the statue. As such, an interested person is not barred by limitations for failing to object to the qualifications of a personal representative within the time frame of this section.

Section 733.3101, F.S., is amended to now require a personal representative to resign immediately if the personal representative knows that he or she was not qualified to act at the time of appointment. If a personal representative becomes unqualified to serve during the administration of the estate, then he or she must send a notice to interested persons stating the reasons and that any interested person may petition to remove him or her from serving as the personal representative. An interested person on whom the notice is served may file a petition requesting removal within 30 days after the date that the notice is served.

As under current law, the personal representative who fails to comply with this section is personally liable for costs and attorney fees incurred in a removal proceeding if the personal representative is removed. The bill extends the liability to include a personal representative who does not know, but should have known of facts that would have required him or her to resign or file and serve notice of the disqualification. Language is added to s. 733.3101, F.S., to clarify that the term "qualified" means that the personal representative is qualified under ss. 733.302 and 733.303, F.S., rather than a more general meaning that might involve other grounds for removing the personal representative.

The bill amends s. 33.504, F.S., to require a court to remove a personal representative if he or she was not qualified to act at the time he or she was appointed. Language is added to clarify that a court may remove a personal representative who was qualified to act when appointed, but is not later entitled to serve.

[29] See discussion at footnote 21 above.

Estate Taxes (Section 7)

Section 733.817, F.S., provides a framework for determining how the estate tax is apportioned to various interests which pass as a result of a decedent's death and for the orderly collection of the estate tax. This bill is a substantial rewording of s. 733.817, F.S. The changes are made to update, clarify, and improve the section by making it compatible with the Internal Revenue Code, address tax issues not dealt with in the current statute, codify existing case law, and amend the default rules so that they reflect what would have been the intent of most decedents. The changes are made by reorganizing the statute, adding titles for better understanding, and making other clarifying changes.

Allocation of Estate Taxes on Gifts Made Just Prior to Death

Section 733.817(3), F.S. provides that, in determining the amount of tax attributable to an interest in property, only interests included in the measure of the particular tax[30] are considered. The tax is determined by the proportion that the value of each interest included in the measure of the tax bears to the total value of all interests included in the measure of the tax. The decedent's gross estate for estate tax purposes includes gift taxes paid on gifts made within 3 years after death[31] and, if the decedent dies within 5 years of a gift to a qualified tuition program (commonly known as a "529 Plan") that exceeds the gift tax annual exclusion,[32] his or her gross estate also includes the portion of such contributions properly allocable to periods after the date of death.[33]

Presently, ss. 733.817(5)(a)-(c), F.S., do not apportion the estate tax on those gift taxes, and the gift taxes are not otherwise excluded from the measure of the tax. A majority of decedents do not intend that the recipients of their gift bear the burden of the estate tax as such gifts often consist of contributions to 529 plans for minors or college aged relatives.

The bill amends s. 733.817(1)(d), F.S., the definition of "included in the measure of the tax," to exclude gift taxes paid within 3 years after the decedent's death and gifts to a 529 Plan. Recipients of the gift will not be allocated the estate tax upon such gifts even though the gift taxes remain a part of the amount upon which the estate tax is calculated. The effect is that the allocation of tax on all other interests remaining in the measure of the federal estate tax will be increased. The exclusion of the gift taxes and 529 Plan amounts from the measure of the tax applies only to the estates of decedents dying on or after July 1, 2015.

[30] "Included in the measure of the tax" means that for each separate tax that an interest may incur, only interests included in the measure of that particular tax are considered. It does not include any interest, whether passing under the will or not, to the extent the interest is initially deductible from the gross estate, without regard to any subsequent reduction of the deduction by reason of the charge of any part of the applicable tax to the interest or interests or amounts that are not included in the gross estate but are included in the amount upon which the applicable tax is computed, such as adjusted taxable gifts with respect to the federal estate tax. If an election is required for deductibility, an interest is not "initially deductible" unless the election for deductibility is allowed. Section 733.817(1)(d), F.S.

[31] 26 U.S.C § 2035(b).

[32] Section 529 of the Internal Revenue Code allows a donor to gift an amount in excess of the annual gift tax exclusion to a qualified tuition program on behalf of any designated beneficiary which may then be treated as having been made over a 5 year period.

[33] 26 U.S.C. § 529(c)(4)(C).

Apportionment of Estate Taxes

Statutory Apportionment – Property passing under a will or trust

In the absence of an effective direction by the decedent in a governing instrument, estate taxes are apportioned pursuant to s. 733.817(5), F.S.

For property passing under a will or trust, the net tax attributable to nonresiduary devises or interests is charged to and paid from the residuary estate or portion whether or not all interests in the residuary estate or portion are included in the measure of the tax. If the residuary estate or portion is insufficient to pay the net tax attributable to all nonresiduary devises or interests, the balance of the net tax attributable to nonresiduary devises or interests is apportioned among the recipients of the nonresiduary devises or interests in the proportion that the value of each nonresiduary devise or interest included in the measure of the tax bears to the total of all nonresiduary devises or interests included in the measure of the tax. The net tax attributable to residuary devises or interests are apportioned among the recipients of the residuary devises or interests included in the measure of tax in the proportion that the value of each residuary devise or interests included in the measure of the tax bears to the total of all residuary devises or interests included in the measure of the tax.[34] The provisions are silent, however, with respect to which devises or interests would be charged with the tax if the residuary is insufficient.

The bill moves the allocation to subsection (3) and provides that if the residuary estate or portion of a will or trust is insufficient to pay the net tax attributable to all residuary devises or interests, the tax must be apportioned among the recipients of the nonresiduary devises or interests in the proportion that the value of each nonresiduary devise or interests included in the measure of the tax bears to the total of all nonresiduary devises or interests included in the measure of the tax.

Statutory Apportionment -- Protected Homestead

Section 733.817(5)(c), F.S., provides that the net tax attributable to an interest in protected homestead[35] is apportioned against the recipients of other interests in the estate or passing under any revocable trust in the following order of priority:[36]

- Class I: Recipients of interests not disposed of by the decedent's will or revocable trust that are included in the measure of the federal estate tax. This includes recipients of exempt property, the family allowance, elective share, pretermitted shares, and property passing by intestacy.
- Class II: Recipients of residuary devises and residuary interests that are included in the measure of the federal estate tax.
- Class III: Recipients of nonresiduary devises and nonresiduary interests that are included in the measure of the federal estate tax.

[34] Section 733.817(5)(a) and (b), F.S.
[35] "Protected homestead" means the property described in s. 4(a)(1), Article X of the State Constitution on which at the death of the owner the exemption inures to the owner's surviving spouse or heirs under s. 4(b), Article X of the State Constitution. For purposes of the code, real property owned in tenancy by the entireties or in joint tenancy with rights of survivorship is not protected homestead. Section 731.201(33), F.S.
[36] Section 733.817(5)(c), F.S.

Property that is not included in the measure of the tax, such as property qualifying for the marital or charitable deduction, does not bear the burden of the payment of tax on protected homestead. The purposes of the Probate Code provisions for exempt property, family allowance, and elective share are defeated by charging those interests with the estate tax on the protected homestead. Further, although s. 733.817(2), F.S., provides that protected homestead is exempt from tax, the statute does not specify an additional source of payment if the property designated pursuant to s. 733.817(5)(c), F.S. is insufficient.

For estates of decedents dying on or after July 1, 2015, the bill provides that the tax on exempt property and the family allowance is to be apportioned against other estate and revocable trust property in the same manner as the tax on protected homestead. Elective share property is no longer charged with the payment of estate tax on protected homestead (and now exempt property and family allowance). However, any property passing to the spouse which is in excess of the elective share is not excused from payment of the tax to the extent the excess property is included in Class I, II or III. Under the bill, the classes charged with payment of tax on protected homestead, family allowance and exempt property, in order of priority, are:

- Class I: Recipients of property passing by intestacy.
- Class II: Recipients of residuary devises, residuary interests, and pretermitted shares.
- Class III: Recipients of nonresiduary devises and nonresiduary interests.

If the assets in Classes I, II, and III are exhausted, the remaining tax is apportioned proportionately to the protected homestead, exempt property and family allowance. However, the tax may not be apportioned against the elective share. If the balance of the net tax attributable to protected homestead, exempt property, or the family allowance is not apportioned as provided above, it is to be apportioned according to the proportion that the value of each bears to the total value of taxable interests.

Apportionment at the Direction of a Decedent

Section 733.817(5)(h), F.S., provides that a decedent may direct against statutory apportionment through the terms of a governing instrument such as a will or trust.

Specificity Requirement. For a direction in a governing instrument to be effective to direct payment of taxes attributable to property not passing under the governing instrument from property passing under the governing instrument, the governing instrument must expressly refer to s. 733.817, F.S., or expressly indicate that the property passing under the governing instrument is to bear the burden of taxation for property not passing under the governing instrument. A direction in the governing instrument to the effect that all taxes are to be paid from property passing under the governing instrument whether attributable to property passing under the governing instrument or otherwise is effective to direct the payment of taxes attributable to property not passing under the governing instrument from property passing under the governing instrument.

Effective for decedents dying on or after July 1, 2015, the bill deletes the provision for directing against default apportionment by reference to s. 733.817, F.S., and provides that a direction against default apportionment may only be achieved by "express direction." An express direction in the governing instruments to the effect that all taxes are to be paid from property passing

under the governing instrument whether attributable to property passing under the governing instrument or otherwise is generally effective.

However, such an express general direction is not effective to waive rights of recovery provided in sections 2207A, 2207B, and 2603 of the Internal Revenue Code, all of which require greater specificity. Those sections provide that the decedent may direct otherwise, but they require the decedent to specifically indicate the intent to waive the right of recovery under those sections. The purpose of the Internal Revenue Code provisions requiring greater specificity in directing against a right of recovery is not to raise revenue but to guard against the decedent's inadvertent waiver of those rights for the benefit of the estate.

The bill describes and codifies what is sufficient to comply with the specificity requirements of sections 2207A, 2207B, and 2603 of the Internal Revenue Code. It also provides that a general statement in a decedent's will or revocable trust waiving all rights of recovery under the Internal Revenue Code is not an express waiver of the rights of recovery provided in sections 2207A or 2207B of the Internal Revenue Code. This provision reflects current law.

Adopting Tax Apportionment Provisions in a Revocable Trust. The Internal Revenue Code enables the personal representative of an estate to recover the estate tax attributable to life insurance or property subject to a general power of appointment from the beneficiaries of those interests, but provides that the decedent may direct otherwise by will. Many decedents put their tax apportionment provisions in their revocable trusts. Section 733.817(5)(h)2., F.S., provides that a provision in the will that the tax is to be apportioned as provided in the revocable trust is deemed to be a direction in the will as well as the revocable trust.

The bill requires that the provision in the will adopting the apportionment provisions of the revocable trust and the apportionment provision of the revocable trust must be express in order to be effective.

Directing that taxes are paid from a revocable trust. Current law permits the decedent's will to direct that estate taxes be paid from the decedent's revocable trust unless the trust contains a contrary provision.[37] It is implicit in current law that the revocable trust that is to pay the tax must be specifically identified and that for an apportionment provision in the revocable trust to be contrary, it must be express. The bill requires that a direction in a will to pay estate taxes from a revocable trust must contain a specific reference to the trust, and that for an apportionment provision in a revocable trust to be considered contrary, it must be an express direction.

Conflicting Provisions. If there is a conflict as to payment of taxes between the decedent's will and the governing instrument, the decedent's will controls, except that the governing instrument will be given effect with respect to any tax remaining unpaid after the application of the decedent's will and a direction in a governing instrument to pay the tax attributable to assets that pass pursuant to the governing instrument from assets that pass pursuant to that governing instrument is effective notwithstanding any conflict with the decedent's will, unless the tax

[37] Section 733.817(5)(h)3., F.S.

provision in the decedent's will expressly overrides the conflicting provision in the governing instrument.[38]

The bill provides that apportionment conflicts between all governing instruments (whether a conflicting instrument is a will or other instrument) are controlled by the last executed governing instrument containing an effective tax apportionment clause to the extent of the conflict. If a will or trust is amended, the date of the amendment is the controlling date only if the amendment contains an express tax apportionment provision. Only tax apportionment provisions that would be effective, but for the conflict, create a conflict. The new rule applies to estates of decedents dying on or after July 1, 2015.

Construction

Apportionment of Property Received By a Will or Trust as a Beneficiary

Property passing under a will or trust is apportioned under the provisions of s. 733.817(5)(a) and (b), F.S. This is the case even if the will or trust received the property as beneficiary of an annuity, insurance policy, IRA, or similar interest, or as recipient of appointed property. This has caused some uncertainty among practitioners as the general "catch-all" apportionment provision in s. 733.817(5)(f), F.S., would seem to apply to these interests. However, the general provisions do not apply if the recipient is the estate or trust. The statute does not contemplate a double tax on what is essentially the same property. However, property subject to a power of appointment does not pass under the will simply because the power is exercised by the will unless the property passes to the estate.[39]

The bill provides that the beneficiary of an annuity or insurance policy or the recipient of property subject to a power of appointment is the "recipient" as defined in s. 733.817(1)(i), F.S. If those interests are paid to the estate or a trust, and subsequently disposed of pursuant to the will or trust, the tax on them is to be apportioned in the manner provided for interests passing from the estate or the trust. Property passing under a general power of appointment to the decedent's creditors (or the creditors of the decedent's estate) benefits the estate and is treated as if it were apportioned to the estate.

Common Instrument Construction

Section 733.817(5)(d), F.S., provides that a decedent's will and revocable trust are construed together to apportion the tax as if all recipients of the estate and trust (other than the estate and trust themselves) were taking under one common instrument for the purpose of apportioning tax to recipients of residuary and non-residuary interests under the provisions regarding wills, trusts and protected homesteads. However, the statute applies to a will and revocable trust in which one does not pour into the other, an application that serves no purpose.

For estates of decedents dying on or after July 1, 2015, the bill requires that a decedent's will or revocable trust (or two revocable trusts, if applicable) must pour into the other for the common instrument construction to apply. The purpose of this provision is to determine which interests

[38] Section 733.817(5)(h)5., F.S.
[39] *In re Estate of Wylie*, 342 So.2d 996 (Fla. 4th DCA 1977); *Smith v. Bank of Clearwater*, 479 So.2d 755 (Fla. 2nd DCA 1985).

are in effect pre-residuary interests and which are residuary interests where a will or trust (or another trust) pours into the other so that the tax attributable to those interests may be apportioned accordingly.

Updates in Response to Changes in Federal Tax Law

In 2001, Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001.[40] That federal legislation phased out over a 5-year period, starting in 2002, the credit for state death taxes and effectively eliminated the Florida estate tax. The credit was replaced by a deduction for state death taxes.[41] This bill reflects the changes in federal tax law as follows:

- The definition of "net tax" is amended to take into account the deduction for state death taxes that replaced the credit for state death taxes. Additionally, s. 733.817(2)(c), F.S., was created to allocate the state death tax deduction to the interests producing the deduction for the purpose of determining the tax attributable to the interest. This is a curative revision intended to clarify existing law and applies retroactively to all proceedings in which the apportionment of taxes has not been finally determined or agreed for estates of decedents dying on or after January 1, 2005. It does not affect any tax payable to the state of Florida.
- Provisions regarding the allocation of the reduction of the Florida estate tax for tax paid to others states are made contingent upon the reinstatement of the Florida estate tax.

Other Changes Related to the Apportionment of the Estate Tax

The bill defines the terms "generation skipping transfer tax" and "Section 2044 interest" as used in s. 733.817, F.S. The definitions are consistent with the terms as used in the Internal Revenue Code.[42]

The bill provides that the generation-skipping transfer tax be apportioned in accordance with s. 2603 of the Internal Revenue Code.[43] Section 2603(b) charges the tax to the property constituting the transfer in effect charging it to the transferee.

The definition of the term "tax" as used in s. 733.817, F.S. is amended to explicitly exclude any additional estate tax that may be imposed by s. 2032A(c) or s. 2057(f) of the Internal Revenue Code to recapture tax savings related to family owned farms and businesses. The payment of the recaptured tax is imposed upon the applicable beneficiaries by ss. 2032(A) and 2057 of the Internal Revenue Code and is not a part of the "tax" apportioned by s. 733.817, F.S.

The bill fills a current gap in the statute by providing that if the apportionment statute does not apportion part of the tax that was not effectively directed by a governing instrument, the court may assess liability for payment of the tax in the manner it finds equitable.

[40] Pub. L. 107-16 (June 7, 2001); 115 Stat. 38.
[41] 26 U.S.C. s. 2058.
[42] See 26 USC ss. 2611-2612 and 26 USC § 2044.
[43] The generation-skipping transfer tax is based on the value of property received by the beneficiary, i.e., net of the estate tax charged against that property. Accordingly, the estate tax apportionment provisions must be determined first. Section 733.817, F.S., does not currently give any guidance on this matter.

The bill clarifies that the taxes on property that would pass to others but for the elective share pursuant to s. 732.2075(2), F.S., are apportioned under the general "catch all" provision of the statute, to the extent those assets do not qualify for the marital deduction. It further provides that this provision applies only to interests passing by reason of the exercise or non-exercise of a general power of appointment.

Currently, the net tax attributable to property over which the decedent held a general power of appointment is calculated in the same manner as other property included in the measure of the tax. For estates of decedents dying on or after July 1, 2015, the bill authorizes the power holder to direct that the property subject to the general power of appointment bear the additional tax incurred by reason of the inclusion of the property subject to the general power of appointment in the power holder's gross estate. This only applies if the direction is express and is in the will.

Effective for decedents dying on or after July 1, 2015, the bill provides that if property is included in the gross estate under both sections 2044 and 2041 of the Internal Revenue Code, the property is deemed included under section 2044 for the purposes of s. 733.817, F.S.

The bill codifies existing law that a grant of permission or authority to pay or collect taxes is not a direction against statutory apportionment[44] and that an effective direction for payment of tax on a type of interest in a manner different from that provided in s. 733.817, F.S., is not effective as an express direction for payment of tax on other types of interests.[45]

Effective for decedents dying on or after July 1, 2015, the bill updates references regarding notice of a petition for an order of apportionment to provide that the personal representative must give notice "in the manner of formal notice" instead of simply "formal notice" as "formal notice" is not currently required by the Florida Probate Rules.

Except as otherwise noted in this analysis, the amendments to s. 733.817, F.S., apply retroactively to all estate proceedings pending on July 1, 2015, in which the apportionment of taxes has not been finally determined or agreed.

Effective Date

The bill states in section 15 that, "except as otherwise expressly provided in this act, this act shall take effect upon becoming a law." The bill has multiple effective dates with some provisions taking effect on July 1, 2015, some on October 1, 2015, and a provision applying portions of the bill retroactively to estate proceedings pending in which the apportionment of taxes has not been finally determined or agreed.

[44] *Nations Bank v. Brenner*, 756 So. 2d 203 (Fla. 3d DCA 2000); *In re Estate of McClaran*, 811 So.2d 799 (Fla. 2d DCA 2002).
[45] *In re Estate of McClaran*, 811 So. 2d. 799 (Fla. 2d DCA 2002).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not appear to have an impact on cities or counties and as such, it does not appear to be a mandate for constitutional purposes.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Several provisions in this bill have retroactive applications. A bill may apply retroactively provided that it does not impair vested rights.

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. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 733.106, 733.212, 733.2123, 733.3101, 733.504, 733.617, 733.817, 736.0708, 736.1005, 736.1006, and 738.302.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.