

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Community Affairs

BILL: CS/SB 1070

INTRODUCER: Judiciary Committee and Senator Berman

SUBJECT: Estates and Trusts

DATE: March 26, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Bond</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Hackett</u>	<u>Ryon</u>	<u>CA</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1070 amends laws on the transfer of property through wills, probate, and trusts.

The bill creates a comprehensive statutory framework for the creation and operation of a directed trust. Directed trusts are authorized by current law. In a directed trust, someone other than a trustee is allowed to direct some actions of a trustee of the trust.

The bill creates a comprehensive statutory framework for the creation and operation of a community property trust. Community property trusts are not addressed in current law. A community property trust holds property owned by a married couple as if the property was in a community property state, which has certain tax and estate planning advantages.

The bill amends probate law to provide that, absent specific intent in the divorce judgment, an ex-spouse is not a beneficiary of the former spouse's will, regardless of when the will was signed. Currently, an ex-spouse remains as a beneficiary after divorce if the will was signed prior to the wedding and the deceased failed to change the will after divorce.

The bill also requires a probate court to allow a surety bond in lieu of a depository account requirement; provides that the limitations periods for an action against a trust's trustee apply to directors, officers, and employees of the trustee; and applies homestead property law applicable to wills to homestead property held in a decedent's revocable trust.

Portions of the bill relating to the effect of divorce and depository accounts are effective upon becoming law. The remainder of the bill is effective July 1, 2021.

II. Present Situation:

Trusts, In General

Chapter 736, F.S., contains the Florida Trust Code (Code). The Code applies to express trusts, charitable or noncharitable, and to trusts created pursuant to a law, judgment, or decree that requires the trust to be administered in the manner of an express trust.

Under the Code, a settlor is the person who creates or contributes property to a trust.¹ A beneficiary of a trust is a person who has a present or future beneficial interest in the trust.² A trustee is the person who holds the legal title to the property of the trust. The trustee is granted certain powers and is subject to certain duties imposed by the terms of the trust, equity jurisprudence, or by statute. A trustee may have the power or duty to perform various acts of management.

A trustee derives his or her rules of conduct, extent and limit of authority, and measure of obligation from the trust instrument. Under the Code, a violation by a trustee of a duty owed to a beneficiary is a breach of trust. A breach of trust makes the trustee liable for any loss of the trust estate.

Except as otherwise provided in the terms of the trust, the Code governs the duties and powers of a trustee, relations among trustees, and the rights and interests of beneficiaries. The terms of a trust prevail over any provision of the Code, except as provided in s. 736.0105(2), F.S., which provides 23 terms that are solely governed by the Code and cannot be changed, waived, or otherwise altered by the terms of the trust.³

One area of trust law that cannot be changed by the terms of a trust is the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. This becomes troublesome where the settlor wants to appoint someone other than a trustee to direct some part of the operation of the trust.

Directed Trusts

In a directed trust, the terms of the trust grant a person other than a trustee a power over some aspect of the trust's administration. There is no consistent vocabulary to describe the person other than a trustee that holds a power in a directed trust. Several terms are common in practice, including "trust protector," "trust adviser," and "trust director." There is much uncertainty in existing law about the fiduciary status of a nontrustee that has a power over a trust and about the fiduciary duty of a trustee, sometimes called an "administrative trustee" or "directed trustee," with regard to actions taken or directed by the nontrustee.

¹ Section 736.0103(18), F.S.

² Section 736.0103(4), F.S.

³ Section 736.0105(2), F.S.

The concept of a directed trust is briefly addressed in current law at ss. 736.0703(9), and 736.0808, F.S. Those sections allow creation of a directed trust, provide for rights and duties between cotrustees, and provide that a trustee of a revocable trust may follow the direction of someone designated by the settlor unless that action would constitute a serious breach of trust. A person who holds a power to direct is considered a fiduciary.

Community Property Trust

The term “community property” refers to the legal theory, applicable in some states, that most property owned by a married person is jointly owned with the spouse. Nine states are considered “community property states.”⁴ Florida is not a community property state, but some residents come from community property states. Holding property as if community property law applies has certain advantages in divorce, tax avoidance, and estate planning. The Probate Code recognizes community property rights.⁵

Impact of Divorce on Wills and Trusts

One consequence of divorce is that is supposed to be the end of the benefits of marriage. One of the financial benefits of marriage is inheritance. Many persons who divorce neglect to change the terms of their wills, trusts, or other financial instruments, to omit their now former spouse as a beneficiary. This common omission, if not corrected by statute, can lead to unexpected windfalls for an ex-spouse years after divorce, to the detriment of the expected heirs of an estate (such as the current spouse, children, parents, and other family). Current law protects expected heirs from this oversight by creating the legal fiction that, for purposes of inheritance, revocable trusts, and certain beneficiary designations, a past divorce is treated in the distribution as if the surviving former spouse had died on the date of divorce.⁶ This legal fiction does not apply where the divorce judgment specifically requires that the former spouse remain as a beneficiary of the will, trust, or other financial instrument, or where the beneficiary designation is reaffirmed after divorce.

A 2018 appellate case exposed an exception in this area. In that case, the decedent had signed his will prior to the wedding date. The statute on wills requires that the will be signed during the term of the marriage for the ex-spouse to be disinherited by the statute. A strict reading of the statute led to the ex-wife receiving an inheritance, to the detriment of the decedent’s disabled father.⁷

Depository Accounts in Probate

Courts are commonly called on to assume control over a person’s property. The most common form of this is probate, but other common areas include guardianship and receivership. The trial

⁴ The nine states that have community-property systems: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Also, a community-property regime is elective in Alaska. Black’s Law Dictionary (11th ed. 2019).

⁵ Sections 732.216-.228, F.S., known as the Florida Uniform Disposition of Community Property Rights at Death Act.

⁶ Sections 732.507 (wills), 732.703 (certain life insurance, IRAs, retirement plans, and pay on death accounts), and 736.1105 (trusts), F.S.

⁷ *Gordon v. Fishman*, 253 So. 3d 1218 (Fla. 3d DCA 2018)

judge does not have the time or expertise to inventory, manage, and distribute such property, and so a fiduciary is appointed. These court-appointed fiduciaries are known by many names, including personal representative, guardian, curator, executor, administrator, trustee, or receiver. Current law provides numerous safeguards to guard against theft or mismanagement of property by a court-appointed fiduciary. A common safeguard is a requirement that a court-appointed fiduciary post a surety bond.

Surety bonds are expensive, and may not be available at any cost in large or complicated estates. Current law at s. 69.031, F.S., gives the court an alternative safeguard applicable to all court-appointed fiduciaries -- the use of a depository account. A depository account may be used where “the size of the bond . . . is burdensome or for other cause.” Where a depository account is used, the property of the estate is deposited with a bank, trust company, or savings and loan. Court approval is required for every distribution from a depository account, a burdensome and costly process.

Probate practitioners report that some jurisdictions require use of a depository account pursuant to a blanket policy. A blanket policy requiring use of a depository account is improper.⁸

Liability of Directors, Officers and Employees

Section 736.1008, F.S., creates limitation periods for a beneficiary’s claim against a trustee for a breach of trust. The trustee has the authority to adequately disclose matters in a trust disclosure document and include a limitations notice to use a 6-month statute of limitations. Where the appointed trustee is a business entity, employees of the trustee may be personally liable for a breach of trust.⁹ It is unclear whether the limitations period for filing a lawsuit against a trustee similarly applies to directors, officers, or employees of the trustee.

Homestead Property in a Trust

The state constitution protects a homestead in three distinct ways. First, it provides homesteads with an exemption from property taxes. Second, the homestead provision protects the homestead from forced sale by creditors. Third, the homestead provision delineates the restrictions a homestead owner faces when attempting to alienate or devise the homestead property.¹⁰ This bill involves the second and third protections.

When held by an individual, a homestead is protected from forced sale by creditors. Of course, this protection does not affect a tax or mortgage lien foreclosure. This protection extends to the heirs of such individual, so that the heirs inherit the homestead property without being subject to creditors of the deceased. It is unclear whether the same protection would apply to a specific devise of homestead property held in a trust. One court has ruled that it did not protect heirs receiving homestead property through a trust because the transfer from the individual to the trust

⁸ *Goodstein v. Goodstein*, 263 So. 3d 78 (Fla. 4th DCA 2019).

⁹ *Beaubien v. Cambridge Consol., Ltd.*, 652 So. 2d 936 (Fla. 5th DCA 1995).

¹⁰ *Snyder v. Davis*, 699 So. 2d 999, 1001–02 (Fla. 1997).

caused the property to lose its homestead status.¹¹ Two appellate courts have held to contrary, finding that homestead property retained its status after transfer to a trust.¹²

The third part of the homestead benefits and limitations trio is related to devise of the property. The term “devise” refers to transfer of property by will. The Probate Code specifically provides that transfer by a trust is the same as a transfer will for purposes of limiting the devise of homestead property. This does not, however, appear in the Trust Code.

Also not appearing in the Trust Code are laws regarding the mechanics of the transfer of title and possession. In probate, title vests in the beneficiary at the moment of death.

It is common in probate proceedings to obtain a court order determining that property owned by the deceased was homestead property on the date of death. Once homestead is determined, the parties can go about the business of paying creditors and distributing property to heirs. A court order determining homestead status is required by title insurance in some circumstances. However, where the property was held in a revocable trust, there is no apparent authority for a court to determine that the trust property was homestead.

III. Effect of Proposed Changes:

Directed Trusts

The bill creates a comprehensive statutory framework for the governance of directed trusts. The bill repeals the brief references to directed trusts in current law. Current law is not changed, just greatly expanded and clarified.

The bill creates Part XIV of the Trust Code, ch. 736, F.S., entitled “Directed Trusts.”

The bill creates s. 736.1403, F.S., to provide that Part XIV applies to a Florida-based trust, including one created before July 1, 2021, but only applies to a decision or action occurring on or after July 1, 2021. If a trust is moved to Florida on or after July 1, 2021, this part only applies to a decision or action taken after the move.

The bill creates s. 736.1405, F.S., to exclude certain persons or transactions from the part. Anyone who holds any power over a trust is subject to this part, so exceptions are required to limit its scope. A person who only holds any of the following powers is not subject to this part, unless specifically subject to this part under the terms of the trust:

- A power of appointment.
- A power to appoint or remove a trustee or trust director.
- Any power of the settlor over the trust while the trust is revocable.
- Any power of a beneficiary, but only to the extent such power only affects the beneficiary or benefits another beneficiary represented by the beneficiary.
- Any non-fiduciary power related to federal income tax planning.
- Any power to add or release a power benefitting the settlor for federal income tax purposes.

¹¹ *Elmowitz v. Estate of Zimmerman*, 647 So. 2d 1064 (Fla. 3rd DCA 1994).

¹² *HCA Gulf Coast Hosp. v. Estate of Downing*, 594 So. 2d 774 (Fla. 1st DCA 1991) (spendthrift trust); *Engelke v. Estate of Engelke*, 921 So. 2d 693 (Fla. 1st DCA 2006)(revocable trust).

For purposes of this section and as to a person other than a trustee of the trust:

- The power to designate a recipient of an ownership in the trust is a power of appointment.
- The power to terminate is a power of appointment.
- The power to create, modify, or terminate a power of appointment is a power of direction; unless it is a power to create a power of appointment that is an element of a broader power to affect an ownership interest in trust property beyond the mere creation of a power of appointment.

The bill creates s. 736.1406, F.S., to specify that the general power of a trust director is the power to do what the trust directs. In carrying out that responsibility, the trust director has the power to do anything appropriate to the exercise or non-exercise of such power of direction, subject to the limits of s. 736.1407, F.S. However, where there are two or more persons with the same power of direction, they must act by majority vote.

The bill creates s. 736.1407, F.S., to limit the powers of a trust director. A trust director must act as a trustee and comply with the requirements of a special needs trust under the federal Medicaid program,¹³ and with the requirements of a charitable interest in the trust.

The bill creates s. 736.1408, F.S., to provide that the duty of a trust director is the same as the duty of a trustee as to that specific power. The terms of the trust may vary the duty or liability of a trust director, with the same limits that the duty and liability of a trustee may be modified.¹⁴ A trust director who is licensed to practice health care and who furnishes health care services to a beneficiary is liable as provided in health care law and not liable under trust law. The terms of a trust may impose an additional duty or liability on a trust director.

The bill creates s. 736.1409, F.S., to provide the duties and liabilities of a directed trustee. In general, a directed trustee has the duty to reasonably comply with the direction of a trust director. However, a directed trustee is not required to comply with a direction that would constitute willful misconduct. A trustee is responsible for determining whether the trust director currently holds the power to direct the specific action or inaction. A direction to release a trustee or a trust director from liability is ineffective if the breach involved willful misconduct by a trustee or trust director, was induced by improper conduct, or the trust director did not know material facts. A directed trustee may apply to the court for instructions related to this section and the trust must pay the costs and fees. These are minimum requirements, the trust may impose additional duties and liabilities.

The bill creates s. 736.141, F.S., regarding duties to provide information. A trustee and a trust director each has a duty to one another to provide relevant information. Reasonable reliance on such information will not make one or the other liable for a breach of trust, absent willful misconduct. A trust director must provide information within the trust director's knowledge or control to a qualified beneficiary upon a written request of a qualified beneficiary, but only to the extent the information is reasonably related to the powers or duties of the trust director.

¹³ 42 U.S.C. s. 1396p(d)(4)(A).

¹⁴ Section 736.0105(2), F.S., lists 23 terms of a trust that are solely governed by the Trust Code and cannot be changed, waived, or otherwise altered by the terms of the trust.

The bill creates s. 736.1411, F.S., limiting duties. Unless provided differently in the trust, a trustee and a trust director have no duty to monitor each other, or to inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee or trust director might have acted differently than the other. Volunteering such information does not thereby create the duty.

The bill creates s. 736.1412, F.S., to allow for a co-trustee to act in the role as a trust director. In such case, the duties and liabilities are the same as those in the directed trustee and trust director roles. This new section is similar to current law at s. 736.0703(9), F.S., in effect.

The bill creates s. 736.1413, F.S., to provide that the limitations periods for an action against a trust director for breach of trust are the same as those applicable to a trustee. The bill creates s. 736.1414, F.S., to provide that a trust director has the same legal defenses as a trustee would in a like situation. The bill creates s. 736.1415, F.S., to provide that a trust director of a trust subject to this Part is subject to the jurisdiction of the state courts. The bill creates s. 736.1416, F.S., to provide that, except as provided in the terms of the trust, a trust director is treated as a trustee for 31 purposes.

If a person has not accepted a trust directorship, or if a trustee, settlor, or a qualified beneficiary of the trust is uncertain whether such acceptance has occurred, a trustee, settlor, or a qualified beneficiary of the trust may make a written demand on a person designated to serve as a trust director, with a written copy to the trustees, to accept or confirm prior acceptance of the trust directorship. The designated trust director must reply within 60 days after receipt.

The bill makes the following conforming changes to the Probate Code related to Directed Trusts:

Applicable to directed trusts, definitions for the Probate Code are amended by adding the following definitions:

- “Directed trust” means a trust which includes a power of direction.
- “Directed trustee” means a trustee subject to direction by a trust director.
- “Power of direction” means a power over a trust granted to a person by the trust terms that is exercisable by the person when not serving as a trustee.
- “Trust director” means a person who has a power of direction under the trust terms to the extent exercisable while that person is not a trustee.

The bill amends s. 736.0105, F.S., regarding requirements of the Trust Code that cannot be modified by the terms of a trust, to allow directed trusts. Specifically, a trustee’s duty of good faith and duty to follow the terms of trust may be modified by a directed trust to provide that:

- A directed trustee may comply with a direction from a trust director, as required by s. 736.1409, F.S. (created by this bill).
- A directed trustee has no duty to monitor or supervise a trust director, as provided by s. 736.1411, F.S. (created by this bill).
- Where a co-trustee is given a power of direction, and whenever that co-trustee is exercising a power of direction, that co-trustee is treated as if he or she were a trust director and the

excluded trustee (one that must comply with the power of direction) is treated as if he or she were a directed trustee.

Section 736.1008, F.S., regarding limitations on actions against a trustee, is amended to additionally apply to actions against a trust director, and to actions against a director, officer or employee of a trust director.

Section 736.1017, F.S., regarding a certification of trust, is amended to include requirements applicable to a directed trust. That section currently lists disclosures regarding the trust that a trust can furnish to a third party rather than giving a copy of the trust. The bill adds the following required disclosures:

- Whether the trust includes a power of direction.
- Identity of current trust directors.
- The trustee powers subject to a power of direction.
- Whether a power of direction related to the proposed transaction has been used in relation to the transaction.

Current statutes on directed trusts, at ss. 736.0703(9) and 736.0808, F.S., are repealed.

Current statutes at ss. 736.0802, 736.08125, and 738.104, F.S., are amended to update cross-references.

Community Property Trusts

The bill creates Part XV of the Trust Code, ch. 736, F.S., entitled “Community Property Trust Act.”

The bill creates s. 736.1502, F.S., to define terms applicable to the part:

- “Community property” means the property and the appreciation of and income from the property owned by a qualified trustee of a community property trust during the marriage of the settlor spouses. The property owned by a community property trust pursuant to this part and the appreciation of and income from such property shall be deemed to be community property for purposes of general law.
- “Community property trust” means an express trust that complies with s. 736.1503, F.S., and is created on or after July 1, 2021.
- “Decree” means a judgment or other order of a court of competent jurisdiction.
- “Dissolution” means either termination of a marriage by a decree of dissolution, divorce, annulment, or declaration of invalidity; or entry of a decree of legal separation maintenance.
- “During marriage” means a period that begins at marriage and ends upon the dissolution of marriage or upon the death of a spouse.
- “Qualified trustee” means either a natural person who is a resident of the state; or a company authorized to act as a trustee in the state.
- “Settlor spouses” means a married couple who establishes a community property trust pursuant to this part.

The bill creates s. 736.1503, F.S., to set the requirements for creation of a community property trust. To create a community property trust, the trust must:

- Expressly say that it is a community property trust.
- Appoint a qualified trustee.
- Be signed by both spouses. Most community property trusts will have testamentary effect, in which case the trust documents must follow existing trust and homestead law applicable to similar trusts, i.e., must be signed with the same formalities as a will.
- Contain this notice:

THE CONSEQUENCES OF THIS COMMUNITY PROPERTY TRUST MAY BE VERY EXTENSIVE, INCLUDING, BUT NOT LIMITED TO, YOUR RIGHTS WITH RESPECT TO CREDITORS AND OTHER THIRD PARTIES, AND YOUR RIGHTS WITH YOUR SPOUSE DURING THE COURSE OF YOUR MARRIAGE, AT THE TIME OF A DIVORCE, AND UPON THE DEATH OF YOU OR YOUR SPOUSE. ACCORDINGLY, THIS TRUST AGREEMENT SHOULD BE SIGNED ONLY AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS TRUST AGREEMENT, YOU SHOULD SEEK COMPETENT AND INDEPENDENT LEGAL ADVICE

The bill creates s. 736.1504, F.S., to set forth the terms of an agreement to create a community property trust. In the agreement, the spouses may:

- Determine rights and obligations regarding property in the trust.
- Describe management and control.
- Set forth the disposition of trust property upon dissolution, death, or other event.
- Declare whether the trust is revocable or irrevocable.
- Set any other lawful term of the trust which does not otherwise destroy the community property status of the property transferred to the trust.

A surviving spouse may amend the terms of a community property trust as to that spouse's half interest, even if the trust is otherwise irrevocable. During the lifetime of both, the spouses are the only qualified beneficiaries of the trust; and after the death of one, the surviving spouse is the only qualified beneficiary of his or her half. This applies whether the trust is revocable or irrevocable.

The bill creates s. 736.1505, F.S., creating miscellaneous provisions regarding a community property trust and property of the trust:

- The spouses may or may not be domiciled in the state.
- No consideration is required for creation of a community property trust.
- All property held by a community property trust is community property.
- Property distributed by a community property trust loses its characterization as community property unless a foreign law makes such property community property.

The bill creates s. 736.1506, F.S., to provide creditor rights in the assets of a community property trust. As to non-homestead property held by the trust, an obligation of one spouse may only be satisfied from that spouse's half, and an obligation of both may be satisfied from the trust.

The bill creates s. 736.1507, F.S., to provide for the death of spouse. Upon the death of a spouse:

- The surviving spouse's half of the trust is protected and is not counted as an asset of the decedent spouse's estate for purposes of the elective share.
- The decedent spouse's half of the trust is subject to probate unless it is protected as homestead property.
- The trustee has the discretion to determine which assets of the trust will be used for distribution to the heirs of the decedent spouse.

The bill creates s. 736.1508, F.S., to provide that a community property trust terminates upon dissolution of the marriage. Upon dissolution, trust assets are split evenly unless otherwise required by an agreement agreed to by both spouses. Section 61.075, F.S., which sets the default standards for distribution of assets in divorce, does not apply to assets held in a community property trust.

The bill creates s. 736.1509, F.S., to provide that the existence of a community property trust does not adversely affect the right of a child of the settlor spouses to support that either would be legally required to pay. This section does not address support owed to a child of one of the spouses, thus that situation would be governed by s. 736.1506, F.S. (as created by this bill), which would allow legal attachment against the parental spouse's half interest.

The bill creates s. 736.151, F.S., to specify that homestead property transferred to a community property trust retains its homestead character. All three forms of homestead apply (property tax exemption including Save Our Homes, protection from creditors, and limitation on devise).

The bill creates s. 736.1511, F.S., to set out the interpretation and treatment of a community property trust under federal tax law. The bill provides that property in a community property trust is considered community property under Florida law for purposes of establishing the taxable basis under 26 U.S.C. s. 1014(b)(6). That federal law provides for calculation of the taxable basis in community property of the decedent as of the time of his or her death. Additionally, community property transferred from another state retains its character as community property while in a Florida community property trust. Property in a community property trust that is revoked only retains its character as community property in Florida if it otherwise would as foreign property under current probate law.¹⁵

The bill creates s. 736.1512, F.S., to make certain community property trusts unenforceable. A community property trust is unenforceable if:

- The terms were unconscionable when made;
- The spouse against whom enforcement is sought did not enter into the agreement voluntary; or
- The spouse against whom enforcement is sought did not receive fair and reasonable financial disclosure, did not waive disclosure, and did not have notice of the other spouse's finances.

¹⁵ Current probate law as ss. 732.216 through 732.228, F.S., is the Florida Uniform Disposition of Community Property Rights at Death Act.

A community property trust is not unenforceable on the grounds that the spouses did not have separate counsel.

Impact of Divorce on Wills and Trusts

The bill amends the Probate Code at s. 732.507, F.S., to provide that a former spouse is considered, for estate purposes, to have died on the date of the divorce. The date the will was signed does not affect this legal fiction. The bill amends the Trust Code at s. 736.1105, F.S., to clarify the same result applies to a revocable trust. These changes apply to estates and trusts of decedents who die on or after the effective date of the bill, regardless of when the trust or will was signed. The effective date of the bill for purposes of the changes to these two sections is upon becoming law.

The similar statute on beneficiaries of certain other financial instruments is not modified by this bill as the same result is clear in the text.

Depository Accounts in Probate

The bill amends s. 69.031, F.S., to allow, in probate proceedings where the court has required a depository account, the personal representative of an estate, or other officer appointed to hold property of the estate, the option at any time to post a surety bond instead. The bond must be for value of the personal property, or other reasonable sum set by the probate court. The bill amends s. 744.3679, F.S., to conform. The change to depository accounts is effective upon becoming law.

Liability of Directors, Officers and Employees

The bill amends s. 736.1008, F.S., to provide that the limitations periods applicable to a trustee also apply to a claim against a director, officer, or employee of the trustee. Additionally, the limitations periods of that statute also apply to claims against a trust director and to a director, officer, or employee of a trust director.

Homestead Property in a Trust

The bill creates s. 736.1109, F.S., to create homestead protections in the Trust Code consistent with those applicable to the Probate Code and consistent with the state constitutional homestead protections. Accordingly, as to a revocable trust, or a trust with testamentary effect:

- Like in wills, if a trust tries to devise homestead in violation of the constitutional limits, the trust provision is void and the property is subject to the Probate Code statute regarding this violation of the homestead provision.¹⁶
- Like in wills, a general power of sale or general direction to pay debts in the trust instrument does not cause loss of the carry-over protection from forced sale by creditors.

¹⁶ Section 732.401, F.S. Under that section, upon violation of the homestead limitation on devise, the property goes to the surviving spouse if there are no descendants. If there are surviving descendants, the surviving spouse gets a life estate in homestead and the remainder is distributed to the descendants. In lieu of a life estate, the surviving spouse may elect a 50 percent share in the property.

- Unlike wills, where a trust directs sale of property that would otherwise be protected homestead, title to the property remains in the name of the trustee.
- These provisions are “intended to clarify existing law” and thus apply retroactively and in the future.

The bill also amends s. 736.0201, F.S., a part of the trust law, to provide that a probate court may determine the homestead status of real property held in a revocable trust at the time of death.

Other Changes

The bill amends s. 736.0603, F.S., to add that the trustee of a revocable trust may follow the direction of the settlor that is contrary to the terms of the trust. This is subject to the statutory requirements of formality should the direction involve real property or testamentary disposition,¹⁷ and the statutory requirement that a revocation be according to the terms of the trust.¹⁸ This addition appears to reflect current law.

Portions of the bill relating to the effect of divorce and depository accounts are effective upon becoming law. The remainder of the bill is effective July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in article VII, section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

¹⁷ Section 736.0403(2), F.S.

¹⁸ Section 736.0602(3)(a), F.S.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

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: 69.031, 732.507, 736.0103, 736.0105, 736.0201, 736.0603, 736.0703, 736.1008, 736.1017, 736.1105, 736.0802, 736.08125, 738.104, and 744.3679.

This bill creates the following sections of the Florida Statutes: 736.1109, 736.1401, 736.1416, 736.1403, 736.1405, 736.1406, 736.1407, 736.1408, 736.1409, 736.141, 736.1411, 736.1412, 736.1413, 736.1414, 736.1415, 736.1501, 736.1502, 736.1503, 736.1504, 736.1505, 736.1506, 736.1507, 736.1508, 736.1509, 736.151, 736.1511, and 736.1512.

This bill repeals section 736.0808, Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

CS by Judiciary Committee on March 22, 2021:

The portion of the bill regarding directed trusts was amended to add short descriptions for many of the cross-referenced statutes which may make that portion of the Trust Code easier for practitioners to use.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
