

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 Banking and Insurance

BILL: CS/SB 1502

INTRODUCER: Banking and Insurance Committee and Senator Powell

SUBJECT: Estates and Trusts

DATE: January 27, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Schrader	Knudson	BI	Fav/CS
2.			JU	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

SB 1502 amends two sections of Florida's estates and trusts law to:

- Codify an existing procedure used by Florida courts to address the circumstance, in probate, where a creditor has pending action against a decedent at the time of the decedent's death.
- Eliminates a provision, under certain circumstances, that if a settlor-spouse creates a lifetime trust for a beneficiary-spouse and names themselves as a subsequent beneficiary if the beneficiary-spouse dies, assets in the trust may be available to the settlor-spouse's creditors pursuant to s. 736.0505(1)(b), F.S.
- Allow trustees to resign from a trust with less than 30 days' notice if the trust instrument specifically allows for this shorter period.

The effective date of the bill is July 1, 2022.

II. Present Situation:

Probate, In General

Probate is a court supervised process for identifying and gathering the assets of a deceased person (also called a decedent), paying the decedent's debts, and distributing the decedent's

assets to beneficiaries.¹ A personal representative (this is Florida’s term for an executor) is appointed to execute this process, and the representative may retain an attorney using funds from the estate.² The personal representative may be appointed by a will, or, if no such person has been appointed (or if the person does not meet the legal requirements to serve as the personal representative), the court will assign a personal representative. A personal representative may be a real person or a bank or trust company, subject to certain restrictions.³

The Florida Probate Code provides the statutory mechanism for the transfer of property from a decedent to persons or entities named in a decedent’s will (often called beneficiaries) or to the decedent’s heirs, if there is no will (called dying intestate). The property transferred via the probate process is called the “estate.”⁴ Assets subject to probate are those that were solely owned by the decedent at their time of death or that were owned by the decedent and one or more co-owners, but such asset lacked a provision for automatic succession of ownership at death.⁵ Some assets owned by a decedent may not be probate assets— these potentially include:⁶

- Bank accounts that are pay-on-death, or transferable on death, to another person, or an account jointly held with rights of survivorship;
- Life insurance, annuities, and retirement accounts payable to a beneficiary;
- Homestead property;
- Real property held as joint tenants with another person with a right of survivorship; and
- Property owned by spouses as tenants in common, so long as the other spouse survives.

If the decedent had a will, the property is transferred as directed by the will. If a person dies intestate, the person’s property is transferred to heirs according to the laws of intestate succession under ch. 732, F.S.⁷

Personal Representative

In order for the decedent’s estate to be transferred to heirs or to the beneficiaries of the will, a petition for administration must be filed with the circuit court; any interested person may file for such administration.⁸ The personal representative must provide a notice of administration to various persons—such as family members and beneficiaries, and other entities such as trustees and persons who may be entitled to exempt property.⁹ Those persons must act to contest the will or take other actions within statutory time limits.¹⁰ The personal representative must search for

¹ The Florida Bar, *Consumer Pamphlet: Probate in Florida*, What is Probate? available at <https://www.floridabar.org/public/consumer/pamphlet026/#whatisprobate> (last visited Jan 21, 2022).

² *Id.* and Section 733.106(2) & (3), F.S.

³ The Florida Bar, *supra* note 1.

⁴ Section 731.201(14), F.S.

⁵ The Florida Bar, *supra* note 1.

⁶ *Id.*

⁷ Section 732.101(1), F.S.

⁸ *See* s. 733.202, F.S.

⁹ *See* s. 733.212, F.S.

¹⁰ *See* s. 733.212(3), F.S.

and provide notice, by publication in a newspaper, to creditors of the decedent.¹¹ This notice must include name of the decedent, the file number of the estate, the designation and address of the court in which the proceedings are pending, the name and address of the personal representative, the name and address of the personal representative's attorney, and the date of first publication.¹² Creditors must generally make claims against the estate within 3 months of first published notice.¹³ As to any creditor required to be served with a copy of the notice to creditors, the deadline is 30 days after the date of service on the creditor.¹⁴

In order for personal representatives to claim monies from bank accounts for the estate, the court must issue letters of administration granting the personal representative the authority to act on behalf of the estate. The letters give the personal representative the power to administer the estate.¹⁵

Creditor Pending Actions

A creditor believing that they are entitled to a compensation from the decedent's estate to satisfy a debt must file a statement of claim in the probate proceeding with the appropriate clerk of the circuit court.¹⁶ The personal representative, or any other interested person, may file an objection to a creditor's statement of claim.¹⁷ If an objection is filed against a creditor's statement of claim, the creditor must file a separate independent lawsuit against the decedent's estate to pursue the claim within thirty days from the date the objection was served.¹⁸ While this procedure is specified in statute for claims that have yet to be filed upon the decedent's death, there exists some conjecture on how to handle claims that had been already filed. That is to say, does the already pending lawsuit satisfy the requirement under s. 733.705(5), F.S., that the claimant bring an independent lawsuit? Currently, Florida does not have an established procedure in statute, or in Florida's Probate Rules, for what occurs when a creditor has a pending action against a decedent that was filed prior to the decedent in question's death. There does, however, appear to be a number of cases that appear to establish how such a situation is to be handled.¹⁹ The Florida Fourth District Court of Appeal, in *Lewsadder v. Estate of Lewsadder*, 757 So. 2d 1221, 1224 (Fla. 4th DCA 2000), summarizes the existing case law regarding current 733.705(5), F.S., thusly:

In applying this statute [current s. 733.705(5), F.S.]²⁰ and its similarly worded predecessor statutes, the courts have held that an action pending against a defendant at the time of the defendant's death will suffice to satisfy the "independent action" provision of the statute when there has been a substitution of

¹¹ See s. 733.2121, F.S.

¹² Section 733.2121(1), F.S.

¹³ See s. 733.702(1), F.S.

¹⁴ *Id.*

¹⁵ The Florida Bar, *supra* note 1.

¹⁶ *Id.* and s. 733.702(1), F.S.

¹⁷ The Florida Bar, *supra* note 1 and s. 733.705, F.S.

¹⁸ The Florida Bar, *supra* note 1 and s. 733.705, F.S.

¹⁹ Probate Law and Procedure Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, *White Paper on Proposed Amendments to S. 733.705(5)*, F.S. (2022).

²⁰ *Lewsadder v. Estate of Lewsadder*, cites to s. 733.705(4), F.S., the pertinent language of which is now codified in s. 733.705(5), F.S.

the personal representative of the decedent's estate, either by timely filed motion for substitution.

Trusts

Chapter 736, F.S., contains the Florida Trust Code (Code). The Code applies to express trusts, charitable or noncharitable, and to trusts created pursuant to a law, judgment, or decree that requires the trust to be administered in the manner of an express trust.²¹

Under the Code, a settlor is the person who creates or contributes property to a trust.²² A beneficiary of a trust is a person who has a present or future beneficial interest in the trust.²³ In general, a trustee is the person who holds the legal title to the property of the trust for the benefit of the trust's beneficiaries. The trustee is granted certain powers over the trust and is subject to certain duties relating to the trust, which are imposed by the terms of the trust, equity jurisprudence, or by statute.²⁴ Under the Code, "trustee" means the original trustee, and also includes any additional trustee, any successor trustee, and any cotrustee.²⁵

Trustees, In General

A trustee derives his or her rules of conduct, extent and limit of authority, and measure of obligation from the trust instrument. Except as otherwise provided in the terms of the trust, the Code governs the duties and powers of a trustee, relations among trustees, and the rights and interests of beneficiaries.²⁶ The terms of a trust prevail over any provision of the Code, except as provided in s. 736.0105(2), F.S., which provides 23 terms that are solely governed by the Code and cannot be changed, waived, or otherwise altered by the terms of the trust.²⁷ This includes the right of a trustee to resign a trusteeship pursuant to s. 736.0705, F.S.

Resignation of a Trustee

Section 736.0705, F.S., provides that trustees may resign:

- Upon at least 30 days' notice to the qualified beneficiaries, the settlor, if living, and all cotrustees; or
- With the approval of the court

In approving a trustee's resignation, a court may issue orders and impose conditions reasonably necessary for the protection of the trust property. Further, s. 736.0705(3), F.S., provides that any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation. If a resigning trustee is the last remaining trustee for the trust, that trustee still retains the fiduciary duties of trustee, and the

²¹ Section 736.0102(1), F.S.

²² Section 736.0103(18), F.S.

²³ Section 736.0103(4), F.S.

²⁴ 55A Fla. Jur 2d Trusts s. 114.

²⁵ Section 736.0103(27), F.S.

²⁶ Section 736.01015(1), F.S.

²⁷ Section 736.0105(2), F.S.

powers necessary to protect trust property, until a successor trustee named by a court is in place.²⁸

Creditor Claims against Settlers

Section 736.0505, F.S., specifies provisions regarding when a creditor may bring a claim against the property in a trust. For revocable trusts, creditors may bring claims against the property in said trust during the settlor's lifetime to the extent the property would not otherwise be exempt by law if owned directly by the settlor. For irrevocable trusts, a creditor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution. Essentially, this provision, codified as s. 736.0505(1)(b), F.S., prevents the creation, if one wishes to maintain the trust's creditor protections, of a trust where a settlor is also a beneficiary. An example of this would be where a settlor-spouse sets up a trust for a beneficiary spouse, with the provision that the trust reverts back to the settlor if the beneficiary-spouse pre-deceases the settlor. Florida law currently provides exceptions to this rule for life estate with power of appointment in the beneficiary-spouse and lifetime irrevocable trusts for which a qualified terminable interest property election has been made.²⁹

III. Effect of Proposed Changes:

Section 1 of the bill amends s. 733.705, F.S. to codify an existing procedure presently used in Florida courts regarding creditor's pending action against a decedent at the time of the decedent's death. Specifically, the proposed provision states that if an action or proceeding by the claimant is pending against a decedent at the time of said decedent's death, the requirement to bring an independent action under present s. 733.705(5), F.S., is satisfied if, within 30 days after the filing of an objection to the claim, one the following conditions are met:

- A motion complying with all applicable rules of procedure is filed, or a similar procedure is initiated, to substitute the proper party (i.e. the decedent's estate instead of the decedent).
- An order substituting the proper party is entered.

The proposed section also provides a similar procedure for circumstances where the decedent entered into a binding arbitration agreement relating to the claim during that person's lifetime, or if arbitration is required under s. 731.401 (regarding arbitration of disputes when arbitration provisions are included in the will or trust instrument). The proposed provision, in this circumstance, calls for a motion to be interested to compel arbitration against the decedent's estate (instead of the decedent). If arbitration had already commenced at the time of the decedent's death, then the requirement is for simply notice to be provided to the proper party.³⁰

Section 2 of the bill amends s. 736.0505, F.S., regarding creditor claims against settlers. Currently, under Florida law, if a settlor-spouse creates a lifetime trust for a beneficiary-spouse

²⁸ Section 736.0707(1), F.S.

²⁹ Section 736.0505(3), F.S.

³⁰ Where such arbitration had been undertaken pursuant to court order, such notice must take the form of a properly filed notice with such court.

and names themselves as a subsequent beneficiary if the beneficiary-spouse dies, assets in the trust may be available to the settlor-spouse's creditors pursuant to s. 736.0505(1)(b), F.S. The CS eliminates this provision for irrevocable trusts (using certain tax exemptions) where the beneficiary is the settlor's spouse for that spouse's lifetime and the transfers to the trust are completed gifts pursuant to s. 2511 of the Internal Revenue Code of 1986.³¹

Section 3 of the bill amends s. 736.0705, F.S., to make it easier for a trustee to resign. The provision clarifies that a trust instrument can make it easier for a trustee to resign from a trust. Specifically, the proposed provision allows that if a shorter notice period than the current 30-day notice provision provided in s. 736.0705(1)(a) is allowed for under the trust instrument, then the trustee may resign utilizing this shorter period—subject to certain noticing requirements. It does maintain current law that a trustee may still also resign with 30-days' notice, or with approval of the court, and these provisions may not be altered by the trust instrument.

Section 3 of the bill provides and effective date of the bill of July 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

³¹ Principally, a completed gift is when:

- There is an irrevocable transfer by the settlor;
- Who is competent to make the gift;
- Who unmistakably intends to divest themselves of title, dominion, and control over the subject matter of said gift;
- To a donor (i.e. beneficiary) capable of accepting said gift.

See Talge v. United States, 229 F. Supp. 836 (W.D. Mo. 1964), *Finley v. C.I.R.*, 255 F.2d 128 (10th Cir. 1958), and *Jordan v. United States*, 297 F. Supp. 1326 (W.D. Okla. 1969).

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

The revisions to the trust code, expanding the types of trusts that are protected from creditors when certain tax exemptions are utilized, will likely serve to encourage Florida residents to use these types of trusts. The persons impacted and able to establish such trusts may see significant federal tax benefits from doing so.

B. Private Sector Impact:

The revisions to the trust code, expanding the types of trusts that are protected from creditors when certain tax exemptions are utilized, will likely serve to encourage Florida residents to use these types of trusts. This will likely cause additional assets owned by Floridians to be protected from creditors and likely have a negative financial impact on creditors seeking to recover debts from persons who have established such trusts.

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: 733.705 and 736.0705.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

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

CS by Banking and Insurance on January 25, 2022:

Currently, under Florida law, if a settlor-spouse creates a lifetime trust for a beneficiary-spouse and names themselves as a subsequent beneficiary if the beneficiary-spouse dies, assets in the trust may be available to the settlor-spouse's creditors pursuant to s. 736.0505(1)(b), F.S. The CS eliminates this provision for irrevocable trusts (using certain tax exemptions) where the beneficiary is the settlor's spouse for that spouse's lifetime and the transfers to the trust are completed gifts pursuant to s. 2511 of the Internal Revenue Code of 1986.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
