

By the Committees on Banking and Insurance; and Judiciary; and
Senator Hukill

597-01758-16

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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
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 of intent to contain
17 specified information and to be served in a specified
18 manner; providing that specified qualified
19 beneficiaries may be entitled to an order compelling
20 the refund of a specified payment to the trust;
21 requiring the court to award specified attorney fees
22 and costs in certain circumstances; authorizing the
23 court to prohibit a trustee from using trust assets to
24 make a specified payment; authorizing the court to
25 enter an order compelling the return of specified
26 attorney fees and costs to the trust with interest at
27 the statutory rate; requiring the court to deny a
28 specified motion unless the court finds a reasonable
29 basis to conclude that there has been a breach of the

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38 trust is withdrawn, dismissed, or judicially resolved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

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

47
48 Section 1. Section 731.1055, Florida Statutes, is created
49 to read:

50 731.1055 Disposition of real property.-The validity and
51 effect of a disposition, whether intestate or testate, of real
52 property in this state shall be determined by Florida law.

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

55 731.106 Assets of nondomiciliaries.-

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

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

70 Section 3. Paragraph (k) of subsection (2) of section
71 736.0105, Florida Statutes, is amended to read:

72 736.0105 Default and mandatory rules.-

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

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

77 Section 4. Section 736.0412, Florida Statutes, is amended
78 to read:

79 736.0412 Nonjudicial modification of irrevocable trust.-

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

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

87 (3) An agreement to modify a trust under this section is

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88 binding on a beneficiary whose interest is represented by
89 another person under part III of this code.

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

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

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

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

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

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

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

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

111 736.0802 Duty of loyalty.—

112 (10) Unless otherwise provided in this subsection, payment
113 of costs or attorney ~~attorney's~~ fees incurred in any proceeding
114 ~~from the assets of the trust~~ may be made by a ~~the~~ trustee from
115 assets of the trust without the approval of any person and
116 without court authorization, ~~unless the court orders otherwise~~

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117 as provided in ss. 736.0816(20) and 736.1007(1) ~~paragraph (b)~~.

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

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

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

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

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

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

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

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

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

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

197 ~~(a) If a claim or defense based upon a breach of trust is~~
198 ~~made against a trustee in a proceeding, the trustee shall~~
199 ~~provide written notice to each qualified beneficiary of the~~
200 ~~trust whose share of the trust may be affected by the payment of~~
201 ~~attorney's fees and costs of the intention to pay costs or~~
202 ~~attorney's fees incurred in the proceeding from the trust prior~~
203 ~~to making payment. The written notice shall be delivered by~~

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204 ~~sending a copy by any commercial delivery service requiring a~~
205 ~~signed receipt, by any form of mail requiring a signed receipt,~~
206 ~~or as provided in the Florida Rules of Civil Procedure for~~
207 ~~service of process. The written notice shall inform each~~
208 ~~qualified beneficiary of the trust whose share of the trust may~~
209 ~~be affected by the payment of attorney's fees and costs of the~~
210 ~~right to apply to the court for an order prohibiting the trustee~~
211 ~~from paying attorney's fees or costs from trust assets. If a~~
212 ~~trustee is served with a motion for an order prohibiting the~~
213 ~~trustee from paying attorney's fees or costs in the proceeding~~
214 ~~and the trustee pays attorney's fees or costs before an order is~~
215 ~~entered on the motion, the trustee and the trustee's attorneys~~
216 ~~who have been paid attorney's fees or costs from trust assets to~~
217 ~~defend against the claim or defense are subject to the remedies~~
218 ~~in paragraphs (b) and (c).~~

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

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

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

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

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

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262 ~~breach of trust.~~

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

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

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

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

279 736.1007 Trustee's attorney's fees.—

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

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291 trustee is not individually liable for the attorney ~~attorney's~~
292 fees and costs.

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

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