# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 343 Estates
**SPONSOR(S):** Civil Justice Subcommittee; Moraitis
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 872

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|---|---|---|
| 1) Civil Justice Subcommittee | 13 Y, 0 N, As CS | Robinson | Bond |
| 2) Finance & Tax Committee | 15 Y, 0 N, As CS | Dugan | Langston |
| 3) Judiciary Committee | | | |

## SUMMARY ANALYSIS

The administration of estates and trusts is governed by the Florida Probate Code and the Florida Trust Code, which provide the legal framework for the marshalling and distribution of assets to intended or default beneficiaries. The bill makes the following changes to the administration of estate and trusts:

- Revises requirements regarding objections to the validity of a will, qualifications of a personal representative, the venue, or jurisdiction of a court in estate proceedings.
- Requires that personal representatives who are not qualified at the time of appointment resign or be removed by the court and have their letters of administration revoked.
- Extends personal liability for attorney fees and costs in a removal proceeding to personal representatives who do not know but should have known of facts requiring them to immediately resign or provide notice of ineligibility to serve as personal representative to interested persons.
- Substantially revises current law regarding the allocation and apportionment of estate taxes to update the statute for consistency with changes in federal estate tax laws, codify case law governing estate tax apportionment, and address gaps in the current statutory apportionment framework.
- Authorizes a court to assess attorney fees and costs against one or more persons part of an estate or trust in proportions it finds just and proper in estate and trust proceedings, and to direct payment for assessments against a portion of an estate from a trust under certain circumstances.
- Provides factors that a court may consider when assessing costs and attorney fees against a person's share of an estate or trust in estate and trust proceedings.
- Makes grammatical, stylistic, technical, and conforming changes to the Florida Statutes.

This bill does not appear to have a fiscal impact on state or local governments.

The effective date of the bill is July 1, 2015, except as otherwise provided. Portions are retroactive.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

**Qualification of Personal Representative**

A personal representative is the person or entity appointed by a court to administer a decedent's probate estate. The personal representative can be an individual,[1] or a bank or trust company,[2] subject to certain restrictions. To qualify to serve as a personal representative, an individual must be:

- at least 18 years of age;
- a non-felon;
- mentally and physically able to perform the duties of a personal representative;
- able to manage his or her own affairs; and
- a resident of Florida, or if not a resident of Florida, a spouse, sibling, parent, child or other close relative of the decedent.[3]

A trust company incorporated under the laws of Florida, or a bank or savings and loan authorized and qualified to exercise fiduciary powers in Florida, may also serve as a personal representative.[4]

Pursuant to s. 733.2123, F.S., the personal representative may serve formal notice of the petition for administration on any interested person.[5] However, s. 733.212(1), F.S., requires the personal representative to serve a copy of the notice of administration on the decedent's surviving spouse, beneficiaries, the trustees of certain trusts and the beneficiaries thereof, and persons who may be entitled to exempt property.[6] The notice must state that any interested person on whom a copy of the notice of administration is served must file any objection to the validity of the will, the qualifications of the personal representative, the venue, or the jurisdiction of the court within three months after the date of service of the notice.[7] An interested person receiving notice of administration pursuant to s. 733.212(2)(c), F.S., must file a petition or other pleading requesting relief within the three month period or such objections are forever barred.[8] Further, any interested person receiving formal notice of the petition of administration pursuant to s. 733.2123, F.S., before the issuance of letters or who waives notice may not challenge the validity of the will, testacy of the decedent, qualifications of the personal representative, venue, or jurisdiction of the court, except in proceedings before issuance of letters.

The Florida Supreme Court recently held in *Hill v. Davis*[9], that s. 733.212(3), F.S., bars an objection to the qualifications of a personal representative, even where the personal representative was never qualified to serve, if the objection was not filed within the three month period, except where fraud, misrepresentation, or misconduct with regard to the qualifications is not apparent on the face of the petition for administration or discovered within the statutory time frame.[10] The decision is significant because s. 733.3101, F.S., requires a personal representative that knows or should have known that

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[1] s. 733.302, F.S.
[2] s. 733.305, F.S.
[3] ss. 733.302-733.04, F.S.
[4] s. 733.305, F.S.
[5] "Interested person" means any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved. In any proceeding affecting the estate or the rights of a beneficiary, the personal representative shall be deemed to be an interested person. In any proceeding affecting the expenses of the administration and obligations of a decedent's estate, or any claims described in s. 733.702(1), the trustee of a trust described in s. 733.707(3) is an interested person in the administration of the grantor's estate. The term does not include a beneficiary who has received complete distribution. The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings. s. 731.201(23), F.S.
[6] s. 733.212(1), F.S.
[7] s. 733.212(2)(c), F.S.
[8] s. 733.212(3), F.S.
[9] *Hill v. Davis*, 70 So.3d 572, 573-574 (Fla. 2011).
[10] *Hill v. Davis*, 70 So.3d 572, 573-574 (Fla. 2011)

he or she would no longer be qualified for appointment to serve notice setting forth the reasons, or be personally liable for costs including attorney fees in any subsequent removal proceeding. Later ineligibility to qualify as a personal representative is cause for the removal of a personal representative under s. 733.504, F.S. The *Hill* decision may have the effect of foreclosing any objection to the personal representative if he or she serves notice of their ineligibility under s. 733.3101, F.S., outside of the three month time period.

**Effect of Proposed Changes - Qualification of Personal Representative**

The bill amends ss. 733.212(2)(c), 733.212(3), and 733.2123, F.S., to remove the three month limitation period for objections to the qualifications of a personal representative after service of notice of administration. All interested persons may object to an unqualified personal representative after the issuance of letters and within 30 days after a personal representative serves a notice of ineligibility under s. 733.3101, F.S. If the personal representative was not qualified to act at the time of appointment, no action will be required on the part of an interested person to remove such personal representative as the bill also requires a personal representative who knows that he or she was not qualified to act at the time of appointment to immediately resign. Courts are also required to remove a personal representative and revoke his or her letters of appointment if he or she was not qualified to act at the time of appointment. A personal representative who was qualified to act at the time of appointment but later becomes ineligible to serve must provide in the notice required under s. 733.3101, F.S., that interested persons have the right to petition for his or her removal. A personal representative who fails to resign if not qualified at the time of appointment or who was qualified at the time of appointment but fails to provide notice of later ineligibility to serve will be personally liable for attorney fees and costs incurred in removal proceedings.

In the case of objections to the validity of a will, or the venue or jurisdiction of a court, the bill partially codifies the holding of the *Hill* decision and provides that except for estoppel based on the misstatement of a personal representative as to the time that an objection may be filed, the three month time period for objections under s. 733.212, F.S., may not be extended for any reason. Any objection not barred by the three month time period must be filed no later than the earlier of entry of an order of final discharge of the personal representative or one year after service of notice of administration.

The bill also requires that if a personal representative serves notice of the petition for administration on interested persons pursuant to 733.2123, F.S., he or she must attach a copy of a will offered for probate to the notice thereby providing access to interested persons of the will offered for probate within the time for objections to the validity of the will.

The amendments to s. 733.212, F.S., apply to proceedings filed on or after July 1, 2015. The amendments to ss. 733.3101 and 733.504, F.S., apply to proceedings pending on the date this bill becomes a law.

**Estate Tax**

Section 733.817, F.S., provides for the allocation, apportionment, and orderly collection of estate tax imposed against a Florida decedent's estate under federal and state laws. The section is, like many other probate provisions, a default provision governing administration of the estate in situations where the decedent failed to properly plan for the orderly administration of the estate. Note too that the estate tax under current federal law only applies to an estate valued in excess of $5,430,000.[11]

Section 733.817, F.S., has not been substantially revised since 1998 although a number of significant changes have occurred in federal and state tax laws since that time, including the elimination of the federal credit for state death taxes and, by extension, the Florida estate tax.

This bill substantially revises s. 733.817, F.S., to:

[11] For tax year 2015. The amount is adjusted annually for inflation. See 26 U.S.C. § 2010(c)(3) and IR-2014-104, Oct. 30, 2014.

- update the statute for consistency with changes in federal estate tax laws;
- codify case law governing estate tax apportionment; and
- address "gaps" in the current statutory apportionment framework.

This bill does not revive or affect the collection of estate taxes by the State of Florida.

**Estate Tax: Overview**

The federal government imposes a tax on the estate of a decedent for the privilege of transferring property at death, known as the "estate tax."[12] In general, the tax is calculated by assessing the total fair market value of all property owned or controlled by the decedent at the time of death,[13] the "gross estate," and subtracting allowable deductions[14] to determine the "taxable estate." The value of lifetime taxable gifts is added to the "taxable estate" and the tax is computed based upon the combined amount, minus the applicable exclusion amount.[15]

Prior to 2005, Florida also imposed an estate tax "upon the transfer of the estate of every person who, at the time of death, was a resident of this state . . . ."[16] Florida also levied an estate tax on every person who at the time of death was not a resident of this state, but was a resident of the United States for the transfer of property situated in the state.[17] The Florida Constitution prescribes, in part, the parameters for the state's imposition of the estate tax, by prohibiting any estate tax upon Florida residents in excess of the amount that may be credited upon or deducted from the federal estate tax or another state's estate tax.[18] Thus the tax on the estate of a Florida decedent did not increase the overall estate tax, but instead apportioned the total estate tax between the federal government and the state. The Florida estate tax was what is known as a "pick-up" tax, which only "picks-up" taxes that would have otherwise been paid to the federal government.

While the Florida estate tax provisions are still set forth in the Florida statutes,[19] Florida does not currently have a state level estate tax. In 2001, Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001.[20] That federal legislation phased out over a five year period, starting in 2002, the credit for state death taxes. Because Florida's estate tax is coupled or tied to the federal estate tax, the change effectively eliminated the state estate tax. Unless Congress acts to reinstate the credit for state taxes or the Florida Constitution is amended to allow for imposition of the tax independently of the federal credit, Florida may not reinstate an estate tax.

Nevertheless, where estate taxes are due to the federal government or to another state from a Florida decedent, s. 733.817, F.S., determines how much tax is attributable to each interest included in the measure of the tax. The statute also determines who is charged with payment of the tax attributable to various interests included in the measure of the tax, determines whether a decedent has effectively directed against statutory apportionment, and resolves conflicting apportionment provisions in governing instruments.

[12] 26 U.S.C. §§ 2001-2801.
[13] The gross estate also includes certain life insurance proceeds, the value of certain annuities, the value of certain property transferred within three years of death, and trusts or other interests in which the decedent held certain powers.
[14] Allowable deductions include the marital deduction, charitable deduction, mortgages and debt, administration expenses of the estate, and losses during estate administration.
[15] The applicable exclusion amount for estates of decedents dying in 2015 is $5,430,000.
[16] s. 198.02, F.S.
[17] s. 198.03, F.S.
[18] FLA. CONST. art. VII, s. 5(a).
[19] ch. 198, F.S.
[20] Pub. L. 107-16 (June 7, 2001); 115 Stat. 38.

**Allocation of Estate Taxes on Gifts Made Just Prior to Death**

Section 733.817(3), F.S., provides that in determining the amount of tax attributable to an interest in property, only interests included in the measure of the particular tax[21] are considered. The tax is determined by the proportion that the value of each interest included in the measure of the tax bears to the total value of all interests included in the measure of the tax. The decedent's gross estate for estate tax purposes includes gift taxes paid on gifts made within three years of death[22] and, if the decedent dies within five years of a gift to a qualified tuition program (commonly known as a "529 Plan") that exceeds the gift tax annual exclusion,[23] his or her gross estate also includes the portion of such contributions properly allocable to periods after the date of death.[24]

Presently, ss. 733.817(5)(a)-(c), F.S., do not apportion the estate tax on those gift taxes, and the gift taxes are not otherwise excluded from the measure of the tax. Therefore, the net tax attributable to the gift taxes is apportionable under s. 733.817(5)(f), F.S., a "catch-all provision" which provides that the net tax that is not apportioned under s. 733.817(5)(a)-(c), F.S., be apportioned among the recipients of the remaining interests in the measure of the tax. A majority of decedents do not intend that the recipients of their gift bear the burden of the estate tax as such gifts often consist of contributions to 529 plans for minors or college aged relatives.

The bill amends s. 733.817(1)(d), F.S., the definition of "included in the measure of the tax," to exclude gift taxes paid within three years of the decedent's death and gifts to a 529 Plan. Recipients of the gift will not be allocated the estate tax upon such gifts even though the gift taxes remain a part of the amount upon which the estate tax is calculated. The effect is that the allocation of tax on all other interests remaining in the measure of the federal estate tax will be increased. The exclusion of the gift taxes from the measure of the tax applies only to the estates of decedents dying on or after July 1, 2015.

**Apportionment of Estate Taxes**

Statutory Apportionment -- Property passing under a will or trust

In the absence of an effective direction by the decedent in a governing instrument, estate taxes are apportioned pursuant to s. 733.817(5), F.S.

For property passing under a will or trust, the net tax attributable to nonresiduary devises or interests is charged to and paid from the residuary estate or portion, whether or not all interests in the residuary estate or portion are included in the measure of the tax. If the residuary estate or portion is insufficient to pay the net tax attributable to all nonresiduary devises or interests, the balance of the net tax attributable to nonresiduary devises or interests is apportioned among the recipients of the nonresiduary devises or interests in the proportion that the value of each nonresiduary devise or interest included in the measure of the tax bears to the total of all nonresiduary devises or interests included in the measure of the tax. The net tax attributable to residuary devises or interests are apportioned among the recipients of the residuary devises or interests included in the measure of tax in the proportion that the value of each residuary devise or interests included in the measure of the tax bears to the total of all residuary devises or interests included in the measure of the tax.[25] The

[21] "Included in the measure of the tax" means that for each separate tax that an interest may incur, only interests included in the measure of that particular tax are considered. It does not include any interest, whether passing under the will or not, to the extent the interest is initially deductible from the gross estate, without regard to any subsequent reduction of the deduction by reason of the charge of any part of the applicable tax to the interest or interests or amounts that are not included in the gross estate but are included in the amount upon which the applicable tax is computed, such as adjusted taxable gifts with respect to the federal estate tax. If an election is required for deductibility, an interest is not "initially deductible" unless the election for deductibility is allowed. s. 733.817(1)(d), F.S.

[22] 26 U.S.C § 2035(b)

[23] Section 529 of the IRC allows a donor to gift an amount in excess of the annual gift tax exclusion to a qualified tuition program on behalf of any designated beneficiary which may then be treated as having been made over a five year period.

[24] 26 U.S.C. § 529(c)(4)(C)

[25] s. 733.817(5)(a) and (b), F.S.

provisions are silent, however, with respect to which devises or interests would be charged with the tax if the residuary is insufficient.

The bill moves the allocation to subsection (3) of s. 733.817, F.S., and provides that if the residuary estate or portion of a will or trust is insufficient to pay the net tax attributable to all residuary devises or interests, the tax must be apportioned among the recipients of the nonresiduary devises or interests in the proportion that the value of each nonresiduary devise or interests included in the measure of the tax bears to the total of all nonresiduary devises or interests included in the measure of the tax.

Statutory Apportionment -- Protected Homestead

Section 733.817(5)(c), F.S., provides that the net tax attributable to an interest in protected homestead[26] is apportioned against the recipients of other interests in the estate or passing under any revocable trust in the following order of priority:[27]

- Class I: Recipients of interests not disposed of by the decedent's will or revocable trust that are included in the measure of the federal estate tax. This includes recipients of exempt property, the family allowance, elective share, pretermitted shares, and property passing by intestacy.

- Class II: Recipients of residuary devises and residuary interests that are included in the measure of the federal estate tax.

- Class III: Recipients of nonresiduary devises and nonresiduary interests that are included in the measure of the federal estate tax.

Property that is not included in the measure of the tax, such as property qualifying for the marital or charitable deduction, does not bear the burden of the payment of tax on protected homestead. The purposes of the Probate Code provisions for exempt property, family allowance, and elective share are defeated by charging those interests with the estate tax on the protected homestead. Further, although s. 733.817(2), F.S., provides that protected homestead is exempt from tax, the statute does not specify an additional source of payment if the property designated pursuant to s. 733.817(5)(c), F.S., is insufficient.

For estates of decedents dying on or after July 1, 2015, the bill provides that the tax on exempt property and the family allowance is to be apportioned against other estate and revocable trust property in the same manner as the tax on protected homestead. Elective share property is no longer charged with the payment of estate tax on protected homestead (and now exempt property and family allowance). However, any property passing to the spouse which is in excess of the elective share is not excused from payment of the tax to the extent the excess property is included in Class I, II or III. Under the bill, the classes charged with payment of tax on protected homestead, family allowance and exempt property, in order of priority, are:

- Class I: Recipients of property passing by intestacy.

- Class II: Recipients of residuary devises, residuary interests, and pretermitted shares.

- Class III: Recipients of nonresiduary devises and nonresiduary interests.

If the assets in Classes I, II, and III are exhausted, the remaining tax is apportioned proportionately to the protected homestead, exempt property and family allowance. However, the tax may not be apportioned against the elective share. If the balance of the net tax attributable to protected

[26] "Protected homestead" means the property described in article X, section 4(a)(1) of the Florida Constitution on which at the death of the owner the exemption inures to the owner's surviving spouse or heirs under article X, section 4(b) of the Florida Constitution. For purposes of the code, real property owned in tenancy by the entireties or in joint tenancy with rights of survivorship is not protected homestead. s. 731.201(33), F.S.

[27] s. 733.817(5)(c), F.S.

homestead, exempt property, or the family allowance is not apportioned as provided above, it is to be apportioned according to the proportion that the value of each bears to the total value of taxable interests.

Apportionment at Direction of Decedent

Section 733.817(5)(h), F.S., provides that a decedent may direct against statutory apportionment through the terms of a governing instrument such as a will or trust.

*Specificity Requirement*

For a direction in a governing instrument to be effective to direct payment of taxes attributable to property not passing under the governing instrument from property passing under the governing instrument, the governing instrument must expressly refer to s. 733.817(5)(h)4., F.S., or expressly indicate that the property passing under the governing instrument is to bear the burden of taxation for property not passing under the governing instrument. A direction in the governing instrument to the effect that all taxes are to be paid from property passing under the governing instrument, whether attributable to property passing under the governing instrument or otherwise, is effective to direct the payment of taxes attributable to property not passing under the governing instrument.

The bill deletes the provision for directing against default apportionment by reference to s. 733.817(5)(h)4., F.S., and provides that a direction against default apportionment may only be achieved by "express direction." An express direction in the governing instrument to the effect that all taxes are to be paid from property passing under the governing instrument, whether attributable to property passing under the governing instrument or otherwise, is generally effective for this purpose. This requirement applies to estates of all decedents dying on or after July 1, 2015.

However, such an express general direction is not effective to waive rights of recovery provided in ss. 2207A, 2207B and 2603 of the Internal Revenue Code (IRC), all of which require greater specificity. Those statutes provide that the decedent may direct otherwise, but they require the decedent to specifically indicate the intent to waive the right of recovery under those statutes. The purpose of greater specificity in those IRC provisions is not to raise revenue but to guard against the decedent's inadvertent waiver of those rights for the benefit of the estate.

The bill describes and codifies what is sufficient to comply with the specificity requirements of ss. 2207A, 2207B, and 2603 of the IRC. It also provides that a general statement in a decedent's will or revocable trust waiving all rights of recovery under the IRC is not an express waiver of the rights of recovery provided in ss. 2207A or 2207B of the IRC. Such provision reflects current law.

*Adopting tax apportionment provisions in a revocable trust*

The IRC enables the personal representative of an estate to recover the estate tax attributable to life insurance or property subject to a general power of appointment from the beneficiaries of those interests, but provides that the decedent may direct otherwise by will. Many decedents put their tax apportionment provisions in their revocable trusts. Section 733.817(5)(h)2., F.S., provides that a provision in the will that the tax is to be apportioned as provided in the revocable trust is deemed to be a direction in the will as well as the revocable trust.

The bill requires that the provision in the will adopting the apportionment provisions of the revocable trust and the apportionment provision of the revocable trust must be express in order to be effective.

*Directing that taxes are paid from revocable trust*

Current law permits the decedent's will to direct that estate taxes be paid from the decedent's revocable trust unless the trust contains a contrary provision.[28] It is implicit in current law that the

[28] s. 733.817(5)(h)3., F.S.

revocable trust that is to pay the tax must be specifically identified and that for an apportionment provision in the revocable trust to be contrary, it must be express.

The bill requires that a direction in a will to pay estate taxes from a revocable trust must contain a specific reference to the trust, and that for an apportionment provision in a revocable trust to be considered contrary, it must be an express direction.

*Conflicting Provisions*

If there is a conflict as to payment of taxes between the decedent's will and the governing instrument, the decedent's will controls, except that the governing instrument will be given effect with respect to any tax remaining unpaid after the application of the decedent's will and a direction in a governing instrument to pay the tax attributable to assets that pass pursuant to the governing instrument from assets that pass pursuant to that governing instrument is effective notwithstanding any conflict with the decedent's will, unless the tax provision in the decedent's will expressly overrides the conflicting provision in the governing instrument.[29]

The bill provides that apportionment conflicts between all governing instruments (whether a conflicting instrument is a will or other instrument) are controlled by the last executed governing instrument containing an effective tax apportionment clause to the extent of the conflict. If a will or trust is amended, the date of the amendment is the controlling date only if the amendment contains an express tax apportionment provision. Only tax apportionment provisions that would be effective but for the conflict create a conflict. The new rule applies to estates of decedents dying on or after July 1, 2015.

**Construction**

Apportionment of Property Received By a Will or Trust as a Beneficiary

Property passing under a will or trust is apportioned under the provisions of s. 733.817(5)(a) and (b), F.S. This is the case even if the will or trust received the property as beneficiary of an annuity, insurance policy, individual retirement account (IRA), or similar interest, or as recipient of appointed property. This has caused some uncertainty among practitioners as the general "catch-all" apportionment provision in s. 733.817(5)(f), F.S., would seem to apply to these interests. However, the general provisions do not apply if the recipient is the estate or trust. The statute does not contemplate a double tax on what is essentially the same property. However, property subject to a power of appointment does not pass under the will simply because the power is exercised by the will unless the property passes to the estate.[30]

The bill provides that the beneficiary of an annuity or insurance policy or the recipient of property subject to a power of appointment is the "recipient" as defined in s. 733.817(1)(i), F.S. If those interests are paid to the estate or a trust, and subsequently disposed of pursuant to the will or trust, the tax on them is to be apportioned in the manner provided for interests passing from the estate or the trust. Property passing under a general power of appointment to the decedent's creditors (or the creditors of the decedent's estate) benefits the estate and is treated as if it were apportioned to the estate.

Common Instrument Construction

Section 733.817(5)(h)2., F.S., provides that a decedent's will and revocable trust are construed together to apportion the tax as if all recipients of the estate and trust (other than the estate and trust themselves) were taking under one common instrument for the purpose of apportioning tax to recipients of residuary and non-residuary interests under the provisions regarding wills, trusts and protected homesteads. However, the statute applies to a will and revocable trust in which one does not pour into the other, an application that serves no purpose.

[29] s. 733.817(5)(h)5., F.S.
[30] *In re Estate of Wylie*, 342 So.2d 996 (Fla. 4th DCA 1977); *Smith v. Bank of Clearwater*, 479 So.2d 755 (Fla. 2nd DCA 1985).

For estates of decedents dying on or after July 1, 2015, the bill requires that a decedent's will or revocable trust (or two revocable trusts, if applicable) must pour into the other for the common instrument construction to apply. The purpose of this provision is to determine which interests are in effect pre-residuary interests and which are residuary interests where a will or trust (or another trust) pours into the other so that the tax attributable to those interests may be apportioned accordingly.

**Updates in Response to Changes in Federal Tax Law**

In 2001, Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001.[31] That federal legislation phased out over a five year period, starting in 2002, the credit for state death taxes and effectively eliminated the Florida estate tax. The credit was replaced by a deduction for state death taxes.[32] This bill reflects the changes in federal tax law as follows:

- The definition of "net tax" is amended to take into account the deduction for state death taxes that replaced the credit for state death taxes. Additionally, s. 733.817(2)(c), F.S., was created to allocate the state death tax deduction to the interests producing the deduction for the purpose of determining the tax attributable to the interest. This is a curative revision intended to clarify existing law and applies retroactively to all proceedings in which the apportionment of taxes has not been finally determined or agreed for estates of decedents dying on or after January 1, 2005. It does not affect any tax payable to the state of Florida.

- Provisions regarding the allocation of the reduction of the Florida estate tax for tax paid to others states are made contingent upon the reinstatement of the Florida estate tax.

**Other Changes Related to the Apportionment of Estate Tax**

- The bill defines the terms "generation skipping transfer tax" and "Section 2044 interest" as used in s. 733.817, F.S. The definitions are consistent with the terms as used in the IRC.[33]

- The bill provides that the generation-skipping transfer tax be apportioned in accordance with s. 2603 of the IRC.[34] Section 2603 provides that in the case of a taxable distribution, the tax is paid by the transferee.

- The definition of "tax", as used in s. 733.817, F.S., is amended to explicitly exclude any additional estate tax that may be imposed by s. 2032A(c) or s. 2057(f) of the IRC to recapture tax savings related to family owned farms and businesses. The payment of the recaptured tax is imposed upon the applicable beneficiaries by ss. 2032(A) and 2057 of the IRC and is not a part of the "tax" apportioned by s. 733.817, F.S.

- The bill fills a current gap in the law by providing that if the apportionment statute does not apportion part of the tax that was not effectively directed by a governing instrument, the court may assess liability for payment of the tax in the manner it finds equitable.

- The bill provides that taxes may only be apportioned on such part of the elective share that would pass to others but for the elective share pursuant to s. 732.2075(2), F.S., to the extent those assets do not qualify for the marital deduction. It further provides that this provision applies only to interests passing by reason of the exercise or non-exercise of a general power of appointment.

[31] Pub. L. 107-16 (June 7, 2001); 115 Stat. 38.
[32] 26 U.S.C. § 2058.
[33] *See* 26 U.S.C. §§ 2044 and 2611-2612.
[34] The generation-skipping transfer tax is based on the value of property received by the beneficiary, net of the estate tax charged against that property. Accordingly, the estate tax apportionment provisions must be determined first. Section 733.817, F.S., does not currently give any guidance on this matter.

- Currently, the net tax attributable to property over which the decedent held a general power of appointment is calculated in the same manner as other property included in the measure of the tax. For estates of decedents dying on or after July 1, 2015, the bill authorizes the power holder to direct that the property subject to the general power of appointment bear the additional tax incurred by reason of the inclusion of the property subject to the general power of appointment in the power holder's gross estate. This only applies if the direction is express and is in the will.

- The bill codifies existing law that a grant of permission or authority to pay or collect taxes is not a direction against statutory apportionment[35] and that an effective direction for payment of tax on a type of interest in a manner different from that provided in s. 733.817, F.S., is not effective as an express direction for payment of tax on other types of interests.[36]

- The bill updates references regarding notice of a petition for an order of apportionment to provide that the personal representative must give notice "in the manner of formal notice" instead of simply "formal notice" as "formal notice" is not currently required by the Florida Probate Rules.

Except as otherwise noted in this analysis, the amendments to s. 733.817, F.S., apply retroactively to all estate proceedings pending on July 1, 2015, in which the apportionment of taxes has not been finally determined or agreed.

**Attorney Fees and Costs in Probate and Trust Proceedings**

**Current Situation**

Although the award of attorney fees are in derogation of the common law, [37] the Legislature has authorized the award of attorney fees and costs in probate and trust proceedings under certain circumstances.

In probate proceedings, a court may award attorney fees directly to:

- The party offering a will for probate as long as the will is in due form and the action was brought in good faith.[38]
- Attorneys for personal representatives as reasonable compensation for ordinary and extraordinary services.[39]
- Attorneys who have rendered services to an estate if such services benefitted the estate. [40]

The court may also award costs as in chancery actions.[41] Such fees and costs are payable from the estate. The court has the discretion to assess the burden of the fees paid from the estate to the part of the estate of the person who should be equitably charged for the fees.[42] However, the assessment is limited to the value of that person's interest in the estate. If the fees and costs awarded are in excess of the person's share of the estate, there is no personal liability for the fees and costs on the part of such person.[43]

Similarly, in trust proceedings, a court may award attorney fees directly to:

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[35] *Nations Bank v. Brenner,* 756 So. 2d 203 (Fla. 3d DCA 2000); *In re Estate of McClaran*, 811 So.2d 799 (Fla. 2d DCA 2002).
[36] *In re Estate of McClaran*, 811 So2d. 799 (Fla. 2d DCA 2002).
[37] *Whitten v. Progressive Casualty Ins. Co*., 410 So.2d 501, 505 (Fla. 1982)
[38] s. 733.106(2), F.S.
[39] s. 733.6171, F.S.
[40] s. 733.106(3), F.S.; See *In Re Gleason's Estate*, 74 So.2d 360, 362 (Fla. 1954) (Attorney may be awarded attorneys' fees directly from the estate if he or she rendered a valuable service and the service benefitted the estate)
[41] Chancery action is an action in equity. "The general rules is that costs follow the results of the litigation but in equity this rule may be departed from according to the circumstances." *Schwartz v. Zaconick*, 74 So.2d 108, 110 (Fla. 1954).
[42] s. 733.106(4), F.S.
[43] *Dourado v. Chousa,* 604 So. 2d 864, 866 (Fla. 5th DCA 1992).

- Attorneys for the trustee of a revocable trust as compensation for ordinary and extraordinary services.[44]
- Attorneys who have rendered services to a trust if such services benefitted the trust.[45]

In addition to fees, costs may be awarded in all trust proceedings as in chancery actions.[46] Such costs and fees are payable from the trust assets. The court has the discretion to direct from which part of the trust the fees and costs are to be paid.[47]

Current law authorizes the court to order that attorney fees and costs be borne unequally by different portions of the estate and trust assets when demanded by appropriate circumstances, such as a finding of bad faith or wrongdoing by a beneficiary.[48] However, the statutes provides no guidance regarding the exercise of the court's discretion to assess fees and costs against a part of the estate or trust, leading to a lack of uniformity among courts regarding factors relevant to the decision of which part of the estate or trust fees or costs should be paid. Additionally, the statutes do not address alternatives available to the court if the court directs an assessment of fees or costs against one or more parts of the estate or trust and such part is insufficient to fully pay the assessment. In estate proceedings, courts have found s. 733.106(4), F.S., empowers a court assessing fees and costs against a part of an estate to order that such fees and costs or any deficiency not recoverable from the person's part of estate assets be paid from the person's part of a trust if the will is a "pour over" will[49] and the matter incurring fees and costs was interrelated with the trust, thereby providing an additional corpus from which to satisfy fees and costs assessed against a part of an estate.[50]

**Effect of Proposed Changes - Fees**

The bill amends ss. 733.106, 736.1005, and 736.1006, F.S., to authorize a court to assess costs and fees in estate or trust proceedings against one or more parts of the estate or trust in such proportions that the court deems to be just and proper. In determining which part or parts of the estate or trust to assess, the bill provides factors that courts may consider, including:

- the impact of an assessment on the value of each person's part of the estate or trust;
- the amount of attorney fees to be assessed against a person's part of the estate or trust;
- the extent to which the person actively participated in the proceeding;
- the benefit or detriment to the person's part of the estate or trust expected from the proceeding;
- merits and success of the claims, defenses, or objections, asserted by the person;
- whether the person unjustly caused an increase in the amount of attorney fees; and
- any other relevant fact, circumstance, or equity.

Courts are no longer required to find that the person whose part of the estate will be assessed engaged in bad faith, wrongdoing, or brought a claim, defense, or objection frivolously.

The bill also codifies case law regarding the assessment of fees in estate proceedings by authorizing a court that assesses fees and costs against one person's part of an estate, to direct payment of such fees and costs from the person's part of a trust if the person's part of the estate is insufficient to fully pay the assessment, a "pour over" will is involved, and the matter was interrelated with the trust from which payment is made.

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[44] s. 736.1007, F.S.
[45] s. 736.1005(1), F.S.; *See Jervis v. Tucker*, 82 So. 3d 126, 130 (Fla. 4th DCA 2012).
[46] s. 736.1006(1), F.S.
[47] ss. 736.1005(2) and 736.1006(2), F.S.
[48] *In Re Estate of Lane*, 562 So. 2d 352, 353 (Fla. 4th DCA 1990).
[49] A "pour over" will devises property in the decedent's estate at the time of death to a revocable trust created during the decedent's life for distribution under the terms of the trust.
[50] *In Re Estate of Paulk*, 529 So.2d 1150, 1153 (Fla. 1st DCA 1988); *Robinson v. Robinson*, 805 So. 2d 94, 98 (Fla. 4th DCA 2002)

B. SECTION DIRECTORY:

Section 1 amends s. 733.212, F.S., relating to notice of administration; filing of objections.

Section 2 amends s. 733.2123, F.S., relating to adjudication before issuance of letters.

Section 3 amends s. 733.3101, F.S., relating to personal representative not qualified.

Section 4 amends s. 733.504, F.S., relating to removal of personal representative; causes for removal.

Section 5 amends s. 733.817, F.S., relating to the apportionment of estate taxes.

Section 6 amends s. 733.106, F.S., relating to costs and attorney fees.

Section 7 amends s. 736.1005, F.S., relating to attorney fees for services to the trust.

Section 8 amends s. 736.1006, F.S., relating to costs in trust proceedings.

Section 9 provides for applicability of the amendments to ss. 733.212, 733.2123, 733.3101, and 733.504, F.S.

Section 10 provides for applicability and retroactive application of the amendments to s. 733.817, F.S.

Section 11 provides for applicability of the amendments to ss. 733.106, 736.1005, and 736.1006, F.S.

Section 12 provides an effective date of July 1, 2015, except as otherwise provided.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will have a direct economic impact on the beneficiaries of a Florida decedent's estate if the estate is subject to the federal estate tax or the estate tax of another state. The tax liability will be increased for some interests, while it will decrease or be eliminated for others.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The bill takes effect on July 1, 2015, except as otherwise provided, and contains a provision applying portions of the bill retroactively to estate proceedings pending on that date in which the apportionment of taxes has not been finally determined or agreed.

Retroactive application of a civil statute is generally unconstitutional if the statute impairs vested rights, creates new obligations, or imposes new penalties.[51]

To determine whether a statute should be retroactively applied, courts apply two interrelated inquiries. First, courts determine whether there is clear evidence of legislative intent to apply the statute retrospectively. If so, then courts determine whether retroactive application is constitutionally permissible.[52] The first prong of the test appears to clearly be met in the retroactive sections of the bill, which contain an explicit statement of retroactivity. The second prong looks to see if a vested right is impaired.

To be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law.[53] It must be an immediate, fixed right of present or future enjoyment.[54]

"Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes."[55]

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 10, 2015, the Civil Justice Subcommittee adopted four amendments and reported the bill favorably as a committee substitute. The amendments:

- Revised the time that an objection to the validity of a will, the qualifications of a personal representative, or the venue or jurisdiction of a court may be filed in estate proceedings and required that such information be included in the notice of administration.
- Required that a copy of a will offered for probate be attached to the formal notice of the petition for administration in estate proceedings.
- Required a personal representative to resign or be removed by the court and have his or her letters of administration revoked if he or she was not qualified to act at the time of appointment.
- Authorized interested persons to file a petition requesting the removal of a previously qualified personal representative who later becomes ineligible for appointment and requiring such a personal

[51] *R.A.M. of South Florida, Inc. v. WCI Communities, Inc*., 869 So.2d 1210, 1216 (Fla. 2nd DCA 2004).
[52] *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494, 499 (Fla. 1999).
[53] *R.A.M.* at 1218.
[54] *Florida Hosp. Waterman, Inc. v. Buster*, 948 So.2d 478, 490 (Fla. 2008).
[55] *City of Lakeland v. Catinella*, 129 So.2d 133 (Fla. 1961).

representative to provide notice of such right to interested persons upon becoming ineligible for appointment.
- Extended personal liability for attorney fees and costs in a removal proceeding to personal representatives who do not know but should have known of facts requiring them to immediately resign or provide notice of ineligibility to interested persons.
- Authorized a court to assess attorney fees and costs against one or more persons part an estate or trust in proportions it finds just and proper; .and to assess costs and fees against a person's portion of a trust if the person's part of the estate is insufficient to fully pay an assessment in matters involving a "pour over" will and the trust.
- Provided factors that a court may consider when assessing costs and attorney fees against a person's share of an estate or trust in estate and trust proceedings.
- Corrected drafting errors and made conforming changes to the bill.

On March 25, 2015, the Finance & Tax Committee adopted a strike all amendment and reported the bill favorably as a committee substitute. The strike all amendment made drafting and technical changes to the bill, and clarified the applicability of the amendments made in this act to ss. 733.106, 733.212, 733.2123, 733.3101, 733.504, 736.1005, and 736, 1006, F.S.

This analysis is drafted to the committee substitute as passed by the Finance & Tax Committee.