

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 625 Estates and Trusts
SPONSOR(S): Judiciary Committee, Altman
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1502

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	15 Y, 0 N	Mathews	Jones
2) Insurance & Banking Subcommittee	13 Y, 0 N	Hinshelwood	Luczynski
3) Judiciary Committee	19 Y, 0 N, As CS	Mathews	Kramer

SUMMARY ANALYSIS

Probate is a court-supervised process for identifying the assets of a deceased person (decedent), paying the decedent's debts, and distributing the decedent's assets to beneficiaries. Through probate, the personal representative is responsible for giving actual notice of the probate proceedings to "known or reasonably ascertainable creditors." Any creditor who believes he or she is entitled to compensation from the decedent's estate to satisfy a debt must file a claim with the clerk of court. The personal representative or any other interested person may file an objection to a creditor's statement of claim. If an objection is filed against a creditor's statement of claim, the creditor must file a separate independent lawsuit against the decedent's estate to pursue the claim within thirty days from the date the objection was served.

A trust is a document created to manage and distribute a person's assets after death. The person who creates the trust is the "grantor" or "settlor." The person responsible for the management of the assets within the trust is the "trustee." The trustee includes the original trustee, any additional trustee, any successor trustee, and any cotrustee. A trustee has a right to resign after providing at least 30 days' notice to the beneficiaries and other interested parties. In Florida, a trustee's right to resign is a mandatory right and may not be denied or curtailed by any provision in the trust instrument. However, under current law, if the resigning trustee is the only remaining trustee, he or she continues to owe a fiduciary duty, regardless of his or her notice and resignation, until another trustee accepts the role.

The bill amends s. 733.705, F.S., codifying the existing procedure by which courts have permitted a creditor's pending action against a person at the time of death to be deemed an "independent action" under s. 733.705(5), F.S., thereby satisfying the creditor's requirement to bring an independent action within 30 days of an objection to a statement of claim. The bill also codifies procedures for deeming the "independent action" requirement satisfied where a claim is subject to a binding arbitration agreement or arbitration was already commenced before the decedent's death. The bill also amends s. 736.0505, F.S., and expands the types of spousal trusts that may be shielded from certain claims of the settlor's creditors.

The bill amends s. 736.0705(1), F.S., to clarify that a trust instrument may provide the procedure by which a trustee may resign, subject to specified notice requirements. The bill effectively permits a trust instrument to make the process of resignation easier for an outgoing trustee. However, if the trust instrument is silent regarding timing of the trustee's resignation or if the trust attempts to impose a notice requirement of more than 30 days, the 30-day notice requirement under current law prevails. Therefore, a trust instrument may not make the resignation process more difficult by imposing a longer notice, but the trust instrument may include provisions to make the resignation process easier.

The bill has no fiscal impact on state or local governments and an indeterminate fiscal impact on the private sector. The bill has an effective date of July 1, 2022.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Probate

Probate is a court-supervised process for identifying and gathering the assets of a deceased person (decedent), paying the decedent's debts, and distributing the decedent's assets to his or her beneficiaries. A will is a legal document that a person (a testator) may use to determine who gets his or her property upon death. A will does not dispose of all of a testator's property, but only his or her estate, or those assets that are subject to probate administration.¹ Other assets are disposed of outside probate.

Without a will, a decedent's estate is distributed pursuant to the intestacy statutes, which devise² a decedent's estate according to default rules. With a will, however, a testator may devise the estate to whomever he or she prefers.

In order for the decedent's estate to be transferred to heirs or to the beneficiaries of the will, a petition for administration must be filed with the circuit court.³ A personal representative, who is designated by the will or the circuit court to serve in that role, must provide a notice of administration to various parties, including family members, beneficiaries, and other entities.⁴ The personal representative must search for and provide notice to the decedent's creditors.⁵ In order for a personal representative to claim monies from bank accounts for the estate, the court must issue letters of administration granting the personal representative the authority to act on the estate's behalf. The letters give the personal representative the authority to gather assets, pay a creditor, and pay an heir or beneficiary. Administration of the decedent's estate ensures that the decedent's creditors are paid as long as certain procedures are followed.⁶

Probate and the Decedent's Creditors

Through the probate process, the personal representative is responsible for giving actual notice of the probate proceedings to "known or reasonably ascertainable creditors."⁷ The notice process ensures creditors have the opportunity to file claims against the decedent's estate to recover debts owed by the decedent to the creditor.⁸ Any creditor who believes he or she is entitled to compensation from the decedent's estate to satisfy a debt must file a claim with the clerk of court. The personal representative or any other interested person may file an objection to a creditor's statement of claim. If an objection is filed against a creditor's statement of claim, the creditor must file a separate independent lawsuit against the decedent's estate to pursue the claim within thirty days from the date the objection was served.

Currently, neither the Florida Statutes nor the Florida Probate Rules address what happens when a creditor has a pending action against a person at the time of death. As such, there is no clear mechanism by which the creditor's pending lawsuit or action is sufficient to be deemed an independent legal action such that it satisfies the creditor's requirement to bring an independent action within 30

¹ S. 732.201(14), F.S.

² To devise means to dispose of real or personal property by will or trust. S. 731.201(10), F.S.

³ S. 733.202, F.S.

⁴ S. 733.212, F.S.

⁵ S. 733.2121, F.S.

⁶ The Florida Bar, *Consumer Pamphlet: Probate in Florida*, <https://www.floridabar.org/public/consumer/pamphlet026/> (last visited Feb. 21, 2022).

⁷ *Id.*

⁸ *Id.*

days of an objection to a statement of claim.⁹ Florida courts appear to have established that a pending action against a decedent at the time of death is deemed an “independent action” under s. 733.705(5), F.S., when a motion for substitution (or voluntary substitution) of the personal representative or other fiduciary of the estate is filed in the pending lawsuit.¹⁰

Resignation of a Trustee

A trust is a document created to manage a person's assets and distribute his or her remaining assets after death.¹¹ The person who creates the trust is the “grantor” or “settlor.”¹² The person responsible for the management of the assets within the trust is the “trustee.”¹³ The trustee includes the original trustee, any additional trustee, any successor trustee, and any cotrustee.¹⁴

Currently, a trustee in Florida has a right to resign after providing at least 30 days' notice to the beneficiaries and other interested parties.¹⁵ In Florida, a trustee's right to resign is a mandatory right and may not be denied or curtailed by any provision in the trust instrument.¹⁶ However, under current law, if the resigning trustee is the only remaining trustee, he or she continues to owe a fiduciary duty, regardless of his or her notice and resignation, until another trustee accepts the role.¹⁷

Spousal Trusts

Section 736.0505(3), F.S., provides that, upon the death of the settlor's spouse, the assets of a spousal trust under certain circumstances are considered to have been contributed by the settlor's spouse and not by the settlor. As such, certain self-settled trusts may be protected from creditors upon the death of a spouse.

Effect of Proposed Changes

Probate and Creditors

The bill amends s. 733.705(5), F.S., to codify the existing procedure by which courts have permitted a creditor's pending action against a person at the time of death to be deemed an “independent action” under s. 733.705(5), F.S., thereby satisfying the creditor's requirement to bring an independent action within 30 days of an objection to a statement of claim.¹⁸ If a creditor has an existing or pending claim or action against the decedent at the time of death, the bill treats the substitution of the decedent's estate (via the personal representative or other fiduciary) in an existing action as satisfying the requirement to file an independent action. The bill also codifies procedures for deeming the “independent action” requirement satisfied where a claim is subject to a binding arbitration agreement or arbitration was already commenced before the decedent's death.

Resignation of a Trustee

The bill amends s. 736.0705(1), F.S., to clarify that a trust instrument may provide the procedure by which a trustee may resign, subject to specified notice requirements. The bill effectively permits a trust

⁹ Probate Law and Procedure Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, *White Paper on Proposed Amendments to S. 733.705(5), F.S.* (2022).

¹⁰ *Id.* See e.g., *Lewsadder v. Estate of Lewsadder*, 757 So. 2d 1221 (Fla. 4th DCA 2000).

¹¹ The Florida Bar, Consumer Pamphlet: The Revocable Trust in Florida, <https://www.floridabar.org/public/consumer/pamphlet028/> (last visited on Feb. 21, 2022).

¹² *Id.*

¹³ *Id.*

¹⁴ S. 736.0103(27), F.S.

¹⁵ S. 736.0705(1)(a), F.S.

¹⁶ Trust Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, *White Paper on Proposed Amendments to S. 736.0705(1)(a), F.S. – Trustee Resignation* (2022).

¹⁷ S. 736.0707(1), F.S.

¹⁸ *Id.*

instrument to make the process of resignation easier for an outgoing trustee. However, if the trust instrument is silent regarding timing of the trustee's resignation or if the trust attempts to impose a notice requirement of more than 30 days, the 30-day notice requirement under current law prevails. Therefore, a trust instrument may not make the resignation process more difficult by imposing a longer notice, but the trust instrument may include provisions to make the resignation process easier.

Spousal Trusts

The bill expands the protections against creditors for certain spousal trusts under s. 736.0505, F.S., to include an irrevocable trust in which:

- The settlor's spouse is a qualified beneficiary for his or her lifetime;
- The settlor has never been a qualified beneficiary during the settlor's spouse's lifetime; and
- Transfers to the trust by the settlor are completed gifts under the Internal Revenue Code.

Therefore, after the death of the settlor's spouse, certain irrevocable trusts will be deemed to have been contributed by the settlor's spouse, not the settlor, and will be protected from the settlor's creditors.

The bill provides an effective date of July 1, 2022.

B. SECTION DIRECTORY:

Section 1: Amends s. 733.705, F.S., relating to payment of and objection to claims.

Section 2: Amends s. 736.0505, F.S., relating to creditors' claims against settlor.

Section 3: Amends s. 736.0705, F.S., relating to resignation of trustee.

Section 3: Provides an effective date of July 1, 2022.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

None.

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On February 21, 2022, the Judiciary Committee adopted one amendment and reported the bill favorably as a committee substitute. The committee substitute expanded the protections for spousal trusts against creditors to include an irrevocable trust in which:

- The settlor's spouse is a qualified beneficiary for his or her lifetime;
- The settlor has never been a qualified beneficiary during the settlor's spouse's lifetime; and
- Transfers to the trust by the settlor are completed gifts under of the Internal Revenue Code.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.