

**HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS**

BILL #:	CS/CS/HB 393	FINAL HOUSE FLOOR ACTION:	
SPONSOR(S):	Insurance & Banking Subcommittee; Civil Justice Subcommittee; Berman and others	114 Y's	1 N's
COMPANION BILLS:	CS/CS/CS/SB 540	GOVERNOR'S ACTION:	Approved

SUMMARY ANALYSIS

CS/CS/HB 393 passed the House on March 4, 2016, as CS/CS/CS/SB 540 as amended. The Senate concurred in the House amendment to the Senate Bill and subsequently passed the bill as amended on March 10, 2016. The bill revises provisions of the Florida Probate Code and the Florida Trust Code.

The Florida Probate Code and the Florida Trust Code govern the disposition and management of estates during a person's lifetime or after their death. This bill amends these codes to:

- codify the common law situs rule which provides that the disposition of real property located in Florida is governed by Florida law regardless of any contrary directive in a will;
- provide, consistent with current practice, that the election by a surviving spouse of the right to receive an elective share of a decedent's estate establishes the minimum share of the estate that may be received by the surviving spouse; and
- provide additional guidance to lawyers and the courts regarding the circumstances under which a trustee may pay attorney fees and costs from trust assets in breach of trust proceedings.

The bill does not appear to have a fiscal impact on state or local governments. The bill may have a positive impact on the private sector.

The bill was approved by the Governor on April 6, 2016, ch. 2016-189, L.O.F., and will become effective July 1, 2016.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Disposition of Real Property in Probate

“Lex loci rei sitae,” or the situs rule, is the fundamental legal principle that real property is governed by the law of the jurisdiction in which it is situated. The situs rule is based upon the rationale that the situs jurisdiction has the greatest interest in controlling the administration of real property located within its borders.¹ As early as the nineteenth century, the Florida Supreme Court affirmed the application of the situs rule in this state:

[I]t is the universal rule that the laws of the state where [the property] is situated furnish the rules for its descent, alienation, and transfer, the construction and validity of conveyances thereof, and the capacity of the parties to such contracts and conveyances, as well as their rights under the same.²

Under the Florida Probate Code, chs. 731-735, F.S., intestate³ succession of real property located in Florida is explicitly governed by Florida law, regardless of whether the decedent owner was a resident or non-resident of the state, in accordance with the common law situs rule.⁴ In regard to testamentary dispositions of Florida real property by non-residents, s. 731.106(2), F.S. provides in pertinent part:

When a nonresident decedent, whether or not a citizen of the United States, provides by will that the testamentary disposition of tangible or intangible personal property having a situs within this state, or of real property in this state, shall be construed and regulated by the laws of this state, the validity and effect of the dispositions shall be determined by Florida law.

As it relates to the disposition of Florida real property by non-residents, s. 731.106(2), F.S., merely restates the long standing common law principle of “lex loci rei sitae,” while acknowledging the realities of multijurisdictional estate planning. However, construing this provision of law as a matter of first impression, the First District Court of Appeal in *Saunders v. Saunders* concluded that the statute was a restraint, rather than codification, of “lex loci rei sitae.”⁵ The court held that Florida law applies to the disposition of a non-resident testator’s Florida real property only when explicitly provided by such testator’s will.⁶ Where the will is silent, the court found that the law of the non-resident decedent’s domicile governs.⁷ The holding of the court is directly at odds with the consistent and longstanding approach of Florida courts endorsing the situs rule.⁸ Rules of statutory construction presume that no change in the common law is intended unless the statute is explicit; and inference and implication cannot be substituted for clear expression.

¹ The situs rule has been justified on several additional grounds: the situs state has a strong interest in regulating the manner in which real estate is used and developed; there is a compelling interest in insuring that title and ownership interests in situs land be regular and predictable; the situs state has a clear interest in land as a source of public revenue, since real property taxation is premised on the accurate identification and description of ownership interests in land; and the situs state is best situated to resolve disputes and enforce legal decisions pertaining to local property, and can best do so when it implements local legal policy. Michael S. Finch, *Choice-of-Law and Property* 26 STETSON L. REV. 257 (1996).

² *Walling v. Christian & Craft Grocery Co.*, 27 So. 46, 48 (Fla. 1899).

³ Any part of the estate of a decedent not effectively disposed of by will. s. 732.101, F.S.

⁴ s. 732.101, F.S.; See also *Estate of Salathe v. Schula*, 703 So. 2d 1167, 1168 (Fla. 2d DCA 1997).

⁵ *Saunders v. Saunders*, 796 So. 2d 1253, 1254 (Fla. 1st DCA 2001).

⁶ *Id.*

⁷ *Id.*

⁸ See *Connor v. Elliott*, 85 So. 164, 165 (Fla. 1920); *Kyle v. Kyle*, 128 So. 2d 427 (Fla. 2d DCA 1961); *Denison v. Denison*, 658 So. 2d 581 (Fla. 4th DCA 1995); *Beale v. Beale*, 807 So. 2d 797, 798 (Fla. 1st DCA 2002).

Effect of Changes (Sections 1 and 2)

The bill creates s. 731.1055, F.S., to provide that the disposition of real property in this state, whether testate or intestate, is governed by laws of this state in accordance with the common law “situs” rule.

The bill also makes conforming changes to s. 731.106, F.S.

Elective Share of Probate Estate

Section 732.201, F.S., establishes the right of the surviving spouse of a Florida domiciliary to elect to take a share of the decedent’s estate known as the “elective share”, instead of the share of the estate provided for the surviving spouse under the will or the laws of intestacy. The right to an elective share insures that a surviving spouse is not disinherited; thereby reducing the likelihood they will be forced to rely upon local, state, and government assistance.⁹ The elective share serves as a substitute for the English common law concepts of *dower*¹⁰ and *curtesy*¹¹, which were abolished by the legislature in 1974.¹²

Currently, the elective share is an amount equal to 30% of the “elective estate”,¹³ which includes not only the probate estate,¹⁴ but non-probate transfers frequently utilized in modern estate planning, such as revocable trusts, retirement accounts, and life insurance.¹⁵ To exercise the right to receive an elective share, the surviving spouse must file the election on or before the earlier of the date that is:¹⁶

- six months after the date the notice of administration was served on the surviving spouse (or his or her representative); or
- two years after the date of the decedent's death.

An election may be withdrawn within eight months¹⁷ after the decedent's death, but before the court's order of contribution.¹⁸

Prior to October 1, 2001, the election by the surviving spouse terminated all rights to inherit under the will of the deceased spouse or to participate in the distribution of intestate property, effectively acting as a cap that prevented the surviving spouse from receiving any amount in excess of the elective share amount.¹⁹ Section 732.2105(2), F.S. (2000) provided in pertinent part:

If an election is filed, the balance of the elective estate, after the application of s. 732.2145(1), shall be administered as though the surviving spouse had predeceased the decedent.

⁹ *In re Estate of Robert W. Magee*, 988 So. 2d 1 (Fla. 2d DCA 2007).

¹⁰ At common law, a wife's right, upon her husband's death, to a life estate in one-third of the land that he owned in fee.

¹¹ At common law, a husband's right, upon his wife's death, to a life estate in the land that his wife owned during their marriage, assuming that a child was born alive to the couple.

¹² s. 732.111, F.S.; *In re Anderson's Estate*, 394 So.2d 1146 (Fla. 4th DCA 1981)(stating that “the purpose of dower and curtesy was to insure provision for the surviving spouse’s needs.”)

¹³ s. 732.2065, F.S.

¹⁴ “Probate estate” means all property wherever located that is subject to estate administration in any state of the United States or in the District of Columbia. s. 732.2025(7), F.S.

¹⁵ See s. 732.2035, F.S.

¹⁶ s. 732.2135(1), F.S.

¹⁷ While the law provides for the ability to withdraw the election for elective share within 8 months after the decedent’s death and before the court’s order of contribution, the provisions merely assures certainty for the estate tax return as to the existence of a spousal share. The Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper: Proposed Amendment to F.S. Section 732.201 Right to Elective Share* (on file with the Civil Justice Subcommittee).

¹⁸ s. 732.2135(3), F.S.

¹⁹ s. 732.211, F.S. (1998).

In 2001, the legislature repealed s. 732.2105(2), F.S. (2000) in its entirety,²⁰ thereby removing the cap. Subsequently, leading Florida estate planning practice manuals have encouraged practitioners to consider whether a protective election to take elective share would be appropriate given that s. 732.2105(2), F.S. (2000) has been repealed and “there seems to be no penalty”.²¹

Given that fact, under certain circumstances, such as a circumstance where valuations are complex and will take longer to complete than the time period allowed for making the election, it may make sense to make an election, irrespective of whether the surviving spouse believes it to be necessary under the plan.

As a result, Florida attorneys routinely advise their clients that there is no disadvantage in acknowledging the right to receive a portion of the estate equal to, or greater than, the elective share amount, as the elective share simply sets a floor, not a ceiling or maximum amount the spouse may receive.²²

Effect of Changes (Sections 3 and 4)

The bill amends s. 732.201, F.S., to provide, consistent with current practice and understanding after the repeal of s. 732.2105(2), F.S. (2000), that the election by a surviving spouse to receive an elective share of a Florida domiciliary’s estate does not reduce the amount of the estate the surviving spouse would receive if the election were not made. The bill further provides that the spouse is not treated as having predeceased the decedent for purposes of administering the balance of the elective estate.

Trusts

The “Florida Trust Code”, ch. 736, F.S., governs the creation and administration of trusts. A “trust” is generally defined as a fiduciary relationship²³ with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person.²⁴ A trust involves three interest holders: the “settlor”²⁵ who establishes the trust; the “trustee”²⁶ who holds legal title to the property for the benefit of the beneficiary; and lastly, the “beneficiary”²⁷ who has an equitable interest in property held subject to the trust.

Trusts are created for many purposes including, but not limited to, the protection of property and beneficiaries, tax planning, and professional management of assets.

Attorney Fees and Costs in Breach of Trust Proceedings

A trustee may be involved in legal proceedings relating to the trust. When legal proceedings are instituted, a trustee may retain counsel and pay attorney fees and costs from the assets of the trust.²⁸

²⁰ Ch. 2001-226, Laws of Fla.

²¹ Abraham M. Mora, Shelly Wald Harris, and Peter Van Dien, *FLORIDA ESTATE PLANNING*, § 21:40 *Time of election* (Thomson West, 2015-2016 ed.).

²² *Supra* FN 17.

²³ *Brundage v. Bank of America*, 996 So. 2d 877, 882 (Fla. 4th DCA 2008) (trustee owes a fiduciary duty to settlor/beneficiary).

²⁴ 55A FLA. JUR.2D *Trusts* § 1.

²⁵ “Settlor” means a person, including a testator, who creates or contributes property to a trust. s. 736.0103(18), F.S.

²⁶ “Trustee” means the original trustee and includes any additional trustee, any successor trustee, and any cotrustee. s. 736.0103(23), F.S.

²⁷ “Beneficiary” means a person who has a present or future beneficial interest in a trust, vested or contingent, or who holds a power of appointment over trust property in a capacity other than that of trustee. s. 736.0103(4), F.S.

²⁸ s. 736.0816(20), F.S.

Payment of such costs and fees may be made without the approval of any person, including trust beneficiaries, and without prior court authorization.²⁹

Breach of Trust

A trustee's broad authority to pay legal fees incurred in connection with the trust administration from trust assets is not without limitation, however, in proceedings involving a breach of trust.

The Trust Code requires a trustee to administer a trust "in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with [the] code,"³⁰ and also imposes a duty of loyalty upon the trustee.³¹ A trustee's violation of a duty owed to a beneficiary is a breach of trust.³² Breaches of trust can include: undervaluing trust assets,³³ failure to obtain a surety bond,³⁴ failure to render accountings to the beneficiaries,³⁵ failure to disperse monies pursuant to the settlor's wishes,³⁶ improperly favoring one beneficiary over another,³⁷ and failure to prosecute claims of the trust or defend claims against the trust.³⁸ Beneficiaries of the trust have standing to initiate causes of action in equity for breaches of trust unless the beneficiary has consented to or ratified the action, released the trustee of liability for such action,³⁹ or the claim is otherwise barred by statute.⁴⁰

Attorney Fees and Costs in Breach of Trust Proceedings

If a claim or defense based upon a breach of trust is made against a trustee in a proceeding, the trustee must provide prior written notice of any intention to pay its attorney fees and costs from the trust assets to qualified beneficiaries.⁴¹ The notice must inform the beneficiary of the right to obtain an order prohibiting the payment of fees and costs.⁴² The notice must be delivered by any commercial delivery service requiring a signed receipt, by any form of mail requiring a signed receipt, or as provided in the Florida Rules of Civil Procedure for service of process.⁴³

Upon the motion of a qualified beneficiary whose share of the trust may be affected by such payment, the court may preclude a trustee from paying its attorney fees and costs from the trust assets.⁴⁴ The beneficiary must make a reasonable showing by evidence in the record, or by proffering evidence, that a reasonable basis exists for a court to conclude that there has been a breach of trust. If the court finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court finds good cause, the court must enter an order prohibiting the payment of attorney's fees and costs from the

²⁹ s. 736.0802(10), F.S.

³⁰ s. 736.0801, F.S.

³¹ s. 736.0802(1), F.S.

³² s. 736.1001(1), F.S.

³³ *McCormick v. Cox*, 118 So. 3d 980, 986 (Fla. 3d DCA 2013).

³⁴ *Id.*

³⁵ *Id.*; *Corya v. Sanders*, 155 So. 3d 1279, 1283-84 (Fla. 4th DCA 2015).

³⁶ *Kritchman v. Wolk*, 152 So. 3d 628, 632 (Fla. 3d DCA 2014).

³⁷ s. 736.0803, F.S.

³⁸ s. 736.0811, F.S.

³⁹ John Grimsley, 18 FLA. PRAC., Law of Trusts § 8:4 (2012), John Bourheau et al, *Breach of Trust Action Against Trustee*, 55A FLA. JUR 2D Trusts § 235 (2015), George Gleason Bogert et al, *Action be Beneficiary Against Express Trustee*, THE LAW OF TRUSTS AND TRUSTEES § 951 (2015); s. 736.1012, F.S.; See also *Anderson v. Northrop*, 12 So. 318, 324 (Fla. 1892).

⁴⁰ s. 736.1008, F.S.

⁴¹ "Qualified beneficiary" means a living beneficiary who, on the date of the beneficiary's qualification is determined, is a distributee or permissible distributee of trust income or principal; would be a distributee or permissible distributee of trust income or principal if the interests of other actual or permissible distributees terminated on that date without causing the trust to terminate; or would be a distributee or permissible distributee of trust income or principal if the trust terminated in accordance with its terms on that date. s. 736.0103(16), F.S.

⁴² s. 736.0802(10), F.S.

⁴³ *Id.*

⁴⁴ *Id.*

assets of the trust. The order must also provide for the refund of attorney's fees or costs paid before an order was entered on the motion.⁴⁵ If a refund is not made as directed by the court, the court may, among other sanctions, strike defenses or pleadings filed by the trustee.⁴⁶

If a claim or defense based upon a breach of trust is later withdrawn, dismissed, or resolved in favor of the trustee, the trustee may pay costs or attorney's fees incurred in the proceeding from the assets of the trust without further court authorization or notice to the beneficiaries.⁴⁷

Leading practitioners have identified several areas in which the provisions governing the payment of attorney's fees and costs in breach of trust proceedings fail to provide direction to lawyers and the court, including:⁴⁸

- The circumstances under which the limitations on the payment of attorney's fees and costs are triggered.
- The categories of attorney's fees and costs subject to limitation.
- The circumstances under which the trustee must serve notice of an intention to pay attorney's fees and costs from trust assets and the consequences, if any, of paying such fees and costs prior to serving notice.
- Whether a trustee may use trust assets to pay its attorney's fees and costs upon a final determination in its favor by the trial court or must wait until the conclusion of any appellate proceeding.
- The type of showing required to preclude a trustee from using trust assets to pay its attorney's fees and cost, and the type of evidence that may be used to make or rebut such a showing.

Effect of Changes – Attorney Fees and Costs in Trust Proceedings (Sections 5 and 6)

The bill substantially amends s. 736.0802(10), F.S., to provide additional guidance to lawyers and the courts regarding the payment of attorney fees and costs from trust assets in breach of trust proceedings. Specifically, the bill:

- Provides that the limitation on the general authority of a trustee to pay attorney fees and costs from trust assets applies only to the payment of attorney fees and costs incurred in connection with a claim or defense of breach of trust that is set forth in a filed pleading. The bill defines "pleading" as a pleading recognized by the Florida Rules of Civil Procedure.⁴⁹
- Requires that the notice of intent to pay attorney fees and costs also identify the judicial proceeding in which the claim or defense of breach of trust has been made.
- Authorizes a trustee to serve the notice of intent to pay attorney fees and costs in the manner provided for service of pleadings and other documents under the Florida Rules of Civil Procedure⁵⁰ if the court has already acquired jurisdiction over the party in the proceeding.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ The Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper Regarding a Trustee's Use of Trust Assets to Pay Attorney's Fees and Costs in Connection with Claim or Defense of Breach of Trust* (on file with the Civil Justice Subcommittee, Florida House of Representatives).

⁴⁹ Fla. R. Civ. Procedure 1.100(a) provides: "There shall be a complaint or, when so designated by a statute or rule, a petition, and an answer to it; an answer to a counterclaim denominated as such; an answer to a crossclaim if the answer contains a crossclaim; a third-party complaint if a person who was not an original party is summoned as a third-party defendant; and a third-party answer if a third-party complaint is served. If an answer or third-party answer contains an affirmative defense and the opposing party seeks to avoid it, the opposing party shall file a reply containing the avoidance. No other pleadings shall be allowed."

⁵⁰ Such service may be made by e-mail, mail, hand delivery, fax, or by deposit with the clerk of court if no address is known. See Fla. R. Civ. Pro. 1.080(a) and Fla. R. Jud. Admin. 2.516.

Additionally, the bill waives service of the notice of intent upon a qualified beneficiary whose identity or location is unknown to, and not reasonably ascertainable by, the trustee.

- Provides that if a trustee pays attorney fees and costs from trust assets prior to serving the notice of intent, any affected qualified beneficiary is entitled to an order compelling the return of the payment with interest at the statutory rate.⁵¹ The court must award attorney fees and costs in connection with a motion to compel under such circumstances.
- Identifies the categories of evidence through which a movant may show, or through which a trustee may rebut, that a reasonable basis exists to conclude there has been a breach of trust. Permissible evidence consists of affidavits, answers to interrogatories, admissions, depositions, and any evidence otherwise admissible under the Florida Evidence Code.⁵²
- Requires that payments made after service of the notice of intent be returned to the trust with interest at the statutory rate if ordered by the court.
- Provides that if the claim or defense of breach of trust is withdrawn, dismissed, or resolved by the trial court without a determination that the trustee committed a breach of trust, the trustee may pay attorney fees and costs from trust assets without court authorization or serving a notice of intent. Further, the attorney fees and costs that the trustee may pay under such circumstances include those payments that the trustee may have been previously compelled to return.

The bill also makes conforming changes to ss. 736.0816 and 736.1007, F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

⁵¹ The Chief Financial Officer is required to set the rate of interest payable on judgments and decrees on December 1, March 1, June 1, and September 1 of each year for the following applicable quarter. The current rate is 4.75%. FLORIDA DEPARTMENT OF FINANCIAL SERVICES, <http://www.myfloridacfo.com/Division/AA/Vendors/> (last visited March 5, 2016).

⁵² ch. 90, F.S.

The bill's clarification of attorney fees incurred in connection with breach of trust cases may have a positive impact on the private sector.

D. FISCAL COMMENTS:

None.