

**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.)

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Prepared By: The Professional Staff of the Committee on Rules

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BILL: CS/SB 998

INTRODUCER: Judiciary Committee and Senator Hukill

SUBJECT: Estates

DATE: April 1, 2014

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<b>Fav/CS</b>
2.	<u>Billmeier</u>	<u>Knudson</u>	<u>BI</u>	<b>Favorable</b>
3.	<u>Davis</u>	<u>Phelps</u>	<u>RC</u>	<b>Favorable</b>

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

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 998 amends provisions in the Probate Code and Trust Code. The amendments are recommended by the Real Property, Probate, and Trust Law Section of the Florida Bar. Those changes:

- Clarify the effective date of legislation passed last session which renders void any part of a written instrument making gifts to a lawyer or lawyer's relatives.
- Clarify that the party who is contesting the validity of a trust or seeking to revoke a trust bears the burden of establishing the grounds of the invalidity on all issues.
- Specify that death benefits, often in the form of life insurance, which are payable to a trust are not available to pay the expenses of administration of a settlor's estate or creditor's claims unless specific language and references are made.
- Align the anti-lapse provisions of the Trust Code to mirror the same provisions of the Probate Code involving outright devises of gifts to certain relatives.

Several of these provisions are designed to clarify existing law and are remedial in nature and apply retroactively while others have prospective application.

**II. Present Situation:**

The Florida Probate Code is found in chs. 731–735, F.S., and the Florida Trust Code is contained in ch. 736, F.S.

## **Gifts to Lawyers and Other Disqualified Persons**

Chapter 2013-172, Laws of Florida makes void, with certain exceptions, any gift to a lawyer or his or her relatives from a written instrument<sup>1</sup> prepared by the lawyer. The legislation contained a general effective date in the final section of the bill but did not contain any specific language stating whether the statute applied to gifts made in preexisting written instruments. This has apparently led to some confusion among attorneys who practice in this area of the law.

## **Will and Trust Contests**

The Florida Probate Code and the Florida Trust Code provide that a will, trust, or revocation of a will or trust, is void if it is procured by fraud, duress, mistake, or undue influence.<sup>2</sup> Both codes specify grounds for a will or trust contest that challenges the validity of the document, but the Probate Code alone specifies which party bears the burden of proof in a contest.<sup>3</sup> There is no statute specifying who carries the burden of proof in an inter vivos trust contest.<sup>4</sup>

Pursuant to the statute governing will contests, the proponent of a will bears the initial burden of establishing the formal execution and attestation of the will.<sup>5</sup> If formal execution and attestation is established, the burden of proof shifts to the person contesting the will to prove the grounds of the contest. Generally, under Florida law, a plaintiff or petitioner bears the burden of proof in a proceeding. It would then seem that a person contesting a trust initially bears the burden of proof since there is no specific statute addressing the issue. However, because trusts are similar to wills in their purpose and are often referred to as substitutes for wills, courts and attorneys practicing in that area are often confused as to who bears the initial burden of proof and when that burden shifts.<sup>6</sup>

## **Death Benefits**

### ***Statutory Law***

Life insurance proceeds usually pass outside of an estate and are generally exempt from administration expenses and claims of creditors as provided in s. 222.13(1), F.S. The exemption is lost, however, if the insurance proceeds are paid to the insured's estate. Section 222.13(1), F.S., states that:

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<sup>1</sup> "Written instrument" "includes, but is not limited to, a will, a trust, a deed, a document exercising a power of appointment, or a beneficiary designation under a life insurance contract or any other contractual arrangement that creates an ownership interest or permits the naming of a beneficiary."

<sup>2</sup> Sections 732.5165 and 736.0406, F.S.

<sup>3</sup> Section 733.107, F.S.

<sup>4</sup> Real Property, Probate, & Trust Law Section of The Florida Bar, *White Paper: Proposed Legislative Clarification Regarding the Burden of Proof in Trust Contests* (2014) (on file with the Senate Committee on Judiciary).

<sup>5</sup> Section 733.107, F.S.

<sup>6</sup> Unlike a will, an inter vivos trust takes effect when it is created by a settlor while the settlor is living. No court process needs to be initiated for the trust to take effect, unlike a probate proceeding for a will. Therefore, the burden is on the contestant of the trust to initiate proceedings to contest the trust's validity. Email from William Hennessey, Trust Law Committee of the Real Property Probate & Trust Law Section, The Florida Bar (March 8, 2014) (on file with the Senate Committee on Judiciary).

[w]henever the insurance, by designation or otherwise, is payable to the insured or to the insured's estate or to his or her executors, administrators, or assigns, the insurance proceeds shall become a part of the insured's estate for all purposes and shall be administered by the personal representative of the estate of the insured in accordance with the probate laws of the state in like manner as other assets of the insured's estate.

Section 733.808, F.S., relates to death benefits and the disposition of proceeds of life insurance policies, certain benefit plans, an annuity or endowment contract, and a health or accident policy. Subsection (1) provides that death benefits of any kind, including a life insurance policy, may be payable to the trustee of a trust. If those insurance proceeds are paid to a trustee of a trust, then the proceeds are to be held and disposed of in accordance with the terms of the trust. Section 733.808(2), F.S., provides very similar rules for insurance proceeds made payable to the trustee named in a will that is admitted to probate.

Section 733.808(3), F.S., provides that if no trustee makes a proper claim to the insurance proceeds within a 6-month period after the date of death of the insured or if satisfactory evidence is furnished that there will be no trustee to receive the proceeds, the insurance company must pay the insurance proceeds to the personal representative of the person making the designation, unless otherwise provided by agreement between the insurance company and the insured.

Section 733.808(4), F.S., states that:

Death benefits payable as provided in subsection (1), subsection (2), or subsection (3), unless paid to a personal representative under the provisions of subsection (3), shall not be deemed to be part of the decedent's estate, and shall not be subject to any obligation to pay the expenses of the administration and obligations of the decedent's estate or for contribution required from a trust under s. 733.607(2) to any greater extent than if the proceeds were payable directly to the beneficiaries named in the trust.

### ***Case Law and Conflicting Interpretation***

In 2012, the First District Court of Appeal issued the decision *Morey v. Everbank*<sup>7</sup> interpreting ss. 222.131(1), F.S., and 733.808(1), F.S. In that case, Mr. Morey, the decedent, designated his revocable trust as the beneficiary of his life insurance policy. After Mr. Morey's death, the trustee filed a petition requesting a determination as to whether the life insurance proceeds, which were payable to the trust, were exempt from all death obligations and therefore unavailable to the deceased settlor's estate or its creditors. The trust instrument instructed the trustee to pay the personal representative amounts that were certified by the personal representative to be required to pay Mr. Morey's "death obligations." The "death obligations" included expenses for the administration of the estate, enforceable debts, and estate taxes. The court held that the language of the trust and the structure of the trust indicated an intent and result that were the same as if the proceeds from the life insurance policy had been paid directly to the estate.

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<sup>7</sup> *Morey v. Everbank*, 93 So.3d 482 (Fla 1st DCA 2012).

Many practitioners in this area of the law have concluded that this decision “is contrary to the generally accepted interpretations” of ss. 222.13(1) and 733.808(4), F.S.<sup>8</sup> Their position is that the generally accepted interpretation of those statutes, when read together, “is that insurance proceeds payable to a trustee of a revocable trust are entitled to the statutory exemption from the claims of creditors of the insured’s estate” regardless of any trust provisions directing the trustee to apply trust assets to cover estate administration expenses or the claims of creditors.<sup>9</sup>

### **Antilapse Provisions**

Section 736.1106, F.S., is the antilapse statute for trusts. The purpose of an antilapse statute is to save certain gifts from lapsing or failing if a named recipient of a gift does not survive the decedent. Currently, the antilapse provisions of the Probate Code and the Trust Code are not consistent in the treatment of outright devises to certain people who do not survive the settlor of a trust or the testator of a testamentary trust.<sup>10</sup> The Trust Law Committee of the Real Property, Probate, & Trust Law Section of The Florida Bar recommends that the Trust Code provisions be amended to mirror the Probate Code provision.<sup>11</sup>

The Probate Code provides that if the will is silent, the share of a beneficiary who dies before the testator dies passes to his or her heirs as long as the heirs are related no more distantly than descendants of grandparents. If the descendants are not alive, the gift fails, which is a desirable result. Under the Trust Code, that is not the case.

Presently, the antilapse statute of the Trust Code saves all devises without regard to the familial relationship between the recipient and the creator of the gift.<sup>12</sup> This was apparently done for administrative convenience. This approach differs from the Probate Code and what was an earlier version of the Trust Code. It often results in unintended consequences and litigation under the Trust Code.

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

### **Gifts to Lawyers and Other Disqualified Persons – Sections 1 and 2**

Section 732.806, F.S., generally prohibits an attorney or any of the attorney’s relatives from being the beneficiary of a gift in a written instrument drafted by the attorney. The bill provides that the prohibition applies to written instruments executed on or after October 1, 2013. This effectively grandfathered such gifts in written instruments preexisting the effective date of the 2013 legislation. The bill further provides that this change is intended to clarify existing law and is remedial in nature.

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<sup>8</sup> Probate and Trust Litigation Committee of the Real Property Probate & Trust Law Section of The Florida Bar, *White Paper: Proposed Revisions to Section 733.808(4) and Section 736.05053(1), Florida Statutes* (2014) (on file with the Senate Committee on Judiciary).

<sup>9</sup> *Id.*, at 2.

<sup>10</sup> Trust Law Committee of the Real Property Probate & Trust Law Section of the Florida Bar, *White Paper: Proposed Legislation Regarding Trust Antilapse and Amendment to s. 736.1106, Florida Statutes* (2013) (on file with the Senate Committee on Judiciary).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

**Will or Trust Contests – Sections 3, 4, 7, and 8**

Sections 3 and 7 amends ss. 733.107, F.S., and 736.0207, F.S., to clarify that the party contesting the validity of a trust or seeking to revoke a trust, in whole or in part, bears the burden of establishing the grounds for invalidity on all issues. Because the current trust code is silent on this matter, these changes may provide clarity to the courts and attorneys involved in trust disputes as to which party bears the burden of proof. Unlike a will contest, these changes place the complete burden on the contestant.

Section 4 of the bill provides that the changes to the burden shifting provisions in s. 733.107, F.S., are intended to clarify existing law, are remedial in nature, and apply retroactively to proceedings pending on or before the bill becomes law and all cases that are begun on or after the effective date of this bill.

Section 8 provides that the changes made to s. 736.0207, F.S., trusts contests, apply to all cases commenced on or after the effective date of the act. The effective date of the act is “upon becoming a law.”

**Death Benefits – Sections 5, 6, 9, and 10**

These proposed changes are a response to the 2012 *Morey v. Everbank* decision, discussed in the Present Situation, and are intended to clarify the circumstances under which death benefits, such as life insurance, payable to a trust are exempt from any obligation to pay the expenses of the administration and obligations of the decedent’s estate.

Section 5 amends s. 733.808, F.S., to provide that a waiver of the statutory exemption, protecting death benefits from claims of creditors or the decedent’s estate, must be explicit. It clarifies that a general provision directing the trustee to pay all debts does not waive the statutory exemption from creditor claims for death benefits paid to the trustee. Section 6 provides that the changes to s. 733.808, F.S., are intended to clarify existing law, are remedial in nature, and apply retroactively without regard to the date of the decedent’s death.

Section 9 amends s. 736.05053, F.S., and is designed to insure that a trustee, paying the expenses of administration and obligations of the settlor’s estate, cannot use the death benefits described in s. 733.808(1), (2), or (3), F.S., unless the settlor specifically waived the prohibition of the use of those benefits in accordance with s. 733.808(4), F.S. If the settlor desires to waive the exemption, there must be a specific waiver. This language establishes that a general direction to pay all of the settlor’s debts is not sufficient. Section 10 provides that the changes made to s. 736.05053, F.S., are intended to clarify existing law, are remedial in nature, and apply retroactively without regard to the date of the settlor’s death.

**Antilapse Provision – Section 11**

The purpose of this section is to make the antilapse statute of the Trust Code consistent with the antilapse statute of the Probate Code in the area of outright devises to persons who do not survive the settlor of a revocable trust or the testator of a testamentary trust. The bill amends the antilapse provisions of the Trust Code to cause an outright devise to a deceased beneficiary to

lapse unless the beneficiary was a grandparent, or lineal descendant of a grandparent of the settlor of a revocable trust, or the testator of a testamentary trust. It is the opinion of some practitioners of probate and trust law that people enter into trust arrangements thinking that a trust devise operates the same as a will. When the results under the terms of a trust are not what the individuals had hoped for litigation ensues. This provision amending s. 736.1106, F.S., applies to trusts that become irrevocable after June 30, 2014.

### **Effective Date & Application**

This bill takes effect upon becoming a law and applies retroactively as discussed in other sections of this analysis.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

None.

### **B. Public Records/Open Meetings Issues:**

None.

### **C. Trust Funds Restrictions:**

None.

### **D. Other Constitutional Issues:**

The Florida Supreme Court issued a decision<sup>13</sup> last year addressing the retroactive nature of statutes. The Court held that the retroactive application of a statute is constitutionally permissible if the Legislature expresses a clear intent that the law apply retroactively and the law is procedural or remedial in nature. Remedial statutes, by their nature, further a remedy or confirm rights that already exist. A procedural law “provides the means and methods for the application and enforcement of existing duties and rights.” If the retroactive provisions contained in this bill could operate to remove a vested right such as the distribution of assets in a closed estate, then the retroactive application might not be constitutional.

## **V. Fiscal Impact Statement:**

### **A. Tax/Fee Issues:**

None.

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<sup>13</sup> *Maronda Homes, Inc. of Florida v. Lakeview Reserve Homeowners Association, Inc.*, 127 So.3d 1258, 1272 (Fla. 2013).

**B. Private Sector Impact:**

The provisions of this bill may facilitate the distribution of a decedent's assets in the way intended by the decedent. The clarifying changes made by this bill may reduce litigation relating to wills or trusts.

**C. Government Sector Impact:**

If this bill reduces litigation, fewer resources from the state court system will be used for litigation relating to wills and trusts.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 732.806, 733.107, 733.808, 736.0207, 736.05053, and 736.1106.

**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 Judiciary on March 11, 2014:**

The committee substitute adds two sections to the underlying bill to clarify the application of a provision passed during the 2013 Legislative Session, which generally prohibits an attorney or any of the attorney's relatives from being the beneficiary of a gift in a written instrument drafted by the attorney.

**B. Amendments:**

None.