

1 A bill to be entitled
2 An act relating to estates; creating s. 731.1055,
3 F.S.; providing that the validity and the effect of a
4 specified disposition of real property be determined
5 by Florida law; amending ss. 731.106 and 736.0105,
6 F.S.; conforming provisions to changes made by the
7 act; amending s. 736.0412, F.S.; providing
8 applicability for nonjudicial modification of an
9 irrevocable trust; amending s. 736.0802, F.S.;
10 defining the term "pleading"; authorizing a trustee to
11 pay attorney fees and costs from the assets of the
12 trust without specified approval or court
13 authorization in certain circumstances; requiring the
14 trustee to serve a written notice of intent upon each
15 qualified beneficiary of the trust before the payment
16 is made; requiring the notice to contain specified
17 information and to be served in a specified manner;
18 providing that specified qualified beneficiaries are
19 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; authorizing
22 the court to prohibit a trustee from using trust
23 assets to make a specified payment; authorizing the
24 court to enter an order compelling the return of
25 specified attorney fees and costs to the trust with
26 interest at the statutory rate; requiring the court to

27 deny a specified motion unless the court finds a
 28 reasonable basis to conclude that there has been a
 29 breach of trust; authorizing a court to deny the
 30 motion for good cause; authorizing the movant to show
 31 that a reasonable basis exists, and a trustee to rebut
 32 the showing, through specified means; authorizing the
 33 court to impose remedies or sanctions; authorizing a
 34 trustee to use trust assets in a specified manner if a
 35 claim or defense of breach of trust is withdrawn,
 36 dismissed, or judicially resolved in a trial court
 37 without a determination that the trustee has committed
 38 a breach of trust; providing construction; amending
 39 ss. 736.0816 and 736.1007, F.S.; conforming provisions
 40 to changes made by the act; providing an effective
 41 date.

42
 43 Be It Enacted by the Legislature of the State of Florida:

44
 45 Section 1. Section 731.1055, Florida Statutes, is created
 46 to read:

47 731.1055 Disposition of real property.—The validity and
 48 effect of a disposition, whether intestate or testate, of real
 49 property in this state shall be determined by Florida law.

50 Section 2. Subsection (2) of section 731.106, Florida
 51 Statutes, is amended to read:

52 731.106 Assets of nondomiciliaries.—

53 (2) When a nonresident decedent, whether or not a citizen
 54 of the United States, provides by will that the testamentary
 55 disposition of tangible or intangible personal property having a
 56 situs within this state, ~~or of real property in this state,~~
 57 shall be construed and regulated by the laws of this state, the
 58 validity and effect of the dispositions shall be determined by
 59 Florida law. The court may, and in the case of a decedent who
 60 was at the time of death a resident of a foreign country the
 61 court shall, direct the personal representative appointed in
 62 this state to make distribution directly to those designated by
 63 the decedent's will as beneficiaries of the tangible or
 64 intangible property or to the persons entitled to receive the
 65 decedent's personal estate under the laws of the decedent's
 66 domicile.

67 Section 3. Paragraph (k) of subsection (2) of section
 68 736.0105, Florida Statutes, is amended to read:

69 736.0105 Default and mandatory rules.—

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

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

74 Section 4. Section 736.0412, Florida Statutes, is amended
 75 to read:

76 736.0412 Nonjudicial modification of irrevocable trust.—

77 (1) After the settlor's death, a trust may be modified at
 78 any time as provided in s. 736.04113(2) upon the unanimous

79 agreement of the trustee and all qualified beneficiaries.

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

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

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

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

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

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

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

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

104 (6) The provisions of this section are in addition to, and

105 not in derogation of, rights under the common law to modify,
106 amend, terminate, or revoke trusts.

107 Section 5. Subsection (10) of section 736.0802, Florida
108 Statutes, is amended to read:

109 736.0802 Duty of loyalty.—

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

116 (a) As used in this subsection, the term "pleading" means
117 a pleading as defined in Rule 1.100 of the Florida Rules of
118 Civil Procedure.

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

130 (c) The notice of intent must identify the judicial

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

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

154 (e) Upon the motion of any qualified beneficiary who is
155 not barred under s. 736.1008 and whose share of the trust may be
156 affected by the use of trust assets to pay attorney fees or

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

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

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

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

181 (g) Notwithstanding the entry of an order prohibiting the
182 use of trust assets to pay attorney fees and costs as provided

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

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

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

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

218 ~~(b) If a claim or defense based upon breach of trust is~~
219 ~~made against a trustee in a proceeding, a party must obtain a~~
220 ~~court order to prohibit the trustee from paying costs or~~
221 ~~attorney's fees from trust assets. To obtain an order~~
222 ~~prohibiting payment of costs or attorney's fees from trust~~
223 ~~assets, a party must make a reasonable showing by evidence in~~
224 ~~the record or by proffering evidence that provides a reasonable~~
225 ~~basis for a court to conclude that there has been a breach of~~
226 ~~trust. The trustee may proffer evidence to rebut the evidence~~
227 ~~submitted by a party. The court in its discretion may defer~~
228 ~~ruling on the motion, pending discovery to be taken by the~~
229 ~~parties. If the court finds that there is a reasonable basis to~~
230 ~~conclude that there has been a breach of trust, unless the court~~
231 ~~finds good cause, the court shall enter an order prohibiting the~~
232 ~~payment of further attorney's fees and costs from the assets of~~
233 ~~the trust and shall order attorney's fees or costs previously~~
234 ~~paid from assets of the trust to be refunded. An order entered~~

235 ~~under this paragraph shall not limit a trustee's right to seek~~
236 ~~an order permitting the payment of some or all of the attorney's~~
237 ~~fees or costs incurred in the proceeding from trust assets,~~
238 ~~including any fees required to be refunded, after the claim or~~
239 ~~defense is finally determined by the court. If a claim or~~
240 ~~defense based upon a breach of trust is withdrawn, dismissed, or~~
241 ~~resolved without a determination by the court that the trustee~~
242 ~~committed a breach of trust after the entry of an order~~
243 ~~prohibiting payment of attorney's fees and costs pursuant to~~
244 ~~this paragraph, the trustee may pay costs or attorney's fees~~
245 ~~incurred in the proceeding from the assets of the trust without~~
246 ~~further court authorization.~~

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

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

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

261 ~~breach of trust.~~

262 Section 6. Subsection (20) of section 736.0816, Florida
 263 Statutes, is amended to read:

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

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

276 Section 7. Subsection (1) of section 736.1007, Florida
 277 Statutes, is amended to read:

278 736.1007 Trustee's attorney ~~attorney's~~ fees.—

279 (1) If the trustee of a revocable trust retains an
 280 attorney to render legal services in connection with the initial
 281 administration of the trust, the attorney is entitled to
 282 reasonable compensation for those legal services, payable from
 283 the assets of the trust, subject to s. 736.0802(10), without
 284 court order. The trustee and the attorney may agree to
 285 compensation that is determined in a manner or amount other than
 286 the manner or amount provided in this section. The agreement is

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287 | not binding on a person who bears the impact of the compensation
288 | unless that person is a party to or otherwise consents to be
289 | bound by the agreement. The agreement may provide that the
290 | trustee is not individually liable for the attorney ~~attorney's~~
291 | fees and costs.

292 | Section 8. This act shall take effect July 1, 2016.