

By Senator Hukill

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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

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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37 defense of breach of trust is withdrawn, dismissed, or  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

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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 this  
70 code except:

71 (k) The ability to modify a trust under s. 736.0412, except  
72 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.

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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 shall  
101 be treated as created when the right of revocation terminates.

102 (6) The provisions of this section are in addition to, and  
103 not in derogation of, rights under the common law to modify,  
104 amend, terminate, or revoke trusts.

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

107 736.0802 Duty of loyalty.—

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

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

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

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

142       (d) If a trustee has used trust assets to pay attorney fees  
143 or costs described in paragraph (b) before service of a notice  
144 of intent, any qualified beneficiary who is not barred under s.  
145 736.1008 and whose share of the trust may have been affected by

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146 such payment is entitled, upon the filing of a motion to compel  
147 the return of such payment to the trust, to an order compelling  
148 the return of such payment, with interest at the statutory rate.  
149 The court shall award attorney fees and costs incurred in  
150 connection with the motion to compel as provided in s. 736.1004.

151 (e) Upon the motion of any qualified beneficiary who is not  
152 barred under s. 736.1008 and whose share of the trust may be  
153 affected by the use of trust assets to pay attorney fees or  
154 costs as provided in paragraph (b), the court may prohibit the  
155 trustee from using trust assets to make such payment and, if  
156 such payment has been made from trust assets after service of a  
157 notice of intent, the court may enter an order compelling the  
158 return of the attorney fees and costs to the trust, with  
159 interest at the statutory rate. In connection with any hearing  
160 on a motion brought under this paragraph:

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

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

171 (f) If a trustee fails to comply with an order of the court  
172 prohibiting the use of trust assets to pay attorney fees or  
173 costs described in paragraph (b) or fails to comply with an  
174 order compelling that such payment be refunded to the trust, the

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175 court may impose such remedies or sanctions as the court deems  
176 appropriate, including, without limitation, striking the  
177 defenses or pleadings filed by the trustee.

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

189 (h) This subsection does not limit proceedings under s.  
190 736.0206 or remedies for breach of trust under s. 736.1001, or  
191 the right of any interested person to challenge or object to the  
192 payment of compensation or costs from the trust.

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

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204 ~~qualified beneficiary of the trust whose share of the trust may~~  
205 ~~be affected by the payment of attorney's fees and costs of the~~  
206 ~~right to apply to the court for an order prohibiting the trustee~~  
207 ~~from paying attorney's fees or costs from trust assets. If a~~  
208 ~~trustee is served with a motion for an order prohibiting the~~  
209 ~~trustee from paying attorney's fees or costs in the proceeding~~  
210 ~~and the trustee pays attorney's fees or costs before an order is~~  
211 ~~entered on the motion, the trustee and the trustee's attorneys~~  
212 ~~who have been paid attorney's fees or costs from trust assets to~~  
213 ~~defend against the claim or defense are subject to the remedies~~  
214 ~~in paragraphs (b) and (c).~~

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



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

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

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

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

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

261 736.0816 Specific powers of trustee.—Except as limited or

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262 restricted by this code, a trustee may:

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

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

275 736.1007 Trustee's attorney's fees.—

276 (1) If the trustee of a revocable trust retains an attorney  
277 to render legal services in connection with the initial  
278 administration of the trust, the attorney is entitled to  
279 reasonable compensation for those legal services, payable from  
280 the assets of the trust, subject to s. 736.0802(10), without  
281 court order. The trustee and the attorney may agree to  
282 compensation that is determined in a manner or amount other than  
283 the manner or amount provided in this section. The agreement is  
284 not binding on a person who bears the impact of the compensation  
285 unless that person is a party to or otherwise consents to be  
286 bound by the agreement. The agreement may provide that the  
287 trustee is not individually liable for the attorney ~~attorney's~~  
288 fees and costs.

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