

2016540er

1
2 An act relating to estates; creating s. 731.1055,
3 F.S.; providing that the validity and the effect of a
4 specified disposition of real property be determined
5 by Florida law; amending s. 731.106, F.S.; conforming
6 provisions to changes made by the act; amending s.
7 732.201, F.S.; revising the right to elective share
8 for a surviving spouse; providing legislative intent;
9 amending s. 736.0802, F.S.; defining the term
10 "pleading"; authorizing a trustee to pay attorney fees
11 and costs from the assets of the trust without
12 specified approval or court authorization in certain
13 circumstances; requiring the trustee to serve a
14 written notice of intent upon each qualified
15 beneficiary of the trust before the payment is made;
16 requiring the notice of intent to contain specified
17 information and to be served in a specified manner;
18 providing that specified qualified beneficiaries may
19 be entitled to an order compelling the refund of a
20 specified payment to the trust; requiring the court to
21 award specified attorney fees and costs in certain
22 circumstances; authorizing the court to prohibit a
23 trustee from using trust assets to make a specified
24 payment; authorizing the court to enter an order
25 compelling the return of specified attorney fees and
26 costs to the trust with interest at the statutory
27 rate; requiring the court to deny a specified motion
28 unless the court finds a reasonable basis to conclude
29 that there has been a breach of the trust; authorizing

2016540er

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37 defense of breach of trust is withdrawn, dismissed, or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

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

46
47 Section 1. Section 731.1055, Florida Statutes, is created
48 to read:

49 731.1055 Disposition of real property.—The validity and
50 effect of a disposition, whether intestate or testate, of real
51 property in this state shall be determined by Florida law.

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

54 731.106 Assets of nondomiciliaries.—

55 (2) When a nonresident decedent, whether or not a citizen
56 of the United States, provides by will that the testamentary
57 disposition of tangible or intangible personal property having a
58 situs within this state, ~~or of real property in this state,~~

2016540er

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

69 Section 3. Section 732.201, Florida Statutes, is amended to
70 read:

71 732.201 Right to elective share.—The surviving spouse of a
72 person who dies domiciled in Florida has the right to a share of
73 the elective estate of the decedent as provided in this part, to
74 be designated the elective share. The election does not reduce
75 what the spouse receives if the election were not made and the
76 spouse is not treated as having predeceased the decedent.

77 Section 4. It is the intent of the Legislature that the
78 amendment to s. 732.201, Florida Statutes, made by this act is
79 to clarify existing law.

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

82 736.0802 Duty of loyalty.—

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

2016540er

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

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

92 (b) If a trustee incurs attorney fees or costs in
93 connection with a claim or defense of breach of trust which is
94 made in a filed pleading, the trustee may pay such attorney fees
95 or costs from trust assets without the approval of any person
96 and without any court authorization. However, the trustee must
97 serve a written notice of intent upon each qualified beneficiary
98 of the trust whose share of the trust may be affected by the
99 payment before such payment is made. The notice of intent does
100 not need to be served upon a qualified beneficiary whose
101 identity or location is unknown to, and not reasonably
102 ascertainable by, the trustee.

103 (c) The notice of intent must identify the judicial
104 proceeding in which the claim or defense of breach of trust has
105 been made in a filed pleading and must inform the person served
106 of his or her right under paragraph (e) to apply to the court
107 for an order prohibiting the trustee from using trust assets to
108 pay attorney fees or costs as provided in paragraph (b) or
109 compelling the return of such attorney fees and costs to the
110 trust. The notice of intent must be served by any commercial
111 delivery service or form of mail requiring a signed receipt; the
112 manner provided in the Florida Rules of Civil Procedure for
113 service of process; or, as to any party over whom the court has
114 already acquired jurisdiction in that judicial proceeding, in
115 the manner provided for service of pleadings and other documents
116 by the Florida Rules of Civil Procedure.

2016540er

117 (d) If a trustee has used trust assets to pay attorney fees
118 or costs described in paragraph (b) before service of a notice
119 of intent, any qualified beneficiary who is not barred under s.
120 736.1008 and whose share of the trust may have been affected by
121 such payment is entitled, upon the filing of a motion to compel
122 the return of such payment to the trust, to an order compelling
123 the return of such payment, with interest at the statutory rate.
124 The court shall award attorney fees and costs incurred in
125 connection with the motion to compel as provided in s. 736.1004.

126 (e) Upon the motion of any qualified beneficiary who is not
127 barred under s. 736.1008 and whose share of the trust may be
128 affected by the use of trust assets to pay attorney fees or
129 costs as provided in paragraph (b), the court may prohibit the
130 trustee from using trust assets to make such payment and, if
131 such payment has been made from trust assets after service of a
132 notice of intent, the court may enter an order compelling the
133 return of the attorney fees and costs to the trust, with
134 interest at the statutory rate. In connection with any hearing
135 on a motion brought under this paragraph:

136 1. The court shall deny the motion unless it finds a
137 reasonable basis to conclude that there has been a breach of
138 trust. If the court finds there is a reasonable basis to
139 conclude there has been a breach of trust, the court may still
140 deny the motion if it finds good cause to do so.

141 2. The movant may show that such reasonable basis exists,
142 and the trustee may rebut any such showing by presenting
143 affidavits, answers to interrogatories, admissions, depositions,
144 and any evidence otherwise admissible under the Florida Evidence
145 Code.

2016540er

146 (f) If a trustee fails to comply with an order of the court
147 prohibiting the use of trust assets to pay attorney fees or
148 costs described in paragraph (b) or fails to comply with an
149 order compelling that such payment be refunded to the trust, the
150 court may impose such remedies or sanctions as the court deems
151 appropriate, including, without limitation, striking the
152 defenses or pleadings filed by the trustee.

153 (g) Notwithstanding the entry of an order prohibiting the
154 use of trust assets to pay attorney fees and costs as provided
155 in paragraph (b), or compelling the return of such attorney fees
156 or costs, if a claim or defense of breach of trust is withdrawn,
157 dismissed, or judicially resolved in the trial court without a
158 determination that the trustee has committed a breach of trust,
159 the trustee is authorized to use trust assets to pay attorney
160 fees and costs as provided in paragraph (b) and may do so
161 without service of a notice of intent or order of the court. The
162 attorney fees and costs may include fees and costs that were
163 refunded to the trust pursuant to an order of the court.

164 (h) This subsection does not limit proceedings under s.
165 736.0206 or remedies for breach of trust under s. 736.1001, or
166 the right of any interested person to challenge or object to the
167 payment of compensation or costs from the trust.

168 ~~(a) If a claim or defense based upon a breach of trust is~~
169 ~~made against a trustee in a proceeding, the trustee shall~~
170 ~~provide written notice to each qualified beneficiary of the~~
171 ~~trust whose share of the trust may be affected by the payment of~~
172 ~~attorney's fees and costs of the intention to pay costs or~~
173 ~~attorney's fees incurred in the proceeding from the trust prior~~
174 ~~to making payment. The written notice shall be delivered by~~

2016540er

175 ~~sending a copy by any commercial delivery service requiring a~~
176 ~~signed receipt, by any form of mail requiring a signed receipt,~~
177 ~~or as provided in the Florida Rules of Civil Procedure for~~
178 ~~service of process. The written notice shall inform each~~
179 ~~qualified beneficiary of the trust whose share of the trust may~~
180 ~~be affected by the payment of attorney's fees and costs of the~~
181 ~~right to apply to the court for an order prohibiting the trustee~~
182 ~~from paying attorney's fees or costs from trust assets. If a~~
183 ~~trustee is served with a motion for an order prohibiting the~~
184 ~~trustee from paying attorney's fees or costs in the proceeding~~
185 ~~and the trustee pays attorney's fees or costs before an order is~~
186 ~~entered on the motion, the trustee and the trustee's attorneys~~
187 ~~who have been paid attorney's fees or costs from trust assets to~~
188 ~~defend against the claim or defense are subject to the remedies~~
189 ~~in paragraphs (b) and (c).~~

190 ~~(b) If a claim or defense based upon breach of trust is~~
191 ~~made against a trustee in a proceeding, a party must obtain a~~
192 ~~court order to prohibit the trustee from paying costs or~~
193 ~~attorney's fees from trust assets. To obtain an order~~
194 ~~prohibiting payment of costs or attorney's fees from trust~~
195 ~~assets, a party must make a reasonable showing by evidence in~~
196 ~~the record or by proffering evidence that provides a reasonable~~
197 ~~basis for a court to conclude that there has been a breach of~~
198 ~~trust. The trustee may proffer evidence to rebut the evidence~~
199 ~~submitted by a party. The court in its discretion may defer~~
200 ~~ruling on the motion, pending discovery to be taken by the~~
201 ~~parties. If the court finds that there is a reasonable basis to~~
202 ~~conclude that there has been a breach of trust, unless the court~~
203 ~~finds good cause, the court shall enter an order prohibiting the~~

2016540er

204 ~~payment of further attorney's fees and costs from the assets of~~
205 ~~the trust and shall order attorney's fees or costs previously~~
206 ~~paid from assets of the trust to be refunded. An order entered~~
207 ~~under this paragraph shall not limit a trustee's right to seek~~
208 ~~an order permitting the payment of some or all of the attorney's~~
209 ~~fees or costs incurred in the proceeding from trust assets,~~
210 ~~including any fees required to be refunded, after the claim or~~
211 ~~defense is finally determined by the court. If a claim or~~
212 ~~defense based upon a breach of trust is withdrawn, dismissed, or~~
213 ~~resolved without a determination by the court that the trustee~~
214 ~~committed a breach of trust after the entry of an order~~
215 ~~prohibiting payment of attorney's fees and costs pursuant to~~
216 ~~this paragraph, the trustee may pay costs or attorney's fees~~
217 ~~incurred in the proceeding from the assets of the trust without~~
218 ~~further court authorization.~~

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

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

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

2016540er

233 ~~breach of trust.~~

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

236 736.0816 Specific powers of trustee.—Except as limited or
237 restricted by this code, a trustee may:

238 (20) Employ persons, including, but not limited to,
239 attorneys, accountants, investment advisers, or agents, even if
240 they are the trustee, an affiliate of the trustee, or otherwise
241 associated with the trustee, to advise or assist the trustee in
242 the exercise of any of the trustee's powers and pay reasonable
243 compensation and costs incurred in connection with such
244 employment from the assets of the trust, subject to s.
245 736.0802(10) with respect to attorney fees and costs, and act
246 without independent investigation on the recommendations of such
247 persons.

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

250 736.1007 Trustee's attorney's fees.—

251 (1) If the trustee of a revocable trust retains an attorney
252 to render legal services in connection with the initial
253 administration of the trust, the attorney is entitled to
254 reasonable compensation for those legal services, payable from
255 the assets of the trust, subject to s. 736.0802(10), without
256 court order. The trustee and the attorney may agree to
257 compensation that is determined in a manner or amount other than
258 the manner or amount provided in this section. The agreement is
259 not binding on a person who bears the impact of the compensation
260 unless that person is a party to or otherwise consents to be
261 bound by the agreement. The agreement may provide that the

2016540er

262 trustee is not individually liable for the attorney ~~attorney's~~
263 fees and costs.

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