

**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/CS/SB 540

INTRODUCER: Banking and Insurance Committee; Judiciary Committee; and Senator Hukill

SUBJECT: Estates

DATE: January 13, 2016

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Caldwell</u>	<u>Cibula</u>	<u>JU</u>	<b>Fav/CS</b>
2.	<u>Billmeier</u>	<u>Knudson</u>	<u>BI</u>	<b>Fav/CS</b>
3.	<u>Caldwell</u>	<u>Phelps</u>	<u>RC</u>	<b>Pre-meeting</b>

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

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/CS/SB 540 specifies when a trustee may use trust assets to pay attorney fees and costs and establishes a procedure when a trustee seeks to use trust assets to pay attorney fees and costs incurred when defending a breach of trust claim. The bill also provides that Florida law determines the validity and effect of the disposition of real property located in the state. Lastly, the bill also provides criteria for the nonjudicial modification of an irrevocable trust.

**II. Present Situation:**

The Florida Trust Code<sup>1</sup> provides the duties and powers of the trustee, including the duty of loyalty.<sup>2</sup> A trustee is required to administer a trust in good faith, in accordance with the terms and purposes of the trust, in accordance with the Florida Trust Code, and solely in the interests of the beneficiaries of the trust.<sup>3</sup>

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<sup>1</sup> Chapter 736, F.S.

<sup>2</sup> Section 736.0802, F.S.

<sup>3</sup> Sections 736.0801 and 736.0802, F.S.

### **Payment of Costs and Attorney Fees from Assets of a Trust**

A trustee may pay costs and attorney fees that have incurred in any proceeding, including a claim or defense based upon breach of trust,<sup>4</sup> from the assets of the trust without the approval of any person and without court authorization unless the court orders otherwise.<sup>5</sup>

Currently, if a claim or defense based upon a breach of trust is made against a trustee in a proceeding, the trustee must provide written notice to each qualified beneficiary of the trust whose share of the trust may be affected by the intention to pay costs or attorney fees before making such payment. The written notice must be delivered by a method requiring a signed receipt and inform each qualified beneficiary of the right to apply to the court for an order prohibiting the trustee from paying attorney fees or costs from trust assets. A trustee who has been served the motion and pays attorney fees or costs, and the attorney who receives such fees or costs, before an order on the motion is issued by the court, are subject to certain remedies.<sup>6</sup>

A party must obtain a court order to prohibit a trustee from paying costs or attorney fees from trust assets if a claim or defense based upon breach of trust is made against a trustee in a proceeding. To obtain such court order, a party must make a reasonable showing by evidence in the record or by proffering evidence that provides a reasonable basis for a court to conclude that there has been a breach of trust. The trustee may proffer evidence to rebut the evidence. The court may defer ruling on the motion to allow for discovery to be taken by the parties. The court is required to enter an order prohibiting the payment of further attorney fees and costs from the assets of the trust and order attorney fees or costs previously paid from assets of the trust to be refunded if it finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court otherwise finds good cause. Such order does not limit a trustee's right to seek an order permitting the payment of some or all of the attorney fees or costs incurred in the proceeding from trust assets, including any fees required to be refunded, after the claim or defense is finally determined by the court.<sup>7</sup>

If a claim or defense based upon a breach of trust is withdrawn, dismissed, or resolved without a determination by the court that the trustee committed a breach of trust after the entry of an order prohibiting payment of attorney fees and costs, the trustee may pay costs or attorney fees incurred in the proceeding from the assets of the trust without further court authorization.<sup>8</sup>

If the court orders a refund, it may enter such sanctions as are appropriate if a refund is not made as directed by the court, including but not limited to, striking defenses or pleadings filed by the trustee.<sup>9</sup>

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<sup>4</sup> Section 736.0802(10)(b), F.S.

<sup>5</sup> Section 736.0802(10), F.S.

<sup>6</sup> Section 736.0802(10)(a), F.S. See paragraphs (b) and (c) for remedies.

<sup>7</sup> Section 736.0802(10)(b), F.S.

<sup>8</sup> Section 736.0802(10)(b), F.S.

<sup>9</sup> Section 736.0802(10)(c), F.S.

The court's power to review fees and costs or the right of any interested persons to challenge fees and costs after payment, after an accounting, or after conclusion of the litigation is not limited.<sup>10</sup>

A trustee is not required to provide written notice if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination of the court that the trustee committed a breach of trust.<sup>11</sup>

According to the Real Property Probate and Trust Law Section, "the current statute lacks clarity, and thus fails to provide direction to lawyers and the court" on certain issues.<sup>12</sup> The paper identifies the following issues stating s. 736.0802(10), F.S. [lacks clarity regarding]:

- The circumstance under which the limitations imposed by the statute are triggered.
- Which categories of attorney's fees and costs are subject to the limitations.
- The circumstances under which the trustee must serve notice of an intention to pay attorney's fees and costs from trust assets and the consequences, if any, of paying such attorney's fees and costs from trust assets prior to serving notice.
- [Mandates that literally and unconditionally] require qualified beneficiaries to seek a court order to prohibit a trustee from using trust assets to pay attorney's fees and costs even when a trustee has no intention of doing so.
- Whether a trustee may use trust assets to pay its attorney's fees and costs upon a final determination in its favor by the trial court or whether the trustee must wait until a final determination by the appellate court.
- What type of showing is required to preclude a trustee from using trust assets to pay its attorney's fees and costs, and regarding the type of evidence that may be used to make or to rebut such a showing.<sup>13</sup>

Section 736.0816, F.S., provides for the specific powers of a trustee and allows a trustee to employ certain persons, including attorneys and pay reasonable compensation and costs incurred in connection with such employment from assets of the trust.

Section 736.1007, F.S., provides for a trustee's attorney fees if a trustee of a revocable trust retains an attorney to render legal services in connection with the initial administration of the trust. The trustee may pay the attorney without a court order.

### **Nonjudicial Modification of an Irrevocable Trust**

After the settlor's death, a trust may be modified at any time pursuant to s. 736.04113(2), F.S., if all the trustees and qualified beneficiaries agree unanimously.<sup>14</sup> Trusts modified pursuant to s. 736.0412, F.S., may be modified notwithstanding a spendthrift clause or a provision in the trust instrument that prohibits amendment or revocation of the trust. A beneficiary whose interest

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<sup>10</sup> Section 736.0802(10)(d), F.S.

<sup>11</sup> Section 736.0802(10)(e), F.S.

<sup>12</sup> Real Property Probate and Trust Law Section of The Florida Bar, *White Paper Regarding a Trustee's Use of Trust Assets to Pay Attorney's Fees and Costs in Connection with Claim or Defense of Breach of Trust*, (on file with the Senate Committee on Judiciary).

<sup>13</sup> *Id.*

<sup>14</sup> Section 736.0412(1), F.S.

is represented by another person under Part III of chapter 736, F.S., is bound by an agreement to modify a trust pursuant to s. 736.0412, F.S. However, a nonjudicial modification of an irrevocable trust does not apply to:

- Any trust created before January 1, 2001.
- Any trust created after December 31, 2000, if under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rule against perpetuities,<sup>15</sup> unless the terms of the trust expressly authorize nonjudicial modification.
- Any trust for which a charitable deduction is allowed or allowable under the Internal Revenue Code until the termination of all charitable interests in the trust.

A revocable trust is treated as created when the right of revocation terminates. The statutory provisions are in addition to and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.<sup>16</sup>

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<sup>15</sup> Section 689.225(2), F.S., relating to the rule against perpetuities provides:

STATEMENT OF THE RULE.—

(a) A nonvested property interest in real or personal property is invalid unless:

1. When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or
2. The interest either vests or terminates within 90 years after its creation.

(b) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

1. When the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive; or
2. The condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

(c) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

1. When the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or
2. The power is irrevocably exercised or otherwise terminates within 90 years after its creation.

(d) In determining whether a nonvested property interest or a power of appointment is valid under subparagraph (a)1., subparagraph (b)1., or subparagraph (c)1., the possibility that a child will be born to an individual after the individual's death is disregarded.

(e) If, in measuring a period from the creation of a trust or other property arrangement, language in a governing instrument (i) seeks to disallow the vesting or termination of any interest or trust beyond, (ii) seeks to postpone the vesting or termination of any interest or trust until, or (iii) seeks to operate in effect in any similar fashion upon, the later of:

1. The expiration of a period of time not exceeding 21 years after the death of a specified life or the survivor of specified lives, or upon the death of a specified life or the death of the survivor of specified lives in being at the creation of the trust or other property arrangement, or
2. The expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement, that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives.

(f) As to any trust created after December 31, 2000, this section shall apply to a nonvested property interest or power of appointment contained in a trust by substituting 360 years in place of "90 years" in each place such term appears in this section unless the terms of the trust require that all beneficial interests in the trust vest or terminate within a lesser period.

<sup>16</sup> Section 736.0412(6), F.S.

### **Assets of Nondomiciliaries**

Florida law determines the validity and effect of a testamentary disposition of tangible or intangible personal property or real property in this state.<sup>17</sup>

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

#### **Payment of Costs and Attorney Fees from Assets of a Trust**

Section 5 of the bill amends s. 736.0802(10), F.S., relating to a trustee's duty of loyalty and the payment of costs and attorney fees from assets of a trust. According to the Real Property Probate and Trust Law Section, the introduction to s. 736.0802(10), F.S., is rewritten to specify that the authority granted to a trustee under ss. 736.0816(20) and 736.1007(1), F.S., to pay attorney fees and costs from assets of the trust remains the general rule, while the provisions of this section are the exception to that rule.<sup>18</sup>

Paragraph (a) defines the term "pleading" to mean the same as defined in rule 1.100 of the Florida Rules of Civil Procedure. Generally, these are claims of relief. Paragraph (b) authorizes a trustee to pay attorney fees or costs in connection with a claim or defense of breach of trust made in a filed pleading without the approval of any person and without court authorization. However, the trustee must first serve a written notice of intent upon each qualified beneficiary of the trust whose share of the trust may be affected by the payment before the payment is made. The written notice does not need to be served upon a qualified beneficiary whose identity or location is unknown to, and not reasonably ascertainable by, the trustee. According to the Real Property Probate and Trust Law Section, the clarification is the specific reference to attorney fees and costs incurred in connection with a claim or defense of breach of trust that is set forth in a filed pleading and not other instances where attorney fees or costs are incurred such as ordinary trust administration or other judicial proceedings not alleging breach of trust or allegations of breach of trust that have not been set forth in a filed pleading.<sup>19</sup>

Paragraph (c) provides for the content of the written notice of intent and the manner of service. The written notice must identify the judicial proceeding in which the claim or defense of breach of trust has been made in a filed pleading and inform the person served of the right to apply to the court for an order prohibiting the trustee from using trust assets to pay attorney fees or costs or compelling the return of the attorney fees and costs already paid to the trust. The written notice of intent must be served by any commercial delivery service or form of mail requiring a signed receipt, the manner provided in the Florida Rules of Civil Procedure for service of process;<sup>20</sup> or if the court has already acquired jurisdiction over any party in that judicial

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<sup>17</sup> Section 731.106(2), F.S.

<sup>18</sup> Real Property Probate and Trust Law Section of The Florida Bar, *supra note 12*.

<sup>19</sup> *Id.*

<sup>20</sup> Rule 1.070 of the Florida Rules of Civil Procedure states in part:

(a) Summons; Issuance. Upon the commencement of the action, summons or other process authorized by law shall be issued forthwith by the clerk or judge under the clerk's or the judge's signature and the seal of the court and delivered for service without praecipe.

(b) Service; By Whom Made. Service of process may be made by an officer authorized by law to serve process, but the court may appoint any competent person not interested in the action to serve the process. When so appointed, the person serving process shall make proof of service by affidavit promptly and in any

proceeding, in the manner provided for service of pleading and other documents by the Florida Rules of Civil Procedure.<sup>21</sup>

Paragraph (d) provides that in the event a trustee pays attorney fees and costs from trust assets before serving a notice of intent, any qualified beneficiary whose share of the trust may have been affected by such payment, who is not otherwise barred pursuant to the provisions of s. 736.1008, F.S., (that limits certain proceedings against a trustee), and who files a motion is entitled to an order compelling the return of such payment, together with statutory interest, to the trust. The court must award attorney fees and costs incurred in connection with the motion to compel as provided in s. 736.1004, F.S.

Paragraph (e) sets forth the process the court must follow. A qualified beneficiary must file a motion with the court and must have a share of the trust that is affected by the use of trust assets to pay attorney fees or costs and may not be barred under s. 736.1008, F.S. The court may prohibit the trustee from using trust assets to make a payment and, if a payment has been made from trust assets after service of a notice of intent, the court may enter an order compelling the return of the attorney fees and costs to the trust, with interest. If a hearing is held on a qualified beneficiary's motion, the court must deny the motion unless it finds a reasonable basis to conclude that there has been a breach of trust. However, the court may deny the motion if it finds good cause to do so. At the hearing, the movant may show that a reasonable basis exists that there has been a breach of trust, and the trustee may rebut such showing, by presenting affidavits, answers to interrogatories, admissions, depositions, and any evidence otherwise admissible under the Florida Evidence Code. According to the Real Property Probate and Trust Section, the types of evidence permitted are "summary judgement evidence" and also includes live witness testimony.<sup>22</sup> This language clarifies that the qualified beneficiary needs to file a motion only if he or she wants to prohibit or compel the return of the payments and clarifies that the court may not prohibit or compel the return of such payments in the absence of making the requisite finding.<sup>23</sup>

Paragraph (f) provides remedies. If a trustee fails to comply with a court order prohibiting the use of trust assets to pay attorney fees or costs or compelling such payment be refunded to the trust, the court may impose such remedies or sanctions as the court deems appropriate, including, without limitation, striking the defenses or pleadings filed by the trustee.

Paragraph (g) addresses the withdrawal, dismissal, or judicial resolution of a claim or defense of breach of trust. A trustee may use trust assets to pay attorney fees and costs without service of a notice of intent or order of the court if a claim or defense of breach of trust is withdrawn, dismissed, or judicially resolved in the trial court without a determination that the trustee has committed a breach of trust, notwithstanding an order prohibiting the use of trust assets to pay

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event within the time during which the person served must respond to the process. Failure to make proof of service shall not affect the validity of the service. When any process is returned not executed or returned improperly executed for any defendant, the party causing its issuance shall be entitled to such additional process against the unserved party as is required to effect service.

<sup>21</sup> Rule 1.080(a) of the Florida Rules of Civil Procedure states in part: "Every pleading subsequent to the initial pleading, all orders, and every other document filed in the action must be served in conformity with the requirements of Florida Rule of Judicial Administration 2.516."

<sup>22</sup> Real Property Probate and Trust Law Section of The Florida Bar, *supra* note 12.

<sup>23</sup> *Id.*

attorney fees and costs or compelling the return of such attorney fees and costs. The payment of attorney fees and costs from trust assets include those payments that the trustee may have returned to the trust pursuant to court order.

Paragraph (h) provides that the statute does not operate to limit the right of any interested person to challenge or object to the payment of compensation or costs from the trust at any time, to seek review of compensation under s. 736.0206, F.S., or to seek remedies for breach of trust under s. 736.1001, F.S.

Sections 6 and 7 amend ss. 736.0816 and 736.1007, F.S., to make conforming references and alerts attorneys and the courts that the authority of a trustee to use trust assets to pay the trustee's attorney fees and costs are subject to the limitations of s. 736.0802(10), F.S.

### **Nonjudicial Modification of an Irrevocable Trust**

Section 4 amends s. 736.0412(4), F.S., by adding a new paragraph (c) providing that a trust created on or after July 1, 2016, may not be modified without court approval during the first 90 years after it is created, unless the terms of the trust expressly authorize nonjudicial modification. Paragraph (b) is amended to limit its application to trusts created after December 31, 2000, and before July 1, 2016.

### **Assets of Nondomiciliaries**

Section 1 creates s. 731.1055, F.S., to provide for the validity and effect of a disposition of all real property located in Florida. Such disposition, whether intestate or testate, is to be determined by Florida law.

Section 2 amends s. 731.106(2), F.S., to remove real property from the provisions addressing the disposition of property, both real and personal, in a will of a nonresident decedent. The disposition of real property is addressed separately in section 1.

### **Effective Date**

Section 8 provides that the act takes effect July 1, 2016.

## **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:**

Individuals may be less likely to incur attorney fees litigating statutes that were previously unclear.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 731.106, 736.0105, 736.0412, 736.0802, 736.0816, and 736.1007. The bill creates section 731.1055, F.S.

**IX. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS/CS by Banking and Insurance on December 1, 2015:**

The committee substitute corrects an erroneous reference to the Florida Rules of Civil Procedure.

**CS by Judiciary on November 17, 2015:**

The committee substitute creates a new section providing that the validity and effect of a disposition of all real property located in Florida, whether intestate or testate, is to be determined by Florida law. The bill also removes the qualification “under this section” from s. 736.0412(4)(c), F.S., in the underlying bill. The phrase related to a provision authorizing the nonjudicial modification of a trust if permitted by the terms of the trust.

**B. Amendments:**

None.