

**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 Banking and Insurance Committee

BILL: CS/CS/SB 998

INTRODUCER: Judiciary Committee and Senator Thrasher

SUBJECT: Trust Administration

DATE: March 10, 2010                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Maclure	JU	Fav/CS
2.	Messer	Burgess	BI	Fav/CS
3.				
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

A. COMMITTEE SUBSTITUTE.....  Statement of Substantial Changes

B. AMENDMENTS.....  Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

**I. Summary:**

The bill limits a personal representative’s entitlement to payment from a trust of certain estate expenses and obligations. It clarifies that when spouses contributing to an irrevocable trust make a “split gift election,” two annual exclusion amounts for gift tax purposes are exempt from claims by creditors of a beneficiary who has the right to withdraw the contributions to the trust when the power to withdraw lapses.

It deletes certain duplicative and unnecessary provisions concerning proceedings to determine reasonable compensation for the attorney for the trustee and notice in proceedings to determine reasonable compensation of trustees and persons employed by trustees. It provides that the court in such proceedings has the discretion to award a reasonable expert witness fee from the assets of the trust unless it finds that the expert testimony did not assist the court. The bill clarifies current law that specific gifts under both the will and trust are to be appropriated proportionately to pay expenses and obligations if the residue of the will or trust is insufficient to pay them.

The bill creates a new statutory section to address the suspension of the federal Economic Growth and Tax Relief Reconciliation Act of 2001 (2001 Act). It permits qualified beneficiaries of a trust to request the court to construe the terms of a trust that is not revocable at the time of

the request. The qualified beneficiary may request the court to define the respective shares or determine beneficiaries in accordance with the settlor's intention, if the trust contains provisions that include specific formulas and other tax related provisions.

This bill substantially amends the following sections of the Florida Statutes: 733.607, 733.707, 736.0206, 736.0505, 736.05053, and 736.1007. This bill also creates section 736.04114, Florida Statutes.

## II. Present Situation:

A personal representative is a fiduciary who is charged with settling and distributing the estate of a decedent in accordance with the terms of the will and the provisions of the Florida Probate Code.<sup>1</sup> This activity includes paying the valid claims against the decedent, paying administration expenses, paying taxes, and distributing the assets to those persons who are entitled to them.<sup>2</sup>

If a decedent's probate estate assets are insufficient to pay expenses of administering the estate and other obligations, s. 733.607(2), F.S., provides that the probate estate can request that the insufficiency be paid from the decedent's revocable trust, if one exists. Similarly, s. 733.707(3), F.S., also provides that a probate estate may require a decedent's revocable trust to pay expenses and obligations of the probate estate. Section 733.805, F.S., provides for the order in which assets are paid. Although the decedent may designate assets to pay certain claims, it does not affect the statutory priority of payment in this section.<sup>3</sup>

### Trusts

The trust code is encompassed in ch. 36, F.S. It applies to "express trusts, charitable or noncharitable, and trusts created pursuant to a law, judgment, or decree that requires the trust to be administered in the manner of an express trust."<sup>4</sup>

### Compensation of Trust Professionals

The compensation of any person employed by a trust, including the trustee and professionals employed by the trustee, is subject to court supervision and review.<sup>5</sup> Section 736.0206(1), F.S., requires that all interested parties must be given notice of an application for compensation.

The court is not required under s. 736.0206, F.S., to obtain expert testimony to justify a request for compensation. If a party objects to compensation, one or more of the parties may employ an expert witness to testify as to the reasonableness of the compensation. If an interested party objects to compensation of any person, the statute requires the trust to pay an expert witness fee should an expert testify.

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<sup>1</sup> Section 733.602.

<sup>2</sup> Henry P. Trawick, Jr., *Redfearn Wills and Administration in Florida*, 89-90 (2009-2010).

<sup>3</sup> *Id.* at 119.

<sup>4</sup> Section 736.0102, F.S.

<sup>5</sup> Section 736.0201, F.S.

## Economic Growth and Tax Relief Reconciliation Act of 2001

The federal Economic Growth and Tax Relief Reconciliation Act of 2001,<sup>6</sup> also referred to in tax-law circles as EGTRRA and the 2001 Act, made significant changes to the United States Internal Revenue Code in the areas of income tax rates, estate and gift tax exclusions, and qualified and retirement plan rules. The federal estate and generation-skipping transfer (GST) tax provisions of the Act were suspended for 2010, when in 2009 Congress was unable to reach a consensus about its reenactment.<sup>7</sup> Enumerated wills and trusts created before and after 2001 that contain provisions that contemplated that the federal estate and generation-skipping transfer (GST) tax provisions would be in effect in 2010 will be affected.<sup>8</sup> At least 13 states, including Florida, Georgia, New York, and Virginia, have introduced or are planning to introduce legislation that will clarify estate tax law in the absence of a federal statute.<sup>9</sup>

### Creditor Claims Against Trust Assets

Section 736.0505(1), F.S., provides that, whether or not a trust includes a spendthrift provision:<sup>10</sup>

- Property of a revocable trust is subject to the claims of the settlor's<sup>11</sup> creditors during the settlor's lifetime unless exempt by law; and
- A settlor's creditor or assignee of an irrevocable trust may reach the maximum that can be distributed to or for the benefit of the settlor. Notwithstanding this ability, the assets of the trust are not subject to the creditor's or assignee's claims merely because the trustee possesses the power to pay tax liabilities of the settlor.

Additionally, s. 736.0505(2)(a), F.S., provides that a person holding a power of withdrawal (the right to demand money from the trust) is treated the same as a settlor of the trust for purposes of the claims of creditors of the person holding that power. While the power of withdrawal is available, the full amount subject to withdrawal may be garnished by a creditor of a person holding the power. Upon the lapse, release, or waiver of the power of withdrawal, however, s. 736.0505(2)(b), F.S., provides that a creditor may only claim the amount that could have been withdrawn that was in excess of the greater of the federal gift tax exclusions.

According to the Real Property, Probate, and Trust Law Section of The Florida Bar (RPPTL), trusts are often drafted so that "a contribution by a married person can be equal to two annual exclusion amounts if the contributor's spouse makes a 'split gift election,' and the power to

<sup>6</sup> Pub. L. 107-16, 115 Stat. 38 (June 7, 2001).

<sup>7</sup> Diana S.C. Zeydel, Norman J. Benford, Linda B. Hirschson, and Elizabeth Glasgow, Greenberg Traurig LLP, *Coping with the uncertain effects of estate and GST tax repeal in 2010* (Feb. 1, 2010), [www.lexology.com/library/detail.aspx?g=3cda3376-115a-49a9-ac83-b367fa8ff934](http://www.lexology.com/library/detail.aspx?g=3cda3376-115a-49a9-ac83-b367fa8ff934).

<sup>8</sup> Real Property, Probate, and Trust Law Section, The Florida Bar, *White Paper: Proposed Enactment of New Sections 733.1051 and 736.04114, Fla. Stat.* (on file with the Senate Committee on Judiciary).

<sup>9</sup> Jessica Toonkel Marquez, *Dead federal estate tax rises from the ashes*, Investment News (Jan. 31, 2010), [www.investmentnews.com/apps/pbcs.dll/article?AID=/20100131/REG/301319995&t](http://www.investmentnews.com/apps/pbcs.dll/article?AID=/20100131/REG/301319995&t).

<sup>10</sup> A spendthrift provision restrains the alienation of a beneficiary's equitable interest in a trust. John Grimsley, David Powell, *Florida Law of Trusts*, 347 (2008).

<sup>11</sup> A "settlor" as defined in part in s. 736.0103(16), F.S., means a person, including a testator, who creates or contributes property to a trust.

withdraw extends to both annual exclusion amounts.” The RPPTL states that the language of this subsection does not appear to apply to more than one gift tax annual exclusion.<sup>12</sup>

### **Trustee’s Duty to Pay Expenses and Obligations of Settlor’s Estate**

Section 736.05053, F.S., describes how a trustee of a revocable trust as described in s. 733.707(3), F.S., pays the expenses and obligations of the settlor’s estate. According to the RPPTL, this section does not direct lawyers or the courts to apply s. 733.805, F.S., which prescribes the order in which assets are paid. The RPPTL states that this statutory direction is necessary in order to fully implement the intent of reading the decedent’s will and revocable trust as one coherent plan.<sup>13</sup>

### **III. Effect of Proposed Changes:**

The bill amends s. 733.607(2), F.S., by providing that payment from the trustee of a trust is subject to the exclusions and preferences under s. 736.05053, F.S., which requires the trustee of a trust to comply with the requirement to pay expenses and obligations of the probate estate. It also provides that the provisions of s. 733.805, F.S., shall apply in determining the amount of any payment required under this section.

The bill amends s. 733.707(3), F.S., to provide that expenses from the administration and obligations of the decedent’s estate can be paid pursuant to the provisions in s. 736.05053, F.S., when there are insufficient funds in the estate to pay them.

The bill eliminates the notice provisions of s. 736.0206(1) and (6), F.S. The notice requirements in trust proceedings are already governed by the Florida Rules of Civil Procedure as provided in s. 736.0201(1), F.S.

The bill creates s. 736.04114, F.S., to address the suspension of the Economic Growth and Tax Relief Reconciliation Act of 2001 (2001 Act). According to RPPTL, wills and trust agreements “frequently contain provisions designed to eliminate, minimize, or defer payment of the federal estate tax and the federal generation-skipping transfer tax.” These provisions are often based on the statutory formulas as prescribed under current federal law. With the suspension of the 2001 Act, and no provision in the Florida Trust Code, there will be a lack of guidance when interpreting a settlor’s or decedent’s intent if provisions of the will or trust were based on and referred to the 2001 Act. The bill permits qualified beneficiaries of a trust to request the court to construe the terms of a trust that is not revocable at the time of the request. The qualified beneficiary may request the court to define the respective shares or determine beneficiaries in accordance with the settlor’s intention, if the trust contains provisions that include specific formulas and other tax related provisions<sup>14</sup> This section is effective upon becoming law.

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<sup>12</sup> Real Property, Probate, and Trust Law Section, The Florida Bar, *White Paper: Proposed Revision to §736.0505, Fla. Stat.* (on file with the Senate Committee on Judiciary).

<sup>13</sup> Real Property, Probate, and Trust Law Section, The Florida Bar, *White Paper: Proposed Revisions to 733.607, 733.707, and 736.05053* (on file with the Senate Committee on Judiciary).

<sup>14</sup> Real Property, Probate, and Trust Law Section, The Florida Bar, *White Paper: Proposed Enactment of New Sections 733.1051 and 736.04114, Fla. Stat.* (on file with the Senate Committee on Judiciary).

The bill amends s. 736.0206(5), F.S., to provide that in judicial proceedings to determine reasonable compensation for a trustee or person employed by a trustee, the court has discretion to award a reasonable expert witness fee from the assets of the trust to an expert witness who testifies on the issue of reasonable compensation unless it finds that the expert testimony did not assist the court.

This bill adds subsection (3) to s. 736.0505, F.S., related to spousal trusts. It provides that, as to trusts under 26 U.S.C. s. 2523(e) and 26 U.S.C. s. 2523(f), upon the death of the settlor's spouse, the assets are considered to have been contributed by the settlor's spouse and not by the settlor. The bill further provides that this protection does not apply if the funding of the trust was a fraudulent conveyance, as such is defined in the fraudulent conveyance law at s. 726.105, F.S.

According to the RPPTL, this bill will "make it clear that both annual exclusion amounts (currently totaling \$26,000) are exempt from claims of the beneficiary's creditors when a married donor's spouse has consented to a split gift election, and the power of withdrawal has lapsed, or has been released or waived."<sup>15</sup>

The bill amends s. 736.05053, F.S., to provide that nonresiduary trust dispositions shall be paid in proportion with nonresiduary devises pursuant to the priorities specified in s. 733.805, F.S., determined as if the beneficiaries of the will and trust, other than the estate or trust itself, were taken under a common instrument.

The RPPTL states that this amendment "will insure the coordination of will and revocable trust provisions to make certain that specific gifts under either document will not be appropriated to pay expenses of administration and obligations of the decedent's probate estate when there are residuary assets of the estate or trust available to pay them."<sup>16</sup> The RPPTL points out that s. 733.805(4), F.S., already provides for this; however, this amendment helps clarify that the order of appropriation of gifts in both a will and a revocable trust is governed by s. 733.805(4), F.S.

The bill deletes subsections (7) and (9) of s. 736.1007, F.S., that address how the court determines reasonable attorney compensation in trust administration. This issue is already addressed in s. 736.0206, F.S.

The bill creates s. 736.1211, F.S., to provide that charitable organizations and trusts may not be compelled to disclose the race, religion, gender, national origin, socioeconomic status, age, ethnicity, disability, marital status, sexual orientation, or political party registration of its employees, officers, directors, trustees, members, or owners.

Section four of this bill is effective upon becoming law; the remaining sections of the bill have an effective date of July 1, 2010.

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<sup>15</sup> Real Property, Probate, and Trust Law Section, The Florida Bar, *White Paper: Proposed Revision to §736.0505, Fla. Stat.* (on file with the Senate Committee on Judiciary).

<sup>16</sup> Real Property, Probate, and Trust Law Section, The Florida Bar, *White Paper: Proposed Revisions to 733.607, 733.707, and 736.05053* (on file with the Senate Committee on Judiciary).

**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

According to RPPTL, the bill “would reduce economic costs and benefit members of the private sector (i.e., trustees, persons employed by trustees and trust beneficiaries) by streamlining and adding greater certainty to the rules applicable to proceedings to determine reasonable compensation of trustees and persons employed by trustees, particularly with regard to the costs associated with the use of expert witness testimony in such proceedings.”<sup>17</sup>

## C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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<sup>17</sup> Real Property, Probate, and Trust Law Section, The Florida Bar, *White Paper: Proposal to Amend Florida Trust Code §§736.0206 & 736.1007 with Respect to Proceedings to Determine Reasonable Compensation* (on file with the Senate Committee on Judiciary).

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Judiciary on February 3, 2010:**

The committee substitute creates a new statutory section to address the suspension of the federal Economic Growth and Tax Relief Reconciliation Act of 2001 (2001 Act). It permits qualified beneficiaries of a trust to request the court to construe the terms of a trust that is not revocable at the time of the request. The qualified beneficiary may request the court to define the respective shares or determine beneficiaries in accordance with the settlor's intention, if the trust contains provisions that include specific formulas and other tax related provisions.

**CS by Banking and Insurance on March 10, 2010:**

The committee substitute changes the effective date of section four of the bill. The federal estate and generation skipping transfer taxes have been suspended for 2010 only. This creates problems with many wills and trusts, created both before and after 2001, which contain provisions that assumed the estate and generation skipping transfer taxes would be in effect in 2010.

Section four of CS/CS/SB 998 is the "Tax Patch" that adds a new provision to the Florida Trust Code enabling fiduciaries and beneficiaries to request a court to construe certain tax-related provisions that may be ambiguous, or lead to unintended results, in light of the failure of Congress to halt the suspension of the federal estate tax and the federal generation skipping transfer tax for 2010 only. The committee substitute provides that the "Tax Patch" in Section four of the bill will be effective upon becoming a law so that the remedial and curative proceedings can be pursued as quickly as possible.

The committee substitute also provides that a Florida charitable organization or trust may never be required to disclose the racial, religious, gender, national origin, socioeconomic status, age, ethnicity, disability, marital status, sexual orientation, or political party registration of its employees, officers, directors, trustees, members, or owners.

- B. **Amendments:**

None.