

1 A bill to be entitled
2 An act relating to estates; amending s. 731.106, F.S.;
3 providing that the validity and the effect of a
4 specified disposition of real property be determined
5 by Florida law; amending s. 736.0105, F.S.; conforming
6 a provision to changes made by the act; amending s.
7 736.0412, F.S.; providing applicability for
8 nonjudicial modification of irrevocable trust;
9 amending s. 736.0802, F.S.; defining the term
10 "pleading"; authorizing a trustee to pay attorney fees
11 and costs from the assets of the trust without
12 specified approval or court authorization in certain
13 circumstances; requiring the trustee to serve a
14 written notice of intent upon each qualified
15 beneficiary of the trust before the payment is made;
16 requiring the notice of intent to contain specified
17 information and to be served in a specified manner;
18 providing that specified qualified beneficiaries may
19 be entitled to an order compelling the refund of a
20 specified payment to the trust; requiring the court to
21 award specified attorney fees and costs in certain
22 circumstances; authorizing the court to prohibit a
23 trustee from using trust assets to make a specified
24 payment; authorizing the court to enter an order
25 compelling the return of specified attorney fees and
26 costs to the trust with interest at the statutory

27 rate; requiring the court to deny a specified motion
28 unless the court finds a reasonable basis to conclude
29 that there has been a breach of the trust; authorizing
30 a court to deny the motion if it finds good cause to
31 do so; authorizing the movant to show that a
32 reasonable basis exists, and a trustee to rebut the
33 showing, through specified means; authorizing the
34 court to impose such remedies or sanctions as it deems
35 appropriate; providing that a trustee is authorized to
36 use trust assets in a specified manner if a claim or
37 defense of breach of trust is withdrawn, dismissed, or
38 judicially resolved in a trial court without a
39 determination that the trustee has committed a breach
40 of trust; providing that specified proceedings,
41 remedies, and rights are not limited; amending ss.
42 736.0816 and 736.1007, F.S.; conforming provisions to
43 changes made by the act; providing an effective date.
44

45 Be It Enacted by the Legislature of the State of Florida:
46

47 Section 1. Subsection (2) of section 731.106, Florida
48 Statutes, is amended to read:

49 731.106 Assets of nondomiciliaries.—

50 (2) When a nonresident decedent, whether or not a citizen
51 of the United States, provides by will that the testamentary
52 disposition of tangible or intangible personal property having a

53 | situs within this state, ~~or of real property in this state,~~
54 | shall be construed and regulated by the laws of this state, the
55 | validity and effect of the dispositions shall be determined by
56 | Florida law. The validity and the effect of a disposition,
57 | whether intestate or testate, of real property in this state
58 | shall be determined by Florida law. The court may, and in the
59 | case of a decedent who was at the time of death a resident of a
60 | foreign country the court shall, direct the personal
61 | representative appointed in this state to make distribution
62 | directly to those designated by the decedent's will as
63 | beneficiaries of the tangible or intangible property or to the
64 | persons entitled to receive the decedent's personal estate under
65 | the laws of the decedent's domicile.

66 | Section 2. Paragraph (k) of subsection (2) of section
67 | 736.0105, Florida Statutes, is amended to read:

68 | 736.0105 Default and mandatory rules.—

69 | (2) The terms of a trust prevail over any provision of
70 | this code except:

71 | (k) The ability to modify a trust under s. 736.0412,
72 | except as provided in s. 736.0412(4) (b) or (c).

73 | Section 3. Section 736.0412, Florida Statutes, is amended
74 | to read:

75 | 736.0412 Nonjudicial modification of irrevocable trust.—

76 | (1) After the settlor's death, a trust may be modified at
77 | any time as provided in s. 736.04113(2) upon the unanimous
78 | agreement of the trustee and all qualified beneficiaries.

79 (2) Modification of a trust as authorized in this section
 80 is not prohibited by a spendthrift clause or by a provision in
 81 the trust instrument that prohibits amendment or revocation of
 82 the trust.

83 (3) An agreement to modify a trust under this section is
 84 binding on a beneficiary whose interest is represented by
 85 another person under part III of this code.

86 (4) This section does ~~shall~~ not apply to any trust:

87 (a) ~~Any trust~~ Created prior to January 1, 2001.

88 (b) ~~Any trust~~ Created after December 31, 2000, and before
 89 July 1, 2016, if, under the terms of the trust, all beneficial
 90 interests in the trust must vest or terminate within the period
 91 prescribed by the rule against perpetuities in s. 689.225(2),
 92 notwithstanding s. 689.225(2)(f), unless the terms of the trust
 93 expressly authorize nonjudicial modification.

94 (c) Created on or after July 1, 2016, during the first 90
 95 years after it is created, unless the terms of the trust
 96 expressly authorize nonjudicial modification under this section.

97 (d) ~~Any trust~~ For which a charitable deduction is allowed
 98 or allowable under the Internal Revenue Code until the
 99 termination of all charitable interests in the trust.

100 (5) For purposes of subsection (4), a revocable trust
 101 shall be treated as created when the right of revocation
 102 terminates.

103 (6) The provisions of this section are in addition to, and
 104 not in derogation of, rights under the common law to modify,

105 amend, terminate, or revoke trusts.

106 Section 4. Subsection (10) of section 736.0802, Florida
 107 Statutes, is amended to read:

108 736.0802 Duty of loyalty.—

109 (10) Unless otherwise provided in this subsection, payment
 110 of costs or attorney ~~attorney's~~ fees incurred in any proceeding
 111 ~~from the assets of the trust~~ may be made by a ~~the~~ trustee from
 112 assets of the trust without the approval of any person and
 113 without court authorization, ~~unless the court orders otherwise~~
 114 as provided in ss. 736.0816(20) and 736.1007(1) paragraph (b).

115 (a) As used in this subsection, the term "pleading" means
 116 a pleading as defined in Rule 1.110 of the Florida Rules of
 117 Civil Procedure.

118 (b) If a trustee incurs attorney fees or costs in
 119 connection with a claim or defense of breach of trust which is
 120 made in a filed pleading, the trustee may pay such attorney fees
 121 or costs from trust assets without the approval of any person
 122 and without any court authorization. However, the trustee must
 123 serve a written notice of intent upon each qualified beneficiary
 124 of the trust whose share of the trust may be affected by the
 125 payment before such payment is made. The notice of intent does
 126 not need to be served upon a qualified beneficiary whose
 127 identity or location is unknown to, and not reasonably
 128 ascertainable by, the trustee.

129 (c) The notice of intent must identify the judicial
 130 proceeding in which the claim or defense of breach of trust has

131 been made in a filed pleading and must inform the person served
132 of his or her right under paragraph (e) to apply to the court
133 for an order prohibiting the trustee from using trust assets to
134 pay attorney fees or costs as provided in paragraph (b) or
135 compelling the return of such attorney fees and costs to the
136 trust. The notice of intent must be served by any commercial
137 delivery service or form of mail requiring a signed receipt; the
138 manner provided in the Florida Rules of Civil Procedure for
139 service of process; or, as to any party over whom the court has
140 already acquired jurisdiction in that judicial proceeding, in
141 the manner provided for service of pleadings and other documents
142 by the Florida Rules of Civil Procedure.

143 (d) If a trustee has used trust assets to pay attorney
144 fees or costs described in paragraph (b) before service of a
145 notice of intent, any qualified beneficiary who is not barred
146 under s. 736.1008 and whose share of the trust may have been
147 affected by such payment is entitled, upon the filing of a
148 motion to compel the return of such payment to the trust, to an
149 order compelling the return of such payment, with interest at
150 the statutory rate. The court shall award attorney fees and
151 costs incurred in connection with the motion to compel as
152 provided in s. 736.1004.

153 (e) Upon the motion of any qualified beneficiary who is
154 not barred under s. 736.1008 and whose share of the trust may be
155 affected by the use of trust assets to pay attorney fees or
156 costs as provided in paragraph (b), the court may prohibit the

157 trustee from using trust assets to make such payment and, if
158 such payment has been made from trust assets after service of a
159 notice of intent, the court may enter an order compelling the
160 return of the attorney fees and costs to the trust, with
161 interest at the statutory rate. In connection with any hearing
162 on a motion brought under this paragraph:

163 1. The court shall deny the motion unless it finds a
164 reasonable basis to conclude that there has been a breach of
165 trust. If the court finds there is a reasonable basis to
166 conclude there has been a breach of trust, the court may still
167 deny the motion if it finds good cause to do so.

168 2. The movant may show that such reasonable basis exists,
169 and the trustee may rebut any such showing by presenting
170 affidavits, answers to interrogatories, admissions, depositions,
171 and any evidence otherwise admissible under the Florida Evidence
172 Code.

173 (f) If a trustee fails to comply with an order of the
174 court prohibiting the use of trust assets to pay attorney fees
175 or costs described in paragraph (b) or fails to comply with an
176 order compelling that such payment be refunded to the trust, the
177 court may impose such remedies or sanctions as the court deems
178 appropriate, including, without limitation, striking the
179 defenses or pleadings filed by the trustee.

180 (g) Notwithstanding the entry of an order prohibiting the
181 use of trust assets to pay attorney fees and costs as provided
182 in paragraph (b), or compelling the return of such attorney fees

183 or costs, if a claim or defense of breach of trust is withdrawn,
184 dismissed, or judicially resolved in the trial court without a
185 determination that the trustee has committed a breach of trust,
186 the trustee is authorized to use trust assets to pay attorney
187 fees and costs as provided in paragraph (b) and may do so
188 without service of a notice of intent or order of the court. The
189 attorney fees and costs may include fees and costs that were
190 refunded to the trust pursuant to an order of the court.

191 (h) This subsection does not limit proceedings under s.
192 736.0206 or remedies for breach of trust under s. 736.1001, or
193 the right of any interested person to challenge or object to the
194 payment of compensation or costs from the trust.

195 ~~(a) If a claim or defense based upon a breach of trust is~~
196 ~~made against a trustee in a proceeding, the trustee shall~~
197 ~~provide written notice to each qualified beneficiary of the~~
198 ~~trust whose share of the trust may be affected by the payment of~~
199 ~~attorney's fees and costs of the intention to pay costs or~~
200 ~~attorney's fees incurred in the proceeding from the trust prior~~
201 ~~to making payment. The written notice shall be delivered by~~
202 ~~sending a copy by any commercial delivery service requiring a~~
203 ~~signed receipt, by any form of mail requiring a signed receipt,~~
204 ~~or as provided in the Florida Rules of Civil Procedure for~~
205 ~~service of process. The written notice shall inform each~~
206 ~~qualified beneficiary of the trust whose share of the trust may~~
207 ~~be affected by the payment of attorney's fees and costs of the~~
208 ~~right to apply to the court for an order prohibiting the trustee~~

209 ~~from paying attorney's fees or costs from trust assets. If a~~
210 ~~trustee is served with a motion for an order prohibiting the~~
211 ~~trustee from paying attorney's fees or costs in the proceeding~~
212 ~~and the trustee pays attorney's fees or costs before an order is~~
213 ~~entered on the motion, the trustee and the trustee's attorneys~~
214 ~~who have been paid attorney's fees or costs from trust assets to~~
215 ~~defend against the claim or defense are subject to the remedies~~
216 ~~in paragraphs (b) and (c).~~

217 ~~(b) If a claim or defense based upon breach of trust is~~
218 ~~made against a trustee in a proceeding, a party must obtain a~~
219 ~~court order to prohibit the trustee from paying costs or~~
220 ~~attorney's fees from trust assets. To obtain an order~~
221 ~~prohibiting payment of costs or attorney's fees from trust~~
222 ~~assets, a party must make a reasonable showing by evidence in~~
223 ~~the record or by proffering evidence that provides a reasonable~~
224 ~~basis for a court to conclude that there has been a breach of~~
225 ~~trust. The trustee may proffer evidence to rebut the evidence~~
226 ~~submitted by a party. The court in its discretion may defer~~
227 ~~ruling on the motion, pending discovery to be taken by the~~
228 ~~parties. If the court finds that there is a reasonable basis to~~
229 ~~conclude that there has been a breach of trust, unless the court~~
230 ~~finds good cause, the court shall enter an order prohibiting the~~
231 ~~payment of further attorney's fees and costs from the assets of~~
232 ~~the trust and shall order attorney's fees or costs previously~~
233 ~~paid from assets of the trust to be refunded. An order entered~~
234 ~~under this paragraph shall not limit a trustee's right to seek~~

235 ~~an order permitting the payment of some or all of the attorney's~~
236 ~~fees or costs incurred in the proceeding from trust assets,~~
237 ~~including any fees required to be refunded, after the claim or~~
238 ~~defense is finally determined by the court. If a claim or~~
239 ~~defense based upon a breach of trust is withdrawn, dismissed, or~~
240 ~~resolved without a determination by the court that the trustee~~
241 ~~committed a breach of trust after the entry of an order~~
242 ~~prohibiting payment of attorney's fees and costs pursuant to~~
243 ~~this paragraph, the trustee may pay costs or attorney's fees~~
244 ~~incurred in the proceeding from the assets of the trust without~~
245 ~~further court authorization.~~

246 ~~(c) If the court orders a refund under paragraph (b), the~~
247 ~~court may enter such sanctions as are appropriate if a refund is~~
248 ~~not made as directed by the court, including, but not limited~~
249 ~~to, striking defenses or pleadings filed by the trustee. Nothing~~
250 ~~in this subsection limits other remedies and sanctions the court~~
251 ~~may employ for the failure to refund timely.~~

252 ~~(d) Nothing in this subsection limits the power of the~~
253 ~~court to review fees and costs or the right of any interested~~
254 ~~persons to challenge fees and costs after payment, after an~~
255 ~~accounting, or after conclusion of the litigation.~~

256 ~~(e) Notice under paragraph (a) is not required if the~~
257 ~~action or defense is later withdrawn or dismissed by the party~~
258 ~~that is alleging a breach of trust or resolved without a~~
259 ~~determination by the court that the trustee has committed a~~
260 ~~breach of trust.~~

261 Section 5. Subsection (20) of section 736.0816, Florida
262 Statutes, is amended to read:

263 736.0816 Specific powers of trustee.—Except as limited or
264 restricted by this code, a trustee may:

265 (20) Employ persons, including, but not limited to,
266 attorneys, accountants, investment advisers, or agents, even if
267 they are the trustee, an affiliate of the trustee, or otherwise
268 associated with the trustee, to advise or assist the trustee in
269 the exercise of any of the trustee's powers and pay reasonable
270 compensation and costs incurred in connection with such
271 employment from the assets of the trust, subject to s.
272 736.0802(10) with respect to attorney fees and costs, and act
273 without independent investigation on the recommendations of such
274 persons.

275 Section 6. Subsection (1) of section 736.1007, Florida
276 Statutes, is amended to read:

277 736.1007 Trustee's attorney's fees.—

278 (1) If the trustee of a revocable trust retains an
279 attorney to render legal services in connection with the initial
280 administration of the trust, the attorney is entitled to
281 reasonable compensation for those legal services, payable from
282 the assets of the trust, subject to s. 736.0802(10), without
283 court order. The trustee and the attorney may agree to
284 compensation that is determined in a manner or amount other than
285 the manner or amount provided in this section. The agreement is
286 not binding on a person who bears the impact of the compensation

HB 393

2016

287 unless that person is a party to or otherwise consents to be
288 bound by the agreement. The agreement may provide that the
289 trustee is not individually liable for the attorney ~~attorney's~~
290 fees and costs.

291 Section 7. This act shall take effect July 1, 2016.