

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: CS/SB 1502

INTRODUCER: Banking and Insurance Committee and Senator Powell

SUBJECT: Estates and Trusts

DATE: February 4, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Schrader</u>	<u>Knudson</u>	<u>BI</u>	<u>Fav/CS</u>
2.	<u>Bond</u>	<u>Cibula</u>	<u>JU</u>	<u>Favorable</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1502 amends probate and trust law to:

- Make an independent action against a decedent's estate unnecessary by expressly allowing the personal representative of the decedent's estate to be substituted as the defendant to a lawsuit or other proceeding that was initiated against the decedent before his or her death.
- Provide that assets contributed to certain irrevocable trusts for the benefit of a beneficiary spouse for his or her lifetime are not subject to creditor claims by the settlor-spouse's creditors.
- Allow a trust instrument to specify terms for resignation of a trustee provided that specified notice is given.

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 legal 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 his or her 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 chapter 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 administration.⁸ The personal representative must provide a notice of administration to various persons, including creditors, family members, beneficiaries, 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 and provide notice, by publication in a newspaper, to creditors of the decedent.¹¹ This notice must include the 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

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.

¹¹ *See* s. 733.2121, F.S.

address of the personal representative's attorney, and the date of first publication.¹² Creditors must generally make claims against the estate within three months after the 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

Creditor Pending Actions

A creditor believing that he or she is entitled to a compensation from the decedent's estate to satisfy a debt of the decedent must file a statement of claim in the probate proceeding with the appropriate clerk of the circuit court.¹⁵ The personal representative, or any other interested person, may file an objection to a creditor's statement of claim.¹⁶ 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 30 days from the date the objection was served.¹⁷ 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 a claim 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 the Florida Probate Rules, for what occurs when a creditor has a pending action against a decedent that was filed prior to the decedent's death. An appellate court ruled on the apparent statutory gap:

[I]n applying this statute [current s. 733.705(5), F.S.]¹⁸ 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 the personal representative of the decedent's estate, either by timely filed motion for substitution, or by the personal representative's voluntary substitution.¹⁹

Trusts

Chapter 736, F.S., is 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.²⁰ Trusts commonly have a testamentary feature, and thus the laws on probate and trusts often intersect.

¹² Section 733.2121(1), F.S.

¹³ See s. 733.702(1), F.S.

¹⁴ *Id.*

¹⁵ *Id.* and s. 733.702(1), F.S.

¹⁶ The Florida Bar, *supra* note 1 and s. 733.705, F.S.

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

¹⁸ The case cites to s. 733.705(4), F.S., the pertinent language of which is now codified in s. 733.705(5), F.S.

¹⁹ *Lewsadder v. Estate of Lewsadder*, 757 So. 2d 1221, 1224 (Fla. 4th DCA 2000)(internal citations omitted).

²⁰ Section 736.0102(1), F.S.

Under the Code, a settlor is the person who creates or contributes property to a trust.²¹ A beneficiary of a trust is a person who has a present or future beneficial interest in the trust.²² 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.²³ Under the Code, "trustee" means the original trustee, and also includes any additional trustee, any successor trustee, and any cotrustee.²⁴

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.²⁵ 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.²⁶ The right of a trustee to resign as trustee for a trust is one of those mandatory provisions.²⁷

Resignation of a Trustee

Section 736.0705, F.S., provides that a trustee 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 powers necessary to protect trust property, until a successor trustee is in place.²⁸

Creditor Claims against Trust 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 the 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 only the maximum amount that can be distributed from the trust 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

²¹ Section 736.0103(18), F.S.

²² Section 736.0103(4), F.S.

²³ 55A Fla. Jur 2d Trusts s. 114.

²⁴ Section 736.0103(27), F.S.

²⁵ Section 736.01015(1), F.S.

²⁶ Section 736.0105(2), F.S.

²⁷ Section 736.0105(2)(o), F.S.

²⁸ Section 736.0707(1), F.S.

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 remainder of the trust assets revert back to the settlor if the beneficiary-spouse pre-deceases the settlor. Florida law currently provides exceptions to this rule for a 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 bill provides that if an action or proceeding by the claimant is pending against a decedent at the time of the 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 of 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 bill 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, F.S., (regarding arbitration of disputes when arbitration provisions are included in the will or trust instrument). The bill, in this circumstance, requires a motion to compel arbitration against the decedent's estate (instead of the decedent). If voluntary arbitration had already commenced at the time of the decedent's death, the bill requires notice of the substitution consistent with the arbitration agreement. If the arbitration was court ordered, a motion for substitution is required.

Section 2 of the bill amends s. 736.0505, F.S., regarding creditor claims against settlors. Currently, if a settlor-spouse creates a lifetime trust for a beneficiary-spouse and names himself or herself 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., during the lifetime of beneficiary-spouse. The bill provides that creditors of a settlor may not attach assets that the settlor previously transferred to an irrevocable trust where the beneficiary of the trust 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 1986.³⁰

²⁹ Section 736.0505(3), F.S.

³⁰ 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 the gift; and
- A donee (i.e. beneficiary) capable of accepting the 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).

Section 3 of the bill amends s. 736.0705, F.S., to add that a trustee may resign pursuant to whatever procedure is set forth in the terms of the trust. In part, this allows a trustee to resign with less than 30 days' notice if the trust instrument allows. A trustee resigning under the terms of a trust must give notice of the resignation to cotrustees. If there are no cotrustees, notice must be given to the successor trustee who has accepted the appointment. If there are no cotrustees or successor trustee, notice must be given to whoever has the authority to appoint a successor trustee. These notice provisions are mandatory.

Section 4 of the bill provides an effective date for the bill of July 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in article VII, section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

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: 733.705, 736.0705, and 736.0505.

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.